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U.S. Department of Homeland Security
20 Massachusetts Ave., NW
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REF: DHS Docket No. USCIS-2012-0003, Expansion of Provisional Unlawful Presence Waivers of Inadmissibility

Dear Chief Dawkins:

The Immigration Reform Law Institute ("IRLI") submits the following comments to the U.S. Department of Homeland Security ("Department") on behalf of the Institute and our client, the Federation for American Immigration Reform (FAIR), in opposition to the proposed rule, as published in the Federal Register on July 22, 2015. *See* 80 F.R. 43338.

IRLI is a non-profit public interest law organization that defends and promotes the rights and opportunities of U.S. citizens and communities. More specifically, IRLI is dedicated to representing citizens and communities that experience injury resulting from illegal immigration. IRLI is the only entity of its kind in the U.S. which focuses exclusively on the interests of U.S. citizens and their communities in the development of sound immigration policy and law. FAIR is a nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest.

Upon review, IRLI has concluded that the proposed rule impermissibly attempts to implement the directive issued by Secretary Jeh Johnson to United States Citizenship and Immigration Services ("USCIS") on November 14, 2014. Secretary Johnson directed that USCIS take extra-statutory action to

IRLI is a nonprofit public interest law firm working to end unlawful immigration and to set levels of legal immigration that are consistent with the national interest.

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nullify Congressional sanctions enacted in 1996 as Immigration and Nationality Act ("INA") § 212(a)(9). These provisions, called the 3 and 10 year bars, sanction unlawfully present aliens who incurred periods of unlawful presence greater than 180 days, by imposing multi-year waiting periods outside the United States that are roughly equivalent to the waiting times experienced by law-abiding petitioners for immigrant visas. In contrast, by impermissibly relaxing the key statutory restrictions in the associated humanitarian waiver provision, INA § 212(a)(9)(B)(v), the directive and proposed rule would make it far more convenient for these inadmissible aliens to obtain green cards. The jump from inadmissible alien to lawful permanent resident is, for example, a much more significant immigration benefit than the deferral of removal available to similarly situated Deferred Action for Childhood Arrival ("DACA") beneficiaries.

This public comment warns the agency that it lacks legal authority to implement the proposed regulatory amendments, as recognized by the unanimous Supreme Court in *Judulang v. Holder*, 132 S. Ct. 476 (2011). *Judulang* recognized important limitations on the scope of executive authority to make substantive changes to admission and removal practices. Applying the arbitrary and capricious analysis now required by *Judulang*, IRLI and FAIR explain below why the USCIS policy of granting provisional advance waivers to aliens who have departed the United States fails to meet Administrative Procedure Act ("APA") standards for permissible agency rulemaking. IRLI and FAIR further explain why the decision of USCIS to exclude determinations of extreme hardship from the proposed rule, in effect making it a discretionary decision by agency personnel, is also arbitrary and capricious under APA standards, as is the agency's claimed justification that "family unity" concerns authorize the proposed rulemaking. The agency's rationale for expanding § 212(a)(9)(B)(v) waiver eligibility to beneficiaries of every possible category of immigrant visa petition adjudicated by USCIS is particularly capricious.

A. <u>USCIS Materially Misstates the Agency's Legal Authority to Issue the Proposed Rule</u>

The proposed rule announced in 80 Fed. Reg. 43338 was issued pursuant to a "memorandum" from Secretary of Homeland Security Jeh Johnson to USCIS Director Leon Rodriguez, *Expansion of the Provisional Waiver Program* ("Johnson Directive") (Nov. 20, 2014). 80 F.R. 43338, 43346, fn 19. The memorandum directed Mr. Rodriguez to (1) amend the 2013 regulation to expand access to the provisional waiver program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available, (2) provide additional guidance on the definition of "extreme hardship," (3) "clarify the factors that are considered by adjudicators in

determining whether the "extreme hardship" standard has been met," and (4) consider criteria by which a presumption of extreme hardship may be determined to exist. *Id.* at 2.

