

## APPENDIX

### Supporting Statement for OMB 1615-0123 “Application for Provisional Unlawful Presence Waiver” (Form I-601A)

The Department of Homeland Security (DHS) invited the public to comment on the proposed rule entitled **Expansion of Provisional Unlawful Presence Waivers of Inadmissibility** published on July 22, 2015 at 80 FR 43338 (2015 Proposed Rule). That rule included proposed changes to Form I-601A and the instructions that accompany this form and requested public comments on this information collection. DHS received a total of four public submissions in response to the 60-day notice requesting feedback on Form I-601A and its instructions. Each submission had one or more substantive comment on the information collections associated with the rule. DHS has considered the comments received and responded to all of the commenters’ suggestions as follows.

#### 1. The General Need for a Standardized Application Form

One commenter requested that USCIS adjudicate the provisional waiver without requiring a specific form. The commenter believed that requiring the completion of a standardized form effectively requires aliens to retain immigration attorneys who may exploit them.

DHS has not accepted the suggestion. USCIS forms are generally designed for use by the public in a manner that standardizes the collection of necessary information and streamlines the adjudication of immigration benefits. The lack of a standardized information collection document, as well as the acceptance of ad hoc requests, could cause confusion and processing delays.

#### 2. Form I-601A, Part 3. Information About Your Immigrant Visa Petition or Your Immigrant Visa Case

DHS received several suggestions for improving the section of the form collecting information about the applicant’s immigrant visa petition. Two commenters asked USCIS to include a section for applicants on Form I-601<sup>1</sup> to indicate the name of the employer, sponsor, or petitioner. One of those commenters requested that Form I-601 include a section for applicants to submit information about approved Immigration Petitions For Alien Worker, Form I-140, particularly for beneficiaries under the employment-based third preference (EB-3) category.

DHS will not adopt this suggestion because it appears to be related to Form I-601 and not Form I-601A, the form used for this rule. Form I-601A already includes questions about the name of the petitioning employer or sponsor. See Part 3, Information About Your Immigrant Visa Petition and Your Immigrant Visa Case, Item Numbers 3.c. through 3.f. on Form I-601A. Two commenters wanted to ensure that derivative spouses of principal beneficiaries are eligible

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<sup>1</sup> Both commenters referred to Form I-601, Application for Waiver of Grounds of Inadmissibility, rather than Form I-601A.

for the provisional waiver. They requested that USCIS specifically ask whether the alien is filing this application based on an approved Form I-140 petition as a derivative spouse of the primary beneficiary and to provide the USCIS receipt number for the Form I-140 petition.

DHS agrees with the need to collect additional information, as suggested by the commenters, in light of the final rule's extension of eligibility for the provisional waiver to spouses and children who accompany or follow to join principal immigrants. DHS has added questions to Form I-601A about derivative spouses or children that should address the concerns raised by the commenters.

### 3. Form I-601A, Date of Entry and Place or Port-of-Entry

One commenter suggested that Form I-601A applicants should be permitted to use approximate dates and places of entry when filing out the form, rather than only specific dates or places of entry. The commenter reasoned that it may be difficult for some applicants, especially those who entered at young age or without lawful status to specify an exact entry date or place. Consistent with these comments and the commenter's suggestions, DHS has revised Part 1 of Form I-601A to permit applicants to provide approximate dates and places of entry, if necessary. Specifically, DHS added the phrase "(on or about)" to "Date of Entry (mm/dd/yyyy)" and the phrase "(actual or approximate)" after "Place or Port-of-Entry (City or Town)."

### 4. Form I-601A, and Instructions, Certain Inadmissibility and Criminal History Issues

One commenter requested that USCIS should not require Form I-601A applicants to provide all related court dispositions regarding criminal history if the disclosure of such court dispositions is prohibited by state law. The commenter was concerned that such a requirement would effectively ask aliens to violate state confidentiality laws or request records that may be impossible to obtain.

