CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

NATIONAL OFFICE

8757 Georgia Avenue • Suite 850 • Silver Spring, MD 20910 • Tel: 301.565.4800 • Fax: 301.565.4824 • Website: www.cliniclegal.org

August 5, 2013

Alejandro Mayorkas
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue
Washington, D.C. 20529

Dear Director Mayorkas,

I am writing share CLINIC's concerns about what we believe to be improper implementation of your agency's regulations governing the provisional waiver for unlawful presence.

The Catholic Legal Immigration Network, Inc. (CLINIC) is a nonprofit organization established by the United States Conference of Catholic Bishops to support a network of faith- and community-based immigration programs. CLINIC's members include more than 220 Catholic and non-Catholic immigration programs with 290 field offices in 47 states. The network employs approximately 1,200 attorneys and accredited representatives who annually assist hundreds of thousands of clients, parishioners, and community members with immigration matters. CLINIC is particularly concerned and involved with family-based immigration matters, and publishes books and provides training on these issues to attorneys and Board of Immigration Appeals (BIA) accredited representatives throughout the United States.

CLINIC's network has reported numerous denials of provisional waiver applications based on USCIS's interpretation of the section of the provisional waiver regulation that prohibits eligibility if USCIS has "reason to believe" that the applicant may be subject to a ground of inadmissibility other than inadmissibility based on unlawful presence. Based on our analysis of these denials, it appears that USCIS is making findings of "reason to believe" in cases where the evidence does not indicate there is another ground of inadmissibility. In addition, these denials indicate an interpretation of "reason to believe" that is inconsistent with the Foreign Affairs Manual (FAM) and case law from the Board of Immigration Appeals and federal courts of appeal.

Background

The regulations at 8 CFR § 212.7(e)(4)(i) specify that a provisional waiver is not available to an applicant who USCIS "has reason to believe" may be subject to a ground of inadmissibility other than unlawful presence under INA §§ 212(a)(9)(B)(i)(I) or (II) at the time of the immigrant visa interview at the U.S. consulate abroad. Understanding the elements of the various grounds of inadmissibility is the first step in evaluating whether there is reason to believe that the applicant may be inadmissible on another ground. For example, a criminal conviction in and of itself may

or may not constitute a ground of inadmissibility. For that reason, the USCIS Adjudicators Field Manual and the Department of State FAM provide guidance to USCIS officers and consular officials about the grounds of inadmissibility and their component parts. For example, the FAM states that in order for a criminal conviction to render a noncitizen inadmissible under INA § 212(a)(2)(A)(i)(I), the conviction must be for a statutory offense that involves moral turpitude. 9 FAM 40.21(a)N2.1.

Examples of Improper Denials

Attached is a summary of some of the denials our affiliate members have reported and which we believe are improper. For example, one denial was based on a conviction of a minor motor vehicle offense that clearly did not constitute a ground of inadmissibility. The conviction was for a violation of a Wisconsin motor vehicle statute, section 343.03(3)(a), which was for operating a vehicle without a valid license. Another denial was for conviction of California Vehicle Code section 20002(a), "Permissible Action: Duty Where Property Damaged." In both cases, the USCIS decision stated "You have a criminal history that includes a conviction for at least one crime." Without a corresponding ground of inadmissibility, a criminal conviction does not indicate a reason to believe that the individual may be inadmissible.

A prior conviction for driving under the influence is another common reason we have seen the agency deny applications for the provisional waiver. The BIA has held that a simple driving under the influence conviction is not a crime involving moral turpitude and does not constitute a ground of inadmissibility under INA §212(a)(2)(A)(i)(I). *Matter of Lopez-Meza,* 22 I&N Dec. 1188, 1194 (BIA 1999). The FAM section titled *Medical Examination for DUIs* sets forth the Department of State's guidance on analyzing whether an alcohol-related arrest or conviction constitutes a medical ground of inadmissibility under INA § 212(a)(1)(A)(iii). 9 FAM 41.108 N.l3. The standard that the Department of State uses requires a determination that the applicant has either: 1) a single alcohol-related arrest or conviction *within the last five years*; 2) two or more drunk driving arrests or convictions *in the last ten years*; or 3) other evidence to suggest an alcohol-related problem.

CLINIC affiliates report numerous denials of provisional waiver applications for a *single* driving under the influence conviction. One CLINIC affiliate reports a denial for single DUI that occurred 19 years ago; another reports a denial for a single DUI that occurred 13 years ago; another reports a denial for a single DUI that occurred 12 years ago. These convictions do not form the basis for any ground of inadmissibility.

A third problem area concerns applicants who have provided a false name and/or date of birth when stopped by immigration officers at the border. The inadmissibility ground related to a misrepresentation, INA § 212(a)(6)(C)(i), requires, among other elements, that the misrepresentation be material to the applicant's eligibility for admission to the United States. The FAM section titled *Different Standards for Findings of "Fraud" or "Willfully Misrepresenting a Material Fact,"* states that a material misrepresentation "includes simply a willful

misrepresentation which is relevant to the alien's visa entitlement." 9 FAM 40.63 N3. Moreover, the FAM restates BIA case law on materiality and notes that a misrepresentation is material if either the applicant is inadmissible on the true facts or the misrepresentation tends to shut off a line of inquiry relevant to the applicant's eligibility and "which might well have resulted in a proper determination that he or she be inadmissible." 9 FAM 40.63 N6.1, *"Materiality" Defined.*

CLINIC affiliates report many denials of provisional waiver applications based on having provided a false name or birth date to an immigration officer after being stopped and granted voluntary return at the U.S-Mexican border. In some cases, CLINIC affiliates state that the applicant *did not* give a false name or birth date when stopped at the border and refused entry, but in fact the officer reported the information incorrectly or incompletely. In any case, providing a false name or birth date *after* immigration officers have prevented the applicant from entering the United States is not a material misrepresentation. The applicants in those situations have already been apprehended and are being processed for voluntary return. Nor does it shut off a line of inquiry relevant to the applicant's eligibility for admission or an immigration benefit. Therefore, providing a false name or birth date under these circumstances would not represent a ground of inadmissibility. In fact, none of our affiliates has ever represented a client who was denied an immigrant visa by the consulate due to having provided false information in the past to a border official while being processed for voluntary return.