The Secretary also identified the agency's intent. His direction to Mr. Rodriguez states, "The purpose behind today's announcement remains the same as in 2013—family unity; and second, that "[i]t is my assessment that additional guidance about the meaning of the phrase 'extreme hardship' would provide broader use of this legally permitted waiver program." *Id.* at 2. The Johnson memorandum did not however state its authority to direct that USICS implement the regulatory amendment and three policy actions. Nor does it provide any explanation for the omission from the proposed regulatory amendments of a definition of "extreme hardship," which is arguably the key phrase in the INA waiver of unlawful presence statute, 8 U.S.C. §1182(a)(9)(B)(v).

The July 22, 2015 Federal Register notice did identify four sources of authority. *See* 80 F.R. at 433339. First, 6 U.S.C. § 112 and 8 U.S.C. § 1103 are said to jointly provide "broad authority to administer the authorities provided under the Homeland Security Act of 2002, the immigration and nationality laws, and other delegated authorities." *Id.* Transfer of "the immigration benefits adjudication functions" to "the Director of USCIS," 6 U.S.C. § 271(b), also under the Homeland Security Act, is invoked as permitting USCIS to reinterpret the operation of the 3 and 10 years bars in INA § 212(a)(9)(B). *Id.*[1] Fourth, the notice asserts that the "Secretary's discretionary authority to waive the unlawful presence grounds of inadmissibility is provided in … 8 U.S.C. § 1182(a)(9)(B)(v)." *Id.*

DHS is impermissibly proposing to use its authorizing statutes to bootstrap a sweeping expansion of eligibility for an important immigration benefit that is separately defined in a substantive provision of the INA. First, USCIS misstates INA § 103(a)(3). The statute actually provides that the Secretary's authority to issue regulations does not extend beyond "his authority under the provisions of this Act." 8 U.S.C. § 1103(a)(3). Clearly, the INA requires that a regulation must derive its authority from a substantive provision of the INA provision in addition to the general rulemaking statute, and not as USCIS incorrectly claims, an executive policy ("considerations") with no more than a rational relation to United States Code Title 8. The relevant provision of 6 U.S.C. § 112, subsection 112(e), actually mandates that the authority of the Secretary to issue regulations "shall be governed by" the procedures and requirements of the APA. *See* 5 U.S.C. 500, *et seq.*

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[1] The statement of legal authority for the 2013 provisional waiver regulation in the proposed and final rules also cited 8 C.F.R. § 212.7. *See* 77 F.R. 19902 (April 2, 2012); 78 F.R. 536 (Jan. 1, 2013).

The principle that APA standards fully apply to agency actions based on federal immigration law was affirmed in *Judulang*, 132 S. Ct. 476, a unanimous Supreme Court decision. In *Judulang*, the Supreme Court unanimously invalidated a Board of Immigration Appeals ("BIA") rule for determining whether noncitizens in deportation proceedings qualified for a retroactive discretionary waiver under former INA § 212(c). The Court reasoned that the policy adopted by the agency was "arbitrary and capricious" in violation of the APA. *Id.* at 479.

By authorizing independent and substantive challenges to agency action under the APA arbitrary and capricious standard of review, even in the absence of conflicting regulations or statutes, *Judulang* overrode decades of BIA and circuit court precedent that was highly deferential to DHS agency policy considerations.[2] "When an administrative agency sets policy, it must provide a reasoned explanation for its action." 132 S. Ct. at 479. *Judulang* held that a USCIS rule "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." A rule "that bears no relation to these matters—that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious." *Id.* at 485.

The Court in *Judulang* rebuked the government's alternative argument, that because its comparable-grounds rule for determining eligibility for INA § 212(c) relief was not an "abrupt departure from its prior practice," it constituted a permissible agency interpretation of its governing statute under the APA. *Id.* at 488. "We think this is a slender reed on which to support a significant government policy" the Court explained, "... longstanding capriciousness receives no special exemption from the APA." *Id.* at 488.

Judulang also held that an agency claim that a goal of increased efficiency of government operations will not save an otherwise arbitrary policy: "Cost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien's eligibility for a waiver.)" *Id.* at 490.