DHS did not adopt the suggestion. DHS does not believe that an individual's request for his or her own court dispositions and that person's subsequent disclosure of the information to USCIS would violate confidentiality law. Although state confidentiality laws may make it improper for a clerk of court to release information about a case to a third party, such laws do not prohibit the subjects of those proceedings from obtaining information about themselves.<sup>2</sup>

USCIS may request any evidence relevant to the adjudication of an immigration benefit, including court records, when needed to assess the applicant's eligibility for the benefit. USCIS often requires court records to assess the applicant's eligibility for a provisional waiver, as well as to determine whether the applicant merits the waiver as a matter of discretion.

Finally, DHS regulations at 8 CFR 103.2(b)(2)(i) and (ii) already provide for submission of secondary evidence or affidavits when aliens are unable to obtain copies of their court records. See 8 CFR 103.2(b)(2)(i) and (ii). Therefore, DHS has decided to retain the original language.

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<sup>2</sup> For example, California state law specifies that individuals can obtain a copy of their own case files and can subsequently disclose such records freely. See Cal. Welf. & Inst. Code § 827(a)(1)(C) and (5).

## 5. Form I-601A, Part 1

One commenter suggested clarifications to the Form I-601A instructions regarding documentation of criminal history in two scenarios: those involving brief detentions and those where criminal records do not exist. First, the commenter suggested a change to the instructions to clarify that the relevant documentation requirements do not apply to an applicant unless he or she has been arrested for, or charged with, a criminal offense (i.e., not individuals who were simply stopped or questioned by law enforcement authorities). Second, the commenter suggested a change to the instructions to clarify that an applicant may submit documents from a relevant court to show the lack of criminal charge or prosecution. To accomplish these two suggestions, the commenter recommended amending the instructions by inserting the following underlined text in the instructions for Item Number 3: “For Item Number 31, if you were arrested but not charged with any crime or offense, a statement or other documentation from the arresting authority, ~~or~~ prosecutor’s office, or court, if available, to show that you were not charged with any crime or offense.”<sup>3</sup>

In response to these suggestions, DHS has inserted the words “arrested but” and “or court” into the relevant instruction as suggested by the commenter. DHS agrees that the insertion of this language would provide additional clarity to applicants. DHS, however, did not add the words “if available” as suggested by the commenter, because USCIS believes it is self-evident that documents cannot be provided if they are not available. USCIS requires applicants to prove the absence of a criminal conviction. We do not specify or limit the types of documents USCIS will consider.

## 6. Form I-601A, Part 5. Statement From Applicant

Commenters suggested that USCIS add questions related to hardship that would allow an officer to quickly determine that a threshold level of extreme hardship has been demonstrated. The commenter cited the Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105-100 (NACARA)), Form I-881, as an example of a form that poses specific questions related to the establishment of extreme hardship.

DHS has not accepted this suggestion. Although Form I-881 includes questions relating to the potential hardship, that form – unlike the provisional waiver application (and the statutory inadmissibility waiver grounds upon which it is based) – is used solely to adjudicate relief under NACARA, and thus utilizes questions generally tracking pertinent regulations outlining hardship factors that may be considered under the NACARA program. See 8 CFR 240.64; 8 CFR 1240.58(b).

Additionally, extreme hardship for purposes of provisional waiver applications is determined on a case-by-case basis, and dependent upon the facts and circumstances of each case. See Matter of Cervantes-Gonzalez, 22 I&N Dec. at 565. As such, DHS does not believe that adding such a list in the provisional waiver context is appropriate because it could cause applicants to restrict the type of evidence they submit to establish extreme hardship. Moreover,

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<sup>3</sup> The commenter’s suggestions are emphasized by being underlined in this sentence.

DHS notes that USCIS does provide, in relevant form instructions, a list of non-exclusive factors that may be considered in making an extreme hardship determination. See Instructions to Form I-601 and Form I-601A.

#### 7. Form I-601A Instructions, Purpose of Form I-601A

A commenter suggested adding language to the Form I-601A instructions clarifying the categories of aliens who may be eligible to apply for provisional waivers under this rule. Specifically, the commenter suggested adding the following underlined text to ensure that certain aliens who are eligible to apply for provisional waivers: “Certain immigrant visa applicants who are relatives of U.S. citizen or Lawful Permanent Residents (LPRs); family-sponsored immigrants; employment-based immigrants; special immigrants; and participants in the Diversity Visa Program may use this application to request a provisional waiver of the unlawful presence grounds ....” The commenter believed that DHS failed to update Form I-601A to reflect the new classes of immigrants that may use Form I-601A.

