

September 18, 2015

Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2020

Submitted via email to OMB USCIS Desk Officer, uscisfrcomment@dhs.gov

**RE: Proposed Rule - Expansion of Provisional Unlawful Presence Waivers of Inadmissibility
DHS Docket No. USCIS-2012-0003**

Dear Ms. Dawkins:

The Catholic Legal Immigration Network, Inc. (CLINIC) respectfully submits the following comments related to the proposed regulatory changes expanding the provisional unlawful presence waiver program published in the Federal Register on July 22, 2015 (80 Fed. Reg. 43338).

CLINIC is the supporting organization for the nation's largest network of nonprofit immigration service providers. CLINIC's network of affiliates includes more than 275 Catholic and non-Catholic affiliates that provide legal and related services in more than 440 locations in 47 states, the District of Columbia, and Puerto Rico. Over 270,000 people were impacted by CLINIC legal services in 2014.

CLINIC's attorneys conduct training and provide technical support on all of the immigration-related legal problems faced by low-income immigrants. The Training and Legal Support Section focuses on family-based immigration issues, including grounds of inadmissibility and eligibility for various waivers. CLINIC has been very involved in the provisional waiver program through efforts at administrative advocacy, training, technical assistance, and the creation of legal reference materials, including a book, *Filing Successful Provisional Waivers: A Practitioner's Guide*, which is currently sold and distributed by the American Immigration Lawyers Association (AILA). Currently, CLINIC is working with its affiliates to create an educational video to help clients understand the concept behind provisional waivers and how to properly file them. CLINIC also advocates with the Department of Homeland Security (DHS) on behalf of our affiliates when problems arise that impact immigrants and their families as they attempt to navigate U.S. immigration laws and policies.

General

CLINIC supports DHS's proposal to expand eligibility for provisional waivers of the grounds of inadmissibility based on the accrual of unlawful presence to all individuals who are statutorily eligible for a waiver of such grounds, are seeking such a waiver in connection with an immigrant visa application, and meet other conditions. CLINIC applauds the agency on its proposed expansion to

include all family-based applicants, as well as employment-based applicants and Diversity Lottery winners. CLINIC would also like to congratulate the agency on its proposed expansion of the definition of a “qualifying relative” to include both U.S. citizen and lawful permanent resident (LPR) spouses and parents. CLINIC notes that DHS has authority to waive certain inadmissibility grounds through a waiver process, providing that relevant statutory and regulatory requirements are met, and commends DHS’s specific and tailored use of discretion.

Similarly, CLINIC has received positive feedback in support of the proposed expansion of the provisional waiver program from all affiliates who responded to survey. Affiliates estimate the impacted population under the expanded program would be significant. However, many note that a more substantial impact would result from a process that permits individuals to seek waivers for additional grounds of inadmissibility.

Generally, affiliates report success in representing clients who are accessing the provisional waiver program. Their clients have greatly benefited from this program as it helps to reduce risk and financial hardships associated with immigrant visa processing abroad. However, affiliates indicated that they have experienced delays in processing resulting from lengthy and generic Requests for Evidence (RFEs) that appear to disregard substantial documentary evidence already submitted and that lack sufficient detail as to the cause and substance of the query. Affiliates raised concerns that, in most instances and despite the length of the RFEs, USCIS has provided representatives with only thirty days to respond.

With respect to RFEs and the overall provisional waiver process, CLINIC’s affiliates noted that improvements in clarity are needed in the definition of key terms and standards, including the “extreme hardship” standard. CLINIC encourages USCIS to provide additional guidance about the meaning of “extreme hardship”. CLINIC also supports the Secretary’s direction to USCIS that it is to consider establishing criteria by which a presumption of hardship may be found.

CLINIC Requests Reconsideration of the Preclusion of the Current Provisional Waiver Program for Immediate Relatives Scheduled for a Consular Interview Prior to January 3, 2013

The one objection that CLINIC has to the proposed rule is the proposed exclusion from eligibility of those for whom a consular interview was scheduled prior to the regulations becoming finalized. This proposed prohibition will have a far-reaching negative effect on family members who were not previously eligible to file for the provisional waiver, e.g., spouses of LPRs, children of LPRs, adult or married children of U.S. citizens, and siblings of U.S. citizens. It will also adversely affect immediate relatives who were not previously eligible because their qualifying relative was an LPR spouse or parent.

These immigrant visa applicants followed instructions from the National Visa Center and responded by paying the immigrant visa fee, completing the DS-260 and I-864, and submitting all necessary documents. If they had failed to respond they would have risked having their case terminated under INA § 203(g). Pursuant to the proposed regulation, these applicants will be precluded from participating in the provisional waiver program. CLINIC urges USCIS to collaborate closely with the Department of State to ensure that all individuals eligible for the program are able to take advantage regardless of when they were scheduled for a consular interview.

After the provisional waiver program was initially announced in 2012, USCIS added a preclusion to the current provisional waiver program for immediate relatives scheduled for a consular interview prior to January 3, 2013. Excluded from eligibility are those whom:

The Department of State initially acted to schedule the immigrant visa interview prior to January 3, 2013 *for the approved immediate relative petition on which the provisional unlawful presence waiver is based*, even if the interview has since been cancelled or rescheduled after January 3, 2013.

But there are three potential remedies to this preclusion: 1) the consulate terminates the visa registration based on the visa applicant's inaction for two years and then the same petitioner re-files a Form I-130; 2) the consulate terminates the visa registration based on the I-130 petitioner's withdrawing of the approved petition and then the same petitioner re-files a new I-130; or 3) the visa applicant withdraws the visa application and a different petitioner files a new I-130.

While these remain potential remedies to immediate relatives, they are impractical for those in the preference categories. If the petition is revoked or terminated, the beneficiary would not be able to retain the original priority date upon the filing of a subsequent petition. Given the long backlogs for Mexican nationals – who represent the vast majority of provisional waiver applicants and potential applicants – in the preference categories, they will not be able to simply start over. After the Secretary announced his intention to expand the provisional waiver program in November 2014, CLINIC, as well as AILA and other national organizations, began advising their members not to proceed with consular processing for any applicant who would otherwise be seeking an unlawful presence waiver after being refused by the consulate. Therefore, the persons who will be the most adversely affected are those who are not represented or who are being assisted by non-attorneys and unaccredited representatives.

We recognize that requesting the Department of State to reschedule immigrant visa interviews for those previously scheduled prior to January 3, 2013 involves an administrative burden. However, this temporary inconvenience would prevent certain hardship to large numbers of low income families who have been patiently awaiting to qualify for the expanded provisional waiver program. We hope that USCIS will reconsider this preclusion and eliminate this disqualifying language.

Conclusion

In summary, CLINIC supports the proposed rule expanding the provisional waiver program, requests the reconsideration of the preclusion noted above, and encourages USCIS to make process improvements by establishing and implementing clear standards. CLINIC appreciates the opportunity to submit comments on the expansion of the provisional waiver program. We look forward to continued collaboration with DHS on these issues. If you have any questions, please contact Ashley Feasley, Director of Advocacy, at afeasley@cliniclegal.org or (301) 565-4831.

Sincerely,



Jeanne Atkinson, Esq.
Executive Director