In light of *Judulang*, the Secretary's sweeping claim of "broad discretion to determine the most effective way to administer the laws" citing (in the 2013 rule) *Narenji v. Civiletti,* 617 F.2d 745, 747 (D.C. Cir. 1979), is itself overbroad, and no longer a correct statement of the Secretary's authority. *See* 78 F.R. 536, 541. The agency asserts that the Secretary is authorized to promulgate the rule "*under the broad authority to administer the authorities provided under the Homeland*

[2] Prior to *Judulang*, the Supreme Court had only recognized a narrower, process-oriented review of immigration policy. *See Shaughnessy v. Pedeiro*, 349 U.S. 48 (1955); *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996).

Security Act of 2002, the immigration and nationality laws, and other delegated authorities." 80 F.R. at 43339. The following sections explain how—when analyzed under the plain language of the substantive law as well as the intent of Congress—the proposed rule would directly conflict with the *Judulang* standard.

B. The Limited Scope of the Secretary's Exercise of Discretion in the Waiver Process.

The unlawful presence waiver statute has seven elements:

(1) The Attorney General (now the Secretary of Homeland Security)
(2) Has sole discretion to waive inadmissibility based on unlawful presence in the United States under INA § 212(a)(9)(B)(i)
(3) In the case of an immigrant who
    a. is the spouse or son or daughter of
    b. a U.S. Citizen or an LPR,
(4) If it is established to the satisfaction of the Secretary
(5) That the refusal of admission to such immigrant alien would result in extreme hardship
(6) To the citizen or LPR resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B)(v). Of those various elements, only the grant of a waiver is a discretionary action; all other elements are statutory limitations on the Secretary's exercise of discretion.

For discretionary forms of relief under the INA, the burden is on the applicant to establish that the grant of a waiver is warranted in the exercise of discretion. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). In an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility for an exercise of agency discretion rests with the applicant. INA § 291, 8 U.S.C. §1361. The proposed rule attempts to disregard that the phrase "to the satisfaction of the Attorney General" does not concern or trigger the discretion exercised by the Secretary of DHS (as successor at law to the Attorney General). Rather it is a statutory limitation that specifies "the identity of the decision-maker." *Ramadan v. Gonzales*, 479 F.3d 646, 655 (9th Cir. 2007). To read § 212(a)(9)(B)(v) otherwise would impermissibly reduce the phrase to surplusage. *Schneider v. Chertoff*, 450 F.3d 944, 954 (9th Cir. 2006).

The waiver statute thus places the burden on the immigrant applicant to "establish," *i.e.*, prove, to the Secretary of DHS as a matter of fact, that "refusal of admission would result in extreme hardship" to the qualifying relative. Establishing extreme hardship to a qualifying relative as a consequence of denial of admission does not create any entitlement to relief under any waiver of inadmissibility provision in the INA. *In re Cervantes Gonzalez*, 22 I&N Dec. 560, 567 (BIA

1999) (Although extreme hardship is a requirement for INA § 212(h) relief, once established it is but one favorable discretionary factor to be considered.)

A waiver of inadmissibility under § 212(a)(9)(B)(v) necessarily involves at least one adverse consideration, unlawful presence in the United States. Thus, the statute itself forecloses the possibility of a DHS policy or regulatory *presumption* that relief is warranted in the exercise of discretion. This is a fundamental difference between the unlawful presence waiver and the exercise of discretion to grant adjustment of status under INA § 245, or for the presumptive waiver of inadmissibility under The Nicaraguan Adjustment and Central American Relief Act ("NACARA"). *See* 8 C.F.R. § 240.64(d).[3] Congress extended the NACARA presumption of hardship under a uniquely narrow retroactive application of §212(c) suspension of deportation benefits to the ABC settlement class. *See Am. Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991). The determination that the ABC group shared numerous common characteristics of hardship which justified a shift in the burden of proof was a legislative decision. Congress has never permitted the agency, on its own initiative, to both waive the burden of proof as to extreme hardship *and* to manipulate the exercise of discretion by tipping the scale of its balancing test for any other group of aliens, in particular the population of potential § 212(a)(9)(B)(v) beneficiaries.

