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November 18, 2022

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Submitted to: Policyfeedback@uscis.dhs.gov

cc: Amanda Baran

United States Citizenship and Immigration Services (USCIS)
5900 Capital Gateway Drive
Camp Springs, Maryland 20588

Re: Immigrant Legal Resource Center (ILRC) comments Changes to the Policy Manual on Medical Certification for Disability Exceptions – 12 USCIS-PM E.3; 12 USCIS-PM J.2 and 12 USCIS-PM J.3 (Effective Oct. 19, 2022)

Dear USCIS,

We write to comment on the October 2022 release of the updated Policy Manual sections on the N-648 Medical Certification for Disability Exceptions and the Oath Waiver, enumerated above.

GENERAL COUNSEL

Bill Ong Hing

Overall, these changes are a welcome development for naturalization applicants with disabilities and the advocates who represent them. While we appreciate that most of the changes will increase access to the disability waiver for qualified applicants, we also offer some suggested improvements to the guidance.

OF COUNSEL

Don Ungar

Specifically, we oppose the sections in the revised Policy Manual and N-648 that add a request for an oath of allegiance waiver to a request for a disability waiver of the English/civics requirement. These two waivers derive from separate sections of the law and have different eligibility standards. We believe that asking the medical professional who is judging the ability to learn English and/or civics for a disability waiver to answer questions about understanding of an oath will create many unnecessary barriers for applicants with disabilities. In addition, we oppose three of the six credible doubt scenarios that the revised Policy Manual includes because we believe they describe arbitrary circumstances that will raise the burden of proof beyond the correct standard of preponderance of the evidence. See more on these suggested changes to these sections below.

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We are grateful that most of the changes included in the updated Policy Manual guidance responded to suggestions by the ILRC and our partners in the Naturalization Working Group.¹ We thank you for your willingness to listen to stakeholders.

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Background on the ILRC

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC also convenes the New Americans Campaign (NAC), a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and the barriers that affect applicants who require a disability waiver.

Background on the Policy Manual Revisions 2018-2020

The October 2022 revisions to Policy Manual are a vast improvement over the previous version of this guidance which had suffered from the addition of punitive restrictions to eligibility through changes made in 2018 and 2020.² We had commented to the agency that those changes should be removed in their entirety. The 2018 and 2020 changes to guidance contradicted the purpose and intent of the law, arbitrarily preventing persons with disabilities from naturalizing. There was no engagement with the affected public before making the changes in 2018 and 2020. These additions created new standards for eligibility not found in the statute and regulations.

After the 2018 and 2020 changes, this vulnerable population of applicants was faced with denials for simple mistakes and misunderstandings of a complex process because of the new standards, including fifteen factors which automatically gave rise to an assumption of "credible doubt, discrepancies, misrepresentation, and fraud."³ In sum, the 2018 and 2020 changes to the USCIS Policy Manual implemented many of the worst practices that advocates had complained of in some USCIS offices where applicants with disabilities were treated with disrespect and were subject to dismissive attitudes and an assumption of fraud by adjudicators. Justification for this assumption of fraud was not provided in the policy changes. Our partner organizations reported that many qualified disability waiver applicants faced a gauntlet of new hurdles in applying for disability waivers after these changes. We are grateful that the 2022 revisions largely removed the barriers that had been created by the prior guidance. The new USCIS Policy Manual is much more closely aligned with the statutory and regulatory requirements than the prior version. These positive changes mean that applicants are less likely to be denied for reasons that do not comply with the statutory and regulatory requirements for a naturalization disability waiver, and that adjudicators will not be encouraged to substitute their judgement on a disability for that of a qualified medical professional.

¹ Naturalization Working Group, *Advocacy Comment on the N-648 Naturalization Disability Waiver Form* (November 9, 2021) <https://www.ilrc.org/advocacy-comment-n-648-naturalization-disability>.

² USCIS altered the Policy Manual on disability waivers at 12 USCIS-PM E.3 on Dec. 12, 2018 <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20181212-N648MedicalCertification.pdf> and again on Dec.4. 2020 <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201204-N-648.pdf> .

³ 12 USCIS-PM E.3(E)5. Historical Version (May 11, 2021).

Removal of Questions on Doctor-Patient Relationship

We agree with USCIS on the changes that remove considerations of whether the medical professional completing the waiver is the regularly treating physician.⁴ These inquiries in prior versions of the Policy Manual were not supported by the statute or regulations. Many times applicants must consult specialized medical professionals who are not their regularly treating physician because of the nature of their disability. Other applicants may not have a regularly treating physician. There was no reasonable justifications for requiring the doctor to be the regularly treating physician, and this created an arbitrary barrier to otherwise eligible applicants.

Removal of Questions on Applicant’s Daily Activities

We also agree with USCIS that it was important to remove the guidance regarding the effect of the disability on the applicant’s daily life including the ability to work or go to school.

