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To www.regulations.gov
Re: Department of State (DOS), Request for Public Input
RIN: 1400-AF30, Docket Number DOS-2021-0017

Dear DOS:

We submit this comment in response to the Request for Public Input on Department of State (DOS) policies and guidance published on September 16, 2021. We appreciate the opportunity to comment on DOS matters.

The Immigrant Legal Resource Center (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 has produced legal trainings, practice advisories, and other materials pertaining to immigration law and processes.

Though our extensive networks with service providers, immigration practitioners and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits, including those who are overseas and are consular processing. The recommendations that follow are gleaned from the experiences of many low-income immigrants who we and our partners serve.

1. **Recommendation: Suspend or eliminate termination of I-130 petitions under INA § 203(g), clarify the termination policy to the public, and allow liberal reinstatement of petitions that have been terminated.**

The Immigration and Nationality Act (INA) § 203(g) provides that the Secretary of State shall terminate the registration (petition) of any noncitizen who fails to apply for an immigrant visa within one year of notice of visa availability. The INA also provides that the petition may be reinstated if, within two years of notice of visa availability, the visa applicant establishes that the failure to apply was for reasons beyond their control. Applicants are required to repay visa application fees if they have been placed in the termination process by DOS, even if they are able to reinstate their petition. If a visa applicant does not respond to notices from the NVC within one year they risk termination of their petition under this section of law and would lose the benefits of that petition such as their priority date.

Termination is an unnecessarily harsh measure, as it ends almost all possibility of a person eventually obtaining permanent residence based on that petition, despite having obtained an approved petition and waiting years for processing. While an applicant can contact DOS during the two-year period following a notice to terminate and sometimes seek to revitalize their visa application by showing that the failure to act within one year was beyond their control, in practice many applicants do not receive the termination notices. Even if they do receive the termination notices, many individuals, particularly *pro se* individuals, may not be aware of the requirement to continue contact with NVC.

There are several reasons an applicant might not receive a termination notice. Notices are sometimes sent to stale addresses. Because of the current backlogs, applicants' addresses are more likely to have changed with the passage of time and change of address correspondence with National Visa Center (NVC) or DOS may not always be timely acknowledged or processed by the agency.[1] In addition, DOS often sends notifications through the United States Postal Service (USPS), which has suffered from reduced resources and management changes since 2020, making this a less than reliable method of communication.[2]

Current consular delays are not within the control of applicants, and applicants should not be penalized for them. When visas are available, but the cases have not yet been scheduled due to delays, DOS should not terminate the visa petitions. Pre-pandemic, there were 75,000 cases pending at National Visa Center (NVC) ready to be scheduled for consular interview. By February 2021, there were 473,000 such cases pending at NVC that had not yet been scheduled for interview. This number does not include cases that had already been transferred to the consulates. This staggering increase in delays and backlogged cases was attributable in part to the pandemic and the international restrictions on travel.[3] Regardless of the reason, applicants' petitions should not be terminated as a result of delays beyond their control.

Even before the pandemic, terminations frequently penalized applicants who were simply unaware of DOS' requirements. Applicants either did not receive the notice, or for financial or personal reasons were unable to respond, and found their petitions eventually terminated. Among those impacted were persons who suffered a loss of a family member on whom their immigration benefit depended. Such individuals may have been able to revive their application under INA § 204(l) or humanitarian reinstatement, but for the fact that DOS terminated their petition during a period when they were unable to respond. Individuals who suffer the loss of a family member may fail to follow up on visa possibilities within a year because they are unaware of the need to communicate with DOS and because they are still grieving.

To ensure that applicants are not unfairly terminated, DOS should instruct consulates to suspend terminations. DOS should also review whether termination as a general policy allows for fair and efficient adjudications. Applicants who may have already been terminated, especially since March 2020, should be given the opportunity to overcome

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[1] Change of address correspondence or any other correspondence by U.S. Postal Mail to the National Visa Center has not been acknowledged since June 1, 2020 when NVC announced online that it would only accept such correspondence through its online inquiry form. *Pro se* individuals, in particular, may not have been aware of that fact when attempted to notify of their change of address. *See* DOS, *NVC Contact Information*, https://travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center/nvc-contact-information.html.