C. The Provisional Grant of a Waiver of Inadmissibility *Prior* to Departure Exceeds the Statutory Authority of DHS.

The "provisional" grant of a waiver of inadmissibility directly conflicts with the plain language of INA § 212(a)(9)(B). A DHS regulation must be set aside if found to be arbitrary and capricious or in excess of statutory jurisdiction. 5 U.S.C. § 706(2)(A) and (C). DHS may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress over resource allocations. *Lincoln v. Vigil*, 508 U.S 182, 193 (1993) (Of course, an agency is not free simply to disregard statutory responsibilities: *Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes….*) (*emphasis* added).

In reviewing the unprecedented scope of the expansion of the waiver under the proposed rule, three factors must be considered: The plain language of section 212(a)(9), the legislative intent of Congress in enacting the provision, and the intent of the proposed agency action. *See, e.g.*,

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[3] NACARA amended The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 309 by adding a subsection (f) entitled "Special Rule for Cancellation of Removal." NACARA § 203, 111 Stat. 2160, 2198 (codified at 8 U.S.C. § 1101 note).

U.S. v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) (agency regulations based only on general agency authority to issue regulations receive less deference).

The plain language of the INA § 212(a)(9)(B)(v) waiver by USCIS requires the alien to establish that "refusal of admission … would result in extreme hardship" to a qualifying relative. 8 U.S.C. § 1182(a)(9)(B)(v). Congress thus made *departure*—rather than commencement of unlawful presence—"the event that triggers inadmissibility or ineligibility for relief, because it is departure which … makes the alien a potential recidivist. It is recidivism, and not mere presence, that section 212 (a)(9) is designed to prevent." *Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006). USCIS has interpreted the statutory language to mean that although a provisional waiver "does not take effect" until the alien applicant departs the United States, 8 C.F.R. § 212.7(e)(12)(i)(A), it can be adjudicated and approved while the applicant "is present in the United States," 8 C.F.R. § 212.7(e)(3)(i). But Congressional delegation to the Secretary of Homeland Security of discretion as to whether to grant relief, after application, has never included discretion to define eligibility for such relief. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987); *see also Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986).

DHS lacks authority to provisionally grant the immigration benefit of a § 212(a)(9)(B)(v) waiver through exercise of discretion. Under the proposed rule, the Secretary's exercise of discretion would be contingent upon on the uncertain future occurrence of a statutory, non-waivable condition for relief—"departure" from the United States. However, only an alien determined to be inadmissible due to unlawful presence and to have departed the United States is eligible to apply for a § 212(a)(9)(B)(v) waiver. A future departure would only become certain as a matter of law if the alien is subject to a final order of removal. But by law, only an immigration judge, and not USCIS, can determine that an alien in the United States is inadmissible and order the alien removed. 8 U.S.C. §1129a(a). Aliens in removal proceedings, and especially aliens subject to final removal or voluntary departures orders, are ineligible to apply. *See* 8 C.F.R. §212.7(e)(4)(v)-(vii). USCIS does not have jurisdiction over an alien in proceedings, even if the alien is a beneficiary of an approved I-130 (or I-360) petition, *see Matter of Lemus-Losa* 25 I&N Dec. 734 (BIA 2012), or if the alien departs the United States prior to the conclusion of the proceeding and subsequently seeks admission, *see Matter of Sanchez-Herbert*, 26 I&N Dec. 43 (BIA 2012).

The structure of the INA § 212(a)(9) grounds for inadmissibility, when properly considered as the context for the § 212(a)(9)(B)(v) waiver clause, supports the existence of a conflict between a regulation "provisionally" granting the waiver and the statutory scheme. An inadmissible alien beneficiary of an immigrant visa petition remains inadmissible even after the petition is approved. 80 F.R. 43338, 43339. The agency seems to forget that the INA requires consular

officials to impose a statutory presumption against admissibility on all visa applicants who are claiming eligibility under the immediate relative, family preference, employment, or special immigrant provisions of the INA. INA § 203(f), 8 U.S.C. § 1153(f). The proposed rule attempts to circumvent—and thus conflicts with—that statutory burden of proof.