The prior USCIS Policy Manual instructed officers to “question the applicant during the naturalization interview about the applicant’s daily life activities...If discrepancies exist regarding the applicant’s daily life activities between the naturalization application and information contained in the A-file, the Form N-648 itself, or for any other source of information, the officer should question the applicant during the interview about these discrepancies.”⁵ This prior guidance had led to many wrongful denials as it encouraged adjudicators to substitute their opinion of disability for that of a qualified medical professional. Daily activities are not a criterion for a disability waiver. The law requires a disability or impairment that prevents an applicant from learning or understanding English and/or civics.

Telehealth

We agree with the Policy Manual change that now permits applicants to be examined by telehealth.⁶ The prior guidance required at least one in-person medical exam. In the era of the COVID pandemic, this became an unreasonable requirement as many medical professionals turned to remote examinations, especially for patients with additional vulnerabilities such as those who have disabilities or impairments.

N-648 Filing

We appreciate the change in the Policy Manual that states that the N-648 “should” be submitted as an attachment to the N-400, rather than stating that it “must” be concurrently filed.⁷ The current guidance also specifies that USCIS should accept a Form N-648 submitted after the application N-400. Previous guidance made assumptions of credible doubt or fraud when applicants filed a N-648 disability waiver after the filing of an N-400.⁸ Our partners reported that legitimate disability waivers were dismissed unfairly because of this arbitrary requirement. Some qualified applicants filed a disability waiver after filing an N-400 because they lacked representation during the initial N-400 filing and were not aware of the possibility. In other cases, applicants may have had a change in circumstances or representation that caused them to file such a waiver after the N-400. With the new guidance,

⁴ 12 USCIS-PM E.3(E)1. Historical Version (May 11, 2021).

⁵ 12 USCIS-PM E.3(E)2. Historical Version (May 11, 2021).

⁶ 12 USCIS-PM E.3(E). (2022).

⁷ 12 USCIS-PM E.3(B). (2022).

⁸ 12 USCIS-PM E.3(E)5. Historical Version (May 11, 2021).

applicants will not have a presumption of “credible doubt” if they file the waiver after the N-400, which is a more equitable approach, and the guidance allows applicants the opportunity to explain their circumstances.

Flexibility in Sufficiency Determinations and Improved Communication with Applicants

The current revisions of the Policy Manual stress that adjudicators should review the N-648 “in its totality and may determine that the Form N-648 is sufficient even if some of the questions have incomplete responses.”⁹ This kind of flexibility in judging sufficiency will be very helpful for qualified applicants. The prior guidance directed that, “Failure to correctly fill out each question with the appropriate, corresponding responses may result in a finding that the Form N-648 is insufficient.”¹⁰ The previous guidance was unfairly applied to deny qualified applicants.

The 2022 revisions also newly emphasize the need to communicate with applicants when officers are reviewing the disability waiver, an emphasis that did not exist in the prior version. Current guidance requires that the officer explain any reasons for doubt through a Request for Evidence (RFE) and that, “the officer must explain why they found the form insufficient in the applicant’s preferred language, using an interpreter if needed.”¹¹ Again, these are welcome changes that will increase access to the waiver for qualified applicants.

Credible Doubt Guidance

In the prior version of the Policy Manual, this section was titled “Credible Doubt, Discrepancies, Misrepresentation and Fraud,” and it had an expansive list of fifteen different circumstances that could justify a USCIS adjudicator’s denial of a disability waiver.¹² The list has now been shortened to six circumstances that may give rise to credible doubt, and the section now deletes “discrepancies, misrepresentation, and fraud” from the title.¹³ We approve of this change because this section of the previous guidance had created a de facto presumption of fraud in an array of circumstances, thereby altering the burden of proof on applicant. Since the standard in adjudications of benefits applicants is a preponderance of the evidence¹⁴ these assumptions of credible doubt because of arbitrary and sometimes vague scenarios unfairly burden the applicant.

The current version of the Policy Manual has deleted the most egregious scenarios for alleged credible doubt, such as not including an explanation of the doctor-patient relationship if the doctor is not the regularly treating physician, or where the medical professional did not explain the diagnostic techniques used, or where there were inconsistencies found between the N-648 and the applicant’s activities of daily life. The prior version of the policy manual also found “credible doubt” if an applicant failed to justify a late filing of an N-648, a basis that is deleted in the current version.¹⁵ We believe all these revisions will help to prevent unfair denials of disability waivers for arbitrary reasons.

However, we still object to the inclusion of three of the scenarios for “credible doubt” in the 2022 revisions because they are arbitrary or overbroad.

⁹ 12 USCIS-PM E.3(G). (2022).

¹⁰ 12 USCIS-PM E.3(D). Historical Version (May 11, 2021).

¹¹ 12 USCIS-PM E.3(G)2. (2022).

¹² 12 USCIS-PM E.3(E)5. Historical Version (May 11, 2021).

¹³ 12 USCIS-PM E.3(F)4. (2022).

¹⁴ 12 USCIS-PM E.3(F). (2022).