[2] *See* United States Senate, *Letter to Postmaster General and Chief Executive Office Louis DeJoy* (Feb. 17, 2021) https://www.carper.senate.gov/public/_cache/files/a/2/a2afa87b-60f7-4333-9773-412ef5b24720/1279C12E678D4639E29AFABED84D0633.2.17.2021-peters-letter-on-mail-delays-final.pdf.

[3] See *Foreign Press Center Briefing With Consular Affairs Acting Deputy Assistant Secretary for Visa Services, Julie M. Stufft on the Topic: Update on U.S. Immigrant Visa Processing at Embassies and Consulates* (Mar. 9, 2021).

termination. The liberal reinstatement of any petitions terminated should be allowed when an applicant can demonstrate that there was any reason, including pandemic-related impacts on communication or travel, for failure to apply for an immigrant visa within one year of the notice of visa availability. This reinstatement should not be artificially limited to a possible two-year period after the initial termination notice is sent, but instead the possible length of time to respond should depend on the circumstances in a particular case. Applicants should not have to repay visa fees where delays were beyond their control. The long delays currently being experienced at both NVC and at consulates in scheduling immigrant visa applicants will necessarily create a large number of applicants who are one year past their visa becoming available. Until operations resume at pre-pandemic levels, and the backlogs are cleared, DOS should not penalize this group of pending applicants.

While some DOS officials stated in liaison meetings that termination would not take place during the closed or reduced operations affected by the pandemic,[4] this information was not communicated to the public and reports of terminations continued. DOS needs to publish clear guidance on the changes to termination on the DOS and consular websites, if any have taken place, and advise waiting applicants of the current policy.[5] Even after backlogs related to the pandemic are resolved, which may take years, DOS should consider eliminating the termination process, especially with *pro se* applicants.

2. Recommendation: Provide a paper-filing alternative to CEAC's system of uploading documents, especially for *pro se* immigrant visa applicants, and upgrade CEAC's user quality.

Consular processing through the National Visa Center (NVC) currently requires all immigrant visa applicants to upload their required documents to the CEAC platform, and then bring all the originals to the visa appointment. Attorneys and applicants report frequent problems with CEAC timing out after 5-6 minutes, forcing them to start over repeatedly. In addition, unrepresented applicants often find the system too complicated, particularly because larger documents such as Affidavits of Support must be compressed with special software in order to be uploaded. While the CEAC website notes that documents must be compressed, it states that the software to accomplish that may be obtained at no cost. Applicants with less computer access are also much less likely to have compression software, and usually it requires an additional purchase. Applicants who do not have computer access should not be denied an immigrant visa. *Pro se* individuals should be allowed a paper-filing alternative when requested. CEAC's capabilities should be upgraded so that it can accept larger documents for upload without compression, and the software should be improved so that it does not time out.

3. Recommendation: For visa applicants with I-601A provisional waiver approvals, when another ground of inadmissibility is possibly present but may be overcome by presentation of additional evidence, DOS should instruct consular officers not to deny, thereby revoking the provisional waiver, but instead issue an INA § 221(g) decision of documentary deficiency.

Provisional waiver approvals are revoked by regulation where there is a consular finding of ineligibility for any admissibility grounds other than unlawful presence. Some applicants with provisional waiver approvals reported that

[4] Catholic Legal Immigration Network, *Updates on Consular Processing from webinar with speakers from the American Consulate at Ciudad Juarez* (CDJ)(Dec. 16, 2020) https://cliniclegal.org/resources/family-based-immigration-law/updates-consular-processing. In the webinar, CDJ officials stated that applicants who had received a visa refusal under 221(g) prior to the closing and reduced operations at the consulate who were unable to respond to request for further evidence would be allowed to request reinstatement. This information is not listed on the DOS website for CDJ, however. https://mx.usembassy.gov/immigrant-visas-information/ (last visited Oct. 4, 2021).

[5] Current review of the DOS website indicates that the INA § 203(g) termination notification remains unchanged www.travel.state.gov, https://travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center/nvc-contact-information.html (last visited Oct. 1, 2021).

they were being denied for public charge grounds and thereby had their provisional waiver revoked as well. Applicants should be given the opportunity to overcome documentary deficiencies rather than receiving final denials, allowing them to proceed with their immigrant visa applications.

In other words, for visa applicants with I-601A provisional waiver approvals, when another ground of inadmissibility is possibly present (such as public charge) but may be overcome by presentation of additional evidence, DOS should instruct consular officers not to deny under INA § 212(a)(4), thereby revoking the provisional waiver, but instead issue an INA § 221(g) decision of documentary deficiency. In addition, applicants who have been denied under public charge since 2018 who had a provisional waiver revoked should be given an opportunity to reopen their provisional waiver and proceed with their immigrant visa application.