Every alien who has incurred one year or more of unlawful presence or who has been ordered removed becomes inadmissible for ten years once they "attempt to enter" the United States by applying for admission. 8 U.S.C. § 1182(a)(9)(C). Waiver of the § 212(a)(9)(C) ten-year bar is only available to certain VAWA self-petitioners, excluding almost all qualifying relatives potentially eligible for § 212(a)(9)(B)(v) waivers. 8 U.S.C. § 1182(a)(9)(C)(iii). Similarly, an alien travelling outside of the United States under a grant of advance parole cannot qualify for a § 212(a)(9)(B)(v) waiver. Such foreign travel is "qualitatively different" from the departure contemplated by Congress as a prerequisite to eligibility for a § 212(a)(9)(B)(v) waiver, because parole can only return the alien to the exact immigration status he or she held at the time advance parole was granted. *In re Arrabally*, 25 I&N Dec. 771, 778 (BIA 2012). Once the purpose of an alien's parole has been satisfied, parole is terminated and the alien reverts to the status of any other applicant for admission by operation of law. *Id.* at 777, citing INA § 212(d)(5)(A).

D. The Agency's Intent to Ease the Adjustment of Status by Unlawfully Present Aliens Directly Conflicts with the Intent of Congress.

DHS states that the "goal of the provisional waiver process is *to reduce the adverse impact of the Form I-601 waiver process* on families in the United States." 80 F.R. 43338, 43341.[4] The DHS policy objective in offering the provisional waiver has been unambiguous since 2013: "By creating these new filing procedures, DHS anticipates that *the immigrant visa waiver process will become more efficient for the U.S. Government and for U.S. citizens and their immediate relatives.* It will *reduce the length of time American families are separated while the immigrant visa applicant is going through the immigrant visa process*. The applicant may remain in the United States with his or her family until the time the applicant must depart from the United States to attend his or her immigrant visa interview." 78 F.R. 538, 542 (Jan 1, 2013) (emphasis

[4] *See also* 80 F.R. at 43346: "[T]housands of non-immediate relatives of U.S. citizens and LPRs seeking immigrant visas who are inadmissible to the United States due to only unlawful presence still face the financial and emotional burdens of pursuing a Form I-601 waiver while outside of the country and away from their family in the United States. In addition to promoting the goal of family unity between eligible non-immediate relatives and their U.S. citizen or LPR family members, this rule would increase USCIS and DOS efficiencies by streamlining the waiver process for unlawful presence for this expanded group of aliens."

added). The unambiguous intent of the proposed regulation is to make it *easier* for such "individuals" to be lawfully admitted as immigrants.

The proposed agency action is thus in direct conflict with the manifest purpose of the § 212(a)(9)(B)(v) waiver provision, *i.e.*, to make lawful admission "more difficult" for this class of aliens. Under the direction of the Attorney General, the EOIR—including the BIA—has controlling authority in interpreting the laws relating to immigration. *See* 8 U.S.C. § 1103(g)(10). The BIA has determined that the "manifest purpose" of section 212(a)(9)(B) "and the provisions which surround it" is "to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter." *In re Arrabally*, 25 I&N Dec. 771, 776 (BIA 2012) (emphasis added). Similarly, under *Judulang* the agency's claim that the provisional waiver process is more "cost efficient" is arbitrary, because it is not tied to the purpose of the statute.

E. The Regulatory Goal of Promoting "Family Unity" is Arbitrary and Capricious.

In addition to side-stepping the adverse consequences of immigration violations that were imposed by Congress under IIRIRA, and impermissibly promoting cost efficiency of consular operations where such reasoning is completely untethered from the manifest purpose of INA § 212(a)(9)(B), the proposed regulation arbitrarily justifies extra-statutory "provisional" relief from the 3 and 10-year bars on the misleading basis that the I-601A provisional waiver program "promotes *family unity*. *See* 78 FR 536 (Jan. 3, 2013); *see also* 77 FR 19902 (Apr. 2, 2012) (proposed rule)." 80 F.R. 43338, 43341 (emphasis added). The DHS characterization of the immigration laws on this point is arbitrary and inaccurate.