Reason to Believe

The phrase "knows, or has reason to believe" occurs several times in the statutory provisions covering grounds of inadmissibility. *See* INA §§ 212(a)(2)(C); 212(a)(2)(H); 212(a)(2)(I). It appears in the provisions concerning drug traffickers, traffickers in persons, and those involved in money laundering. Under the FAM guidelines, federal circuit court cases, and BIA precedent decisions, the phrase "reason to believe" requires the adjudicator to connect evidence to the ground of inadmissibility being applied.

The FAM makes clear that a presumption or supposition is insufficient to establish a "reason to believe." For example, the FAM section titled *Reason to Believe* explains how to determine whether there is reason to believe an applicant is a drug trafficker under INA § 212(a)(2)(C). 9 FAM 40.23 N2. The FAM states that the applicable 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. You are required to assess independently evidence relating to a finding of inadmissibility." 9 FAM 40.23 N2(b). Under the rules governing consular officers described in the FAM, conjecture is insufficient.

Likewise, federal circuit court decisions require there to be articulable evidence of inadmissibility before finding a "reason to believe" the applicant is a drug trafficker. In a case evaluating the "reason to believe" standard in the INA § 212(a)(2)(C) context, the 11th Circuit

noted that "a finding of inadmissibility must be based on something more than the alien's failure to prove a negative." *Garces v. U.S. Atty Gen.,* 611 F.3d 1337, 1346 (11th Cir. 2010).

A variation of the "reason to believe" language appears in modified form in the security-related inadmissibility sections of the statute. Section 212(a)(3) applies the standard "know, or has reasonable ground to believe." In the context of the security-related grounds of inadmissibility, INA §§ 212(a)(3)(A), (B), (C), and (E), the BIA has equated the *reason to believe* standard with *probable cause. In re U-H-,* 23 I&N Dec. 355, 356 (BIA 2002). The probable cause standard requires facts sufficient to lead a reasonable person to believe that the claim or charge is true.

Using the "reason to believe" standard as an evidentiary basis to establish potential inadmissibility where no ground of inadmissibility has been identified permits speculative reasoning to govern the provisional waiver adjudication. This reliance on speculation is inconsistent with the regulations, the FAM, and case law.

Conclusion

In light of the foregoing, we have serious concerns that USCIS officers are using an improper "reason to believe" standard in adjudicating provisional waiver applications. We urge you to instruct adjudicators to employ the proper standard. Further, as there is no appeal of a denial of a provisional waiver, and in order to support family unity, we ask that you consider re-opening cases improperly denied based on the "reason to believe" standard. We look forward to meeting with you soon regarding the steps the agency can take to resolve this urgent matter. Thank you very much for your attention.

Sincerely,

Jeanne M. Atkinson

Jeanne M. Atkinson
Executive Director

cc: Stephen H. Legomsky, Chief Counsel, USCIS
Donald J. Monica, Associate Director, Field Operations, USCIS
Mariela Melero, Associate Director, Customer Service and Public Engagement

Sample I-601A Denials

1) ***Maria N.***, applicant

"You provided a false name and/or date of birth to immigration officials when apprehended after you attempted to enter the U.S. without inspection."

Client provided a false name after she was apprehended for entering the U.S. in 2000.

2) ***Rafael C.,*** applicant

"You have a criminal history that includes a conviction for at least one crime."

§ 343.03(3)(a) Wisconsin - operate without valid license 11-8-08 - paid $186 fine

§ 343.03(3)(a) Wisconsin - operate without valid license 4-21-11 - paid $480 fine

§ 343.03(3)(a) Wisconsin - operate without valid license 2-11-13 - paid $379 fine

3) ***Pablo M.,*** applicant

"You provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the U.S. without inspection."

Client states he did not give a false name when he was apprehended for entering the U.S. in 2002 and 2006.

4) ***Applicant's name redacted***

"You provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the U.S. without inspection."

Client states he did not give a false name when he was apprehended for entering the U.S.

5) ***Applicant's name redacted***

DUI on 7-27-94

6) ***Applicant's name redacted***

DUI in 2000

7) ***Applicant's name redacted***

DUI in 2004

8) **Nayelly R.**, U.S. citizen spouse of applicant

DUI in 2007

9) **Yesenia B.**, U.S. citizen spouse of applicant

DUI in 2001

10) **Carla F.**, U.S. citizen spouse of applicant

DUI in 2004

11) ***Applicant's name redacted***

DUI in about 2008

12) ***Applicant's name redacted***

"You provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the U.S. without inspection."

Client provided a false name or date of birth after being apprehended for entering the U.S.

13) **Rebecca S.**, U.S. citizen spouse of applicant

"You provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the U.S. without inspection."

Client provided a false name after she was apprehended for entering the U.S. in 2002

14) ***Applicant's name redacted***

"You provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the U.S. without inspection."

Client provided a false name after being apprehended for entering the U.S.

15) ***Applicant's name redacted***

Conviction for "Permissible Action: Duty Where Property Damaged," California Vehicle Code 20002(a)

16) ***Applicant's name redacted***

Conviction for "Creating a Disturbance"

17) **Maely R.**, U.S. citizen spouse of applicant

DUI in 2005 and client provided a false name after being apprehended for entering the U.S.