¹⁵ *Id.*

Those three circumstances are:

“The evidence in record or other credible information available to the officer indicates fraud or misrepresentation; The applicant provides multiple N-648s with different diagnoses and information; or Any other articulable grounds that supported by the record.”¹⁶

We urge USCIS to reconsider this section, and in future revisions emphasize the preponderance of the evidence standard without depicting some circumstances as necessarily problematic. The inclusion of multiple N-648s with different diagnoses, for example, can occur when an applicant consults separate specialists about multiple disabilities because each specialist is only expert in their area. There are also circumstances where an applicant may have consulted a medical professional who found themselves unable to provide a sufficient diagnosis, thus the applicant consults a second medical professional. Since such scenarios can be reasonably explained in some circumstances, they should not automatically give an applicant a heightened burden of proof.

Our objections to credible doubt being raised because evidence in the record indicates it, or because there is any other articulable grounds is that both these scenarios are overbroad and invite denial for unspecified reasons. We hope these three bases for credible doubt can be removed.

Inclusion of Oath Waiver

As stated in our comments to the proposed form,¹⁷ we remain concerned by the addition of a question asking the medical professional to make a judgement on the applicant’s ability to understand the oath of allegiance for naturalization. This question was added to the N-648 in Part 4, Question 1: “Is the applicant able to understand and communicate that they understand the meaning of the Oath of Allegiance to the United States?” Its inclusion is also described in the revised Policy Manual.¹⁸

The medical professional will have no professional knowledge of what the oath contains or what an oath waiver entails, nor how an oath may legally be modified or simplified for an appropriate applicant. In fact, in a recent example of confusion that this question causes, a partner program informed us that a doctor was filling out the N-648 this week under the new guidance, and when they came to the oath of allegiance question, not knowing what that meant, the doctor googled it, and concluded that it must be the pledge of allegiance. The doctor then questioned the naturalization applicant about their understanding of the pledge of allegiance before arriving at an answer for the N-648. This kind of confusion will be common as we go forward with the new guidance and it is created by including this question on the N-648. The question of the oath waiver has never been included in the N-648 before, as it is based on a separate law and is requested through a separate process.

Congress intended to make an oath waiver available to certain applicants with disabilities who could not understand the oath by explicitly changing the statute to allow that in 2000.¹⁹ This was an entirely separate law than the 1994

¹⁶ *Id.*

¹⁷ Naturalization Working Group, *Advocacy Comment on the N-648 Naturalization Disability Waiver Form*, November 9, 2021, <https://www.ilrc.org/advocacy-comment-n-648-naturalization-disability>.

¹⁸ 12 USCIS-PM J.3(C).

¹⁹ INA § 337(a). Pub. L. 106–448 (July 12, 2000).

naturalization disability waiver that can waive the English/Civics requirement.²⁰ These two laws should not be conflated by asking a medical professional who is required to assess the ability to learn English and/or civics to also judge whether an oath of allegiance can be understood, thus determining whether an oath waiver is needed.

The addition of this question will likely lead to many unnecessary oath waiver requests. If an oath waiver is requested, according to the USCIS Policy Manual, the applicant will need to have a qualifying U.S. citizen relative who is also a primary caregiver or a court-ordered legal guardian, surrogate or designated representative act on their behalf.²¹ This requirement does not exist for applicants seeking a disability waiver of the English and/or civics requirement.

Our concern is that many applicants do not have one of the limited U.S. citizen relatives currently allowed by the USCIS Policy Manual to act for them in this process, nor do they have the time or funds available to go through a lengthy court-ordered guardian or representative process.

We recommend that USCIS eliminate the question about the oath of allegiance from the N-648, since the waiver of the English/civics requirement is the focus of this form, and the underlying law is separate from that of the oath requirement and its waiver.

Again, we appreciate the work being done at USCIS to strengthen access to disability waivers and commend the agency for the 2022 Policy Manual revisions. If you have any questions or require any further information please do not hesitate to reach out to pgleason@ilrc.org.

Sincerely,

Peggy Gleason
Senior Staff Attorney
Immigrant Legal Resource Center

²⁰ INA 312(b)(1). Section 108 of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (Oct. 25, 1994).

²¹ This limited list of persons who can act in place of a disabled applicant are in 12 USCIS-PM C.3.A.4 and 12 USCIS-PM J.3.C.2. ILRC has commented separately to USCIS that the requirements of certain U.S. citizen relatives or a court-ordered guardian are an unreasonable barrier to the oath waiver that was created by the USCIS Policy Manual. To avoid creating additional bars to oath waiver applicants USCIS should allow a more inclusive list such as “a family member, social worker or trusted individual” to stand in for the naturalization applicant who cannot understand the oath. ILRC, *Advocacy Letter on Oath Waiver and Accommodations for Naturalization Applicants with Disabilities* (June 21, 2022) <https://www.ilrc.org/ilrc-advocacy-letter-oath-waiver-and-accommodations-naturalization-applicants-disabilities> .