The two cases cited by DHS as authority for its family unity doctrine, *Holder v. Martinez Gutierrez,* 132 S. Ct. 2011, 2019 (2012); and *INS v. Errico,* 385 U.S. 214, 219-20 (1966), are not on point. *INS v. Errico* held that former INA § 241(f), the so-called "forgiveness provision," was enacted in 1957 to promote the reunification of parents and children, by forgiving entry obtained through misrepresentation "no matter the section under which the charge is brought." *Castro-Guerrero v. INS*, 515 F.2d 615, 618 (5th Cir. 1975) (citing *Errico*, 385 U.S. at 219-220). In 1975, the Supreme Court rolled back its holding in *Errico*, finding that § 241(f) did not apply to aliens who obtained visas by fraud or worked in the United States without proper certification. *Reid v. INS*, 420 U.S. 619 (1975). In 1990 Congress repealed § 241(f), leaving a legislative residue in 8 U.S.C. § 1251(a)(1)(H) (now INA § 237(a)(1)(H)). *See* Pub. L. 101-649, 104 Stat. 4978 (1990). An INA provision repealed by Congress cannot support the Secretary's claim that

his authority to waive a different INA provision enacted years later derives from family unity considerations reflected in the repealed provision.

In *Holder v. Martinez Gutierrez*, the Supreme Court rejected a claim that since one of the purposes of the INA was "promoting family unity," a parent's period of U.S. residence could be imputed to a child in an application for cancellation of removal. 132 S. Ct. at 2019. Family unity was among the goals that "underlie or inform many provisions of immigration law. But they are not the INA's only goals, and Congress did not pursue them to the nth degree." *Id.* (citations omitted). The Supreme Court concluded, "We cannot read a silent statute as requiring (not merely allowing) imputation just because that rule would be family-friendly." *Id.*

The two Supreme Court holdings cited by the Secretary, when read together, demonstrate that Congress legislates consistent with the canon of construction, "expresio unis est exclusion alterius." (the expression of one thing is to the exclusion of the other). *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188, (1978); *Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) (applying the canon). Where Congress has intended that family unity be the purpose of a given provision of immigration law, it has expressly indicated that intent in the statutory language. *See, e.g.*, INA § 212(d)(11) (waiver "to assure family unity" for certain aliens who are inadmissible for having encouraged or inducing the smuggling of a family member), § 212(d)(12) (waiver "to assure family unity" of inadmissibility due to document fraud committed solely to assist or aid an alien's spouse or child), or § 212(a)(9)(B)(iii)(III) (excluding beneficiaries of the Immigration Act of 1990 ("IMMACT 90") family unity protection from accrual of unlawful presence while in such status).

The plain language of § 212(a)(9)(B)(v) rebuts the Secretary's claim that by enacting the waiver, Congress intended to indirectly promote family unity. Hardship to the applicant's U.S. citizen or LPR child is not an eligibility factor. Only the immigrant's spouse or parent is a qualifying relative. Unlike other INA waivers, the qualifying spouse or parent must demonstrate that extreme hardship would occur regardless of whether the qualifying relative accompanied the inadmissible alien abroad, or remained behind in the United States. While the intent of the waiver is humanitarian, it was designed narrowly, to mitigate only the harshest collateral consequences of removal, and only for the qualifying adult citizen or permanent immigrant parent or spouse, a very distinct legislative purpose from preserving "family" unity.

Given the lack of a legitimate basis for the Department's assertion of a family unity interest in granting "provisional" § 212(a)(9)(B)(v) provisional waivers, the open-ended amendments proposed for 8 C.F.R. § 212.7(e)(3) seem particularly arbitrary. The decision to expand

eligibility to allow the derivative spouse and children of an immigrant who has petitioned in his or her own right to independently apply for a waiver based on extreme hardship to the immigrant's qualifying U.S. resident parent or spouse is arbitrary, given the plain language of the waiver. INA § 203 limits the entitlement of derivative spouses and children of family preference, employment and diversity-based visa recipients to the same "status" and "order of consideration" and only if "accompanying or following to join." 8 U.S.C. § 1153(d). These statutory entitlements do not extend to the right of the derivative relative to independently apply for a § 212(a)(9)(B)(v) waiver, whether on a standard or "provisional" basis. There is no basis in statute for the Secretary to provisionally attribute extreme hardship to such derivatives, given the requirement that they be must be "accompanying or following to join" to receive a visa and admission in the first place.