DHS has not adopted this suggestion. DHS believes the pre-existing language accurately captures those aliens who have the requisite family relationship to apply for provisional waivers, including those aliens who become newly eligible to apply under this rulemaking. To file for a provisional waiver of the unlawful presence an applicant must have an approved immigrant petition or have been selected as a Diversity Visa immigrant. The alien must also have a qualifying U.S. citizen or LPR spouse or parent. DHS believes that the additional language suggested by the commenter could be read to imply that an applicant is not required to have the requisite relationship with a U.S. citizen or LPR in order to apply for a provisional waiver. DHS has thus not amended this portion of the Form I-601A instructions.

#### 8. Form I-601A Instructions, Who May File

One commenter suggested that DHS add language to the Form I-601A instructions stating that aliens who are not immediate relatives and who filed more than one Form I-601A application are still eligible to file a subsequent Form I-601A application even if DOS acted, before the effective date of this rule, to schedule their first immigrant visa interview.

DHS has not adopted the suggestion. As noted previously, this final rule eliminates the regulatory provisions that make aliens ineligible for provisional waivers depending on the date on which DOS initially acted to schedule their immigrant visa interviews. Therefore, the commenter’s suggested amendment is now unnecessary.

#### 9. Form I-601A Instructions, Can I File Other Forms with Form I- 601A?

One commenter suggested adding text to the Form I-601A instructions indicating that an alien may request electronic notification of USCIS acceptance of the filing of Form I-601A by filing E-Notification of Application/Petition Acceptance, Form G-1145, along with Form I-601A. DHS adopted the suggestion.

#### 11. Form I-601A Instructions, Page 5, General Instructions

One commenter suggested changes to the Form I-601A instructions to make it easier for aliens who have physical or developmental disability or mental impairment. Specifically, the commenter recommended replacing the portion of the Form I-601A instructions concerning the ability of a legal guardian to sign for a mentally incompetent alien with the following: “A designated representative may sign if the requestor is unable to sign due to a physical or developmental disability or mental impairment.” The commenter noted that the proposed Form I-601A Instructions only allow a legal guardian to sign on behalf of a mentally incompetent alien, but not for aliens with a physical or developmental disability that interferes with the alien’s ability to sign. Additionally, the commenter pointed out that the suggested language would mirror the language that already appears in the Form I-821D Instructions. DHS has not adopted this suggestion, as the Department believes that current regulations are sufficient to address the commenter’s concerns. First, current regulations provide that a legal guardian may sign for an individual who is mentally incompetent. See 8 CFR 103.2(a)(2). Second, even if no legal guardianship has been established, applicants with disabilities have various options for affecting signatures. Under USCIS policy, a valid signature does not need to be legible or in English, and it may be abbreviated provided it is consistent with the manner in which the individual normally signs his or her name. An individual who is unable to write in any language may place an “X” or similar mark in lieu of a signature. DHS believes existing regulations already address the commenters concern and did not adopt the suggestion.

#### 11. Form I-601A Instructions, General Instructions

One commenter requested that DHS to include an example of a translation certification into the Form I-601A instructions. The commenter indicated that the recommended text would ensure that a requestor will provide a certification that contains all the necessary information and is identical to USCIS guidance. The commenter suggested the following underlined language:

“**Translations.** If you submit . . . foreign language into English. An example certification would read “I, [typed name], certify that I am fluent (conversant) in the English and [language] languages, and that the above/attached document is an accurate translation of the document attached entitled [name of document].” The certification should also include the date and the translator’s signature, typed name, and address.”

DHS did not adopt this suggestion. Regulations require that any document containing foreign language submitted to USCIS shall be accompanied by 1) a full English language translation that the translator has certified as complete and accurate, and 2) the translator’s certification that he or she is competent to translate from the foreign language into English. See 8 CFR 103.2(b)(3). DHS believes the regulation is sufficiently clear and the Department is worried that providing an example translation certification will be understood by applicants as a required form, thus effectively limiting options for obtaining translation services.