In part, these issues arose because of changes to the public charge guidance in the Foreign Affairs Manual (FAM) in January 2018 at 9 FAM 302.8-2(B) which lessened the importance of a properly filed, non-fraudulent I-864 Affidavit of Support by making it only a positive factor in the totality of the circumstances analysis, instead of being generally sufficient to meet the INA § 212(a)(4) requirements. DOS also published an interim final rule altering the public charge standards in October 2019. These changes were later enjoined in July 2020.[6] In March 2021, DOS updated the FAM, reverting to the pre-January 2018 public charge guidance on public charge.[7]

In the back and forth over all these changes, immigrant visa applicants with provisional waivers reported denials for public charge under § 212(a)(4) even when they had a properly filed, non-fraudulent I-864 that only required additional documentation. Because these applicants were not given a visa deficiency notice under INA § 221(g), their provisional waiver was revoked. 8 CFR § 212.7(c)(14) requires that a provisional waiver be revoked if there is a consular finding of ineligibility, but not if there is a § 221(g) notice of deficiency.

4. Recommendation: Improve uniformity of processing and availability of biometric scheduling for U and T applicants overseas.

After an applicant for U nonimmigrant status submits the application and before the conditional approval, United States Citizenship and Immigration Services (USCIS) will request biometrics from applicants abroad (including derivative applicants) between the ages of fourteen through seventy-nine. In addition to issuing the receipt notice for the Form I-918 Supplement A, USCIS will request fingerprints in the form of a "Request for Evidence" (RFE), together with two blank fingerprint cards.[8] USCIS gives the applicant ninety days to respond to the RFE. The applicants need to arrange an appointment at a U.S. consulate abroad. A similar process requires T visa derivative applicants abroad to arrange biometric appointments at consulates.

Unfortunately, applicants find great variation between consulates in the ability to schedule biometrics. Delays and uncertainty in the process mean that an eligible applicants cannot complete the process nor comply with the time deadlines imposed by USCIS for biometrics.

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[6] *Make the Road New York, et al v. Pompeo, et al* (USDC SDNY) (July 29, 2020). DOS, *Updates on Public Charge* (Mar. 26, 2001) https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html.

[7] DOS, *Updates on Public Charge* (August 7, 2020) and (Mar. 26, 2021).

[8] United States Citizenship and Immigration Services (USCIS), *Consular Processing for Overseas Derivative T and U Nonimmigrant Status Family Members: Questions and Answers*, https://www.uscis.gov/archive/consular-processing-for-overseas-derivative-t-and-u-nonimmigrant-status-family-members-questions-and. The fingerprint process for overseas applicants is outlined at DOS, Foreign Affairs Manual (FAM) 9 FAM 403.6-6 (D)(3).

Practitioners have noted that many of these offices are still unfamiliar with the fingerprint requirements or process for U nonimmigrant applicants. In February 2010, the U.S. Department of State issued clarifying guidance on the U nonimmigrant visa process to U.S. consulates at 9 FAM 402.6-6(D)(3) but the guidance is not followed uniformly. The pandemic has vastly increased problems with obtaining biometrics appointments as consulates suspended these services in March 2020 and are still only partially operating at many locations.

5. Recommendation: DOS should plan creatively to distribute needed resources to the Immigrant Visa (IV) posts with the largest volume.

The pandemic closures and subsequent reduced operations have created unprecedented delays, as well as the predicted loss of 150,000 family-based visas in Fiscal Year 2021 due to the inability of the government to schedule interviews and of applicants to travel.[9] Many government operations have adapted in the United States, with USCIS and the immigration courts providing access by phone and video for many different types of appearances. USCIS has relieved backlogs in benefits adjudications in many offices by allowing virtual interviews with USCIS officers who are located in different physical offices that the applicants. DOS has adapted by instituting an interview waiver for certain non-immigrant visa applicants.[10]

DOS could also adapt and reduce the present IV backlog by providing for virtual interviews in non-complex cases. DOS should be creative in seeking alternatives to the scheduling of in-person interviews and modify regulations to allow virtual interviews if necessary. While trying to clear the present backlogs, DOS could consider allowing applicants who do virtual interviews to perform necessary medical exams and biometrics in the United States, either by cooperating with DHS systems or by other means. DOS could allow consular personnel in other locations to provide IV interviews, either in person or virtually, especially in non-complex cases where no fraud is indicated.