As for special immigrants described in INA § 101(a)(27), they do not receive the derivative treatment and entitlements prescribed in INA § 203(d) at all. Some special immigrant categories do not include a derivative spouse or child, so a blanket extension to aliens described in § 203(a)(27) of an entitlement to claim extreme hardship as a qualifying relative under § 212(a)(9)(B)(v) would be clearly unlawful.

Similarly, the agency's proposal to extend eligibility for "provisional" waiver approval to inadmissible aliens with approved employment and diversity-based visas on the basis of family unity or agency convenience would be arbitrary under the *Judulang* doctrine, as it would have no basis in the purposes of the inadmissibility statute or the immigration laws in general. The 3 and 10 year bars were unambiguously intended to create very serious impediments to reentry for Entry Without Inspection ("EWIs") aliens and visa-overstay aliens, including bars to adjustment of status in the United States under INA § 245(a). There is not a scintilla of evidence in case precedent or in the legislative history of what is now INA § 212(a)(9) that Congress did not intend or was unaware that even beneficiaries of the narrow relief provided under § 212(a)(9)(B)(v) would experience inconvenience and delay in consular processing, as a quid pro for the tremendous benefit of transiting directly from illegal alien to lawfully present permanent resident alien status.

F. Extreme Hardship.

By enacting INA § 212(a)(9)(B)(v) as part of IIRIRA, Congress created a statutory requirement that the Secretary of DHS must determine the existence of extreme hardship as a factual matter, before exercising discretion as to whether or not to grant the waiver. The deliberate omission of a definition of extreme hardship from the proposed regulation would thus be arbitrary, capricious, and *ultra vires* under the standards for agency action announced in *Judulang*.

Nonetheless, Secretary Johnson has ordered the Director of USCIS to make such determinations as an exercise of discretion and policy. *See* Johnson Directive at 2. However, as an interpretation of the statutory scheme embodied in an internal DHS memorandum rather than in regulations, the exclusion of the definition of extreme hardship from the regulatory scheme is not binding. *In re Arrabally*, 25 I&N Dec. 771, 776 (BIA 2012) (citing *Christensen v. Harris County*, 529 U.S. 576, 587, (2000)).

As the Johnson Directive noted, the fact that many BIA decisions have characterized the concept of extreme hardship as "not a definable term of fixed and inflexible content or meaning" did not deter legacy INS from enacting a regulatory definition of extreme hardship for the narrow purpose of adjudicating claims of extreme hardship for post-IIRIRA suspension of deportation cases under NACARA and Haitian Refugee Immigration Fairness Act ("HRIFA"). *See* 8 C.F.R. § 1240.58(b); *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). Subparagraph 1240.58(b) includes factors relating to the effects of a denial of admission on the alien applicants children, while subparagraph (c) provides an additional set of factors applying exclusively to "section 244(a)(3)"—but apparently referring to "additional extreme hardship factors relevant to battered spouses and children" *See* 66 F.R. 27856 (May 21, 1999).

The NACARA special rule regulation requires that "the applicant must demonstrate that deportation would result in a degree of hardship beyond that typically associated with deportation," but only lists representative non-exclusive "factors." 8 C.F.R. § 1240.58(b). IRLI and FAIR believe that USCIS could formulate a regulatory statement of adverse factors "typically associated" with removal as a baseline for more consistent adjudications of eligibility using the historic data and case precedent. Such a regulation would be invaluable for the consistent adjudication of all INA waiver applications that condition eligibility on a showing of a heightened level of hardship, such as exceptional hardship (8 U.S.C. § 1182(e)), extreme hardship (*e.g.*, 8 U.S.C. §§ 1154(a)(1), 1182(a)(9)(B)(v), 1182(h)(i)(B), 1182(i)(1), 1186a(c)(4), 1229a(c)(6)(C)(iv)(III)), or exceptional and extremely unusual hardship (8 U.S.C. §§ 1229b(b)(1)(D) and 1229b(b)(2)(A)). The regulations governing extreme hardship waivers under former INA § 212(c) also required the alien seeking suspension to allege and support by affidavit or other evidentiary material the particular facts claimed to constitute extreme hardship. *See* former 8 C.F.R. § 3.8. Failure by USCIS to impose a similar common-sense requirement, in the proposed amendments to 8 C.F.R. § 212.7, so as to reduce the incentives for applicants to make conclusory and unsupported allegations on Form I-601A, is unexplainable other than as a capricious political benefit to unlawfully present aliens.