#### 12. Form I-601A Instructions, Specific Instructions

One commenter suggested providing applicants with additional instructions to help clarify when aliens are deemed to be admitted or to have entered without inspection.

Specifically, the commenter suggested that DHS replace the term “EWI” (entry without inspection) with “no lawful status” in the Form I-601A instructions and to add a note to the instructions indicating that applicants without lawful status who entered at a port of entry may have nevertheless entered pursuant to inspection and admission. The commenter, citing to decision of the Board of Immigration Appeals at Matter of Quilantan, 25 I&N Dec. 285 (BIA 2010), stated that the alien without lawful status who is nevertheless permitted to enter the United States at a port of entry may be “admitted,” even if the inspection at the port did not comply with substantive legal requirements and there is no record of the alien having been admitted in any particular status. Additionally, the commenter pointed out that these aliens may be eligible to adjust status in the United States and, therefore, would not need the provisional waiver. Finally, the commenter pointed out that the suggested language is consistent with USCIS’ previous changes to the Form I-821D Instructions, which changed references from “without inspection” to “no lawful status” in light of Matter of Quilantan. Thus, the commenter suggested adding the following underlined text at the end of the instructions to Item Numbers 17. – 19., and Item Numbers 20.a. to 26.: “Please note, if you did not have lawful status but entered at a port of entry you may have entered with inspection and admission.”

DHS has not adopted these suggestions. DHS believes that the form instructions are sufficiently clear for applicants to appropriately answer all relevant questions. DHS does not believe it is necessary to add reminders or warnings on the issue raised by the commenter, as DHS does not believe that an applicant will erroneously state that he or she is present without admission or parole.

#### 14. Form I-601A Instructions, Immigration or Criminal History

One commenter requested that Form I-601A instructions be amended to provide information about grants of voluntary departure and how such grants affect the provisional waiver process. Specifically, the commenter indicated that an order of voluntary departure is neither an order of removal nor is it pending proceedings. Therefore, the commenter requested that the instructions include a provision specifying that an immigration judge may grant voluntary departure or dismiss or terminate removal proceedings, prior to the applicant leaving the United States for immigrant visa processing.

DHS has not adopted this suggestion, as an alien granted voluntary departure is not eligible for a provisional waiver. USCIS, however, modified Form I-601A by including a question asking whether the applicant has been granted voluntary departure. USCIS also made corresponding amendments in the form instructions.

#### 15. Form I-601A Instructions Penalties

One commenter asserted that USCIS established an overly broad standard for denying Form I-601A applications, as well as other immigration benefits, due to the submission of false documents with such applications. To address this concern, the commenter suggested that the Form I-601A instructions be amended to indicate that applications will be denied only if the applicants submit “materially” false documents. The commenter, therefore, suggested adding the word “materially” (as indicated by underline) to the following phrase: “If you knowingly and

willfully falsify or conceal a material fact or submit a materially false document with your Form I-601A, we will deny your Form I-601A and may deny any other immigration benefit.” The commenter pointed out that 18 U.S.C. 1001 (which generally addresses false or fraudulent statements made to the U.S. Government, including statements on government forms) defines an act that is “knowingly and willfully” committed and that this statute only covers false documents or statements that are material. The commenter furthermore cited Kungys v. United States, 485 U.S. 759, 760 (1988), which the commenter asserts reaffirmed the requirement of materiality in the context of fraudulent statements by stating that fraud in an immigration context requires a willful misrepresentation of material fact.

DHS has not adopted the commenter’s suggestion, as there are existing statutory requirements regarding the use of false documents. DHS, however, has modified the relevant language in the form instructions to more closely match the language of 8 U.S.C. 1324c and 18 U.S.C. 1001(a), which relate to civil and criminal penalties for the use of false documents to defraud the U.S. Government or obtain an immigration benefit. The new language reads, “If you knowingly and willfully falsify or conceal a material fact or submit a false, altered, forged, or counterfeited writing or document with your Form I-601A, we will deny your Form I-601A and may deny any other immigration benefit.”