6. Recommendation: Improve communication channels from both NVC and consular posts for both attorneys and *pro se* individuals and publish accurate processing time information on NVC and consular websites.

Practitioners and visa applicants report great difficulty communicating with NVC and consular posts on individual cases. NVC no longer directs inquiries to nvcattorney@state.gov, instead requiring inquiries to go through an online form that often results in no or very delayed returned communication. Consular posts should have dedicated emails for inquiry as well. In addition, Legalnet@state.gov needs to be fully staffed to provide efficient service for those seeking a legal consultation on an interpretation at a consular post. It needs to be staffed by persons with expertise in visa processing who are in direct communication with posts.

In addition, especially during the years it will take to clear the current backlogs, it would be helpful if consular posts uniformly published on their websites the processing times to show which IV cases are currently being scheduled. NVC has a helpful processing times page that advises applicants how long it will take NVC to create a file in their case after receiving a petition from USCIS, but no equivalent chart exists to inform applicants of movement in their case after that initial stage.[11] With the current backlogs of 506,000 documentarily qualified cases still pending at NVC

[9] American Immigration Lawyers Association (AILA) *Policy Brief: Reopening America: How DOS Can Reduce Delays and Eliminate Backlogs and Inefficiencies to Create a Welcoming America* (June 29, 2021). As noted in the report, over the course of the pandemic, the number of immigrant visas issued has sharply fallen, even with recent increases in March and April of 2021, the average number of IVs issued per month during the pandemic is just over 11,000, compared to the pre-pandemic average of close to 39,000, https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-reopening-america.

[10] DOS, *Expansion of Interview Waiver Eligibility* https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html (Mar. 11, 2021).

[11] DOS, NVC, *NVC Timeframes*, https://travel.state.gov/content/travel/en/us-visas/immigrate/nvc-timeframes.html.

without scheduled consular interviews, it will be years before consular processing is moving at a normal pace.[12] If applicants are better informed about how long they should expect to wait at both NVC and consular posts, it will reduce inquiries and lighten burdens on staff.

7. Recommendation: Allow derivative applicants to process at consulates after a principal adjusts in the United States without requiring an I-824, Application for Action on an Approved Application or Petition.

Currently, families face long waiting periods for reunification where a principal applicant adjusts in the United States and then wants to have their derivative spouse or child join them here. The I-824 must be filed at USCIS to notify the NVC and consulate to begin the consular process for that derivative. Three of four service centers can currently take as long as 20 months to adjudicate an I-824, even though it is a ministerial function that does not involve submission of any additional evidence.[13] The process is also expensive, charging applicants $465 for what is simply a transfer of petition to another location. Many of these petitions are transferred digitally through ELIS currently and can be received by posts within days. There is no justification for charging a high fee and making an applicant wait two years for something that can be transferred digitally in days. It would speed family reunification to allow a direct communication line between USCIS and DOS upon the approval of a principal's adjustment where family members abroad are indicated as wishing to consular process. This kind of direct communication is possible between USCIS and DOS, as it has been established and served efficiently in the provisional waiver process.

8. Recommendation: Instruct DOS officers to prioritize visas for approved N-600K applicants, and to expedite these visas if the applicants are about to age out.

An applicant for § 322 citizenship must become eligible and complete the entire process before they turn eighteen years old and before their lawful status in the United States expires. This means that they must be admitted to citizenship before their eighteenth birthday and before their visa expires. If the child is not granted a visa, the child cannot enter lawfully to complete the citizenship process. DOS officers should prioritize granting visas for approved N-600K applicants. Additionally, DOS should expedite these visas if the applicants are close to turning 18, and thus aging out of N-600K eligibility.

Thank you for your consideration of our recommendations.

Respectfully submitted,

Peggy Gleason
Senior Staff Attorney, on behalf of Immigrant Legal Resource Center

[12] American Immigration Lawyers Association (AILA), *Liaison Update: Key Takeaways from AILA Meeting Concerning DOS Backlog and Delays*, AILA Doc. No. 21071331 (July 9, 2021).

[13] USCIS, *Case Processing Times, I-824*, *Service Centers* (last visited Oct. 5, 2021) https://egov.uscis.gov/processing-times/.