Controlling case precedent and internal agency procedures both provide USCIS ample direction for the drafting of a regulatory definition of extreme hardship that would be permissible under

the *Judulang* standard. The U.S. Supreme Court has held that former INA § 212(c) provided the former INS with a statutory basis to interpret the meaning of extreme hardship narrowly. *Jong Ha Wang v. INS*, 450 U.S. 139, 145 (1981). Federal courts have repeatedly held that the common results of removal from the United States are insufficient to prove extreme hardship. *See Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996); *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Shooshtary v. INS*, 39 F.3d 1049, 1051 (9th Cir. 1994) (holding that the uprooting of a family and separation from friends do not necessarily amount to extreme hardship but rather represent the type of inconvenience and hardship experienced by the qualifying relatives of most aliens being deported). The Supreme Court has clarified that "although removal is a serious burden for many aliens, it is not categorically irreparable." *Nken v. Holder*, 556 U.S. 418, 435 (2009). *See* also *Machner v. INS*, 1995 U.S. App. LEXIS 19286 (4th Cir. 1995) (finding that facing "linguistic and cultural difficulties in adjusting to life in Germany" were "normal consequences of deportation.").

The BIA has also summarized various "maxims" describing other hardships or inconveniences associated with removal that do not in themselves rise to the level of extreme hardship. These include (1) a significant reduction in a qualifying relative's standard of living, (2) some degree of financial hardship, (3) difficulty of the qualifying relative in adjusting to life in the country of deportation, and (4) losing access to better economic, educational, and medical facilities or opportunities in the United States. *In re L-O-G-*, 21 I&N Dec. 413, 417 (BIA 1996).

Only hardship to the qualifying relative, and not to the alien applicant, may be considered. *In re Monreal*, 23 I&N Dec. 56, 63 (BIA 2001). However, hardship to a U.S. qualifying spouse "is diminished" if the parties married after the commencement of proceedings. *See In re Mendez-Morales*, 21 I&N Dec. 296, 302 (BIA 1996). A qualifying U.S. relative's fear of persecution in the country of removal should generally be discounted in assessing whether extreme hardship would occur, since (1) other remedies such as asylum and withholding of removal are favored, and (2) a qualifying relative under § 212(a)(9)(B)(v) may choose to remain in the United States. *See Gebremichael v. INS*, 10 F.3d 28, 40 (1st Cir. 1993); *Farzad v. INS*, 802 F.2d 123, 126 (5th Cir. 1986).

DHS in fact has used detailed internal agency guidance issued shortly after implementation of the 2013 final I-601A waiver rule that directs immigration officers at USCIS as to the requisite severity of claimed hardship, the standard of proof, the burden of proof, and the nexus between the determination of eligibility and the weighing of favorable and unfavorable factors in the exercise of discretion. USCIS National Benefit Center, *Standard Operating Procedures for Form I-601A Application for Provisional Unlawful Presence Waiver, Version 1.1*, at 49-57 (March 14, 2013) (available as AILA Infonet Doc. No. 14050241).

G. Conclusion.

For the reasons provided above, IRLI and FAIR conclude that the proposed rule must undergo major revision before its asserted reinterpretation of the waiver of admissibility provision can permissibly fall within the limits of the authority delegated to the Secretary by Congress. After *Judulang*, the standards for permissible rulemaking in the immigration law field can no longer rest on deference to the transient policy interests of the administration in power, even though such doctrines may have been acceptable in the past. The intent of Congress in enacting the 3-and-10 year bars cannot be reasoned away by reference to extra-statutory interests. In particular, the arbitrary decision to exclude entirely from the proposed regulation the central element of a waiver of inadmissibility—determination of extreme hardship to a qualifying adult relative—must be rectified.

Respectfully Submitted,

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