December 21, 2020

Michael J. McDermott
Chief, Security and Public Safety Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive, MD Camp Springs 20746

Re: DHS Docket No. USCIS-2019-0024—Notice of Proposed Rulemaking regarding Employment Authorization for Certain Classes of Aliens With Final Orders of Removal

Dear Mr. McDermott:

The American Civil Liberties Union of Massachusetts, WilmerHale LLP, and Kathleen Gillespie, class counsel for the *Calderon* class (together, "Class Counsel"), submit the below comments in response to the Department of Homeland Security's ("DHS") Notice of Proposed Rulemaking titled "Employment Authorization for Certain Classes of Aliens With Final Orders of Removal" (the "Proposed Rule").

The Proposed Rule directly undermines the 2016 provisional waiver regulations, the prevailing purpose of which is to enable immigrants with final orders of removal, such as the *Calderon* class members described below, to seek lawful status without prolonged separation from their U.S. citizen spouses and U.S. citizen children. Class Counsel is troubled by the failure of DHS to consider the purposes of the 2016 provisional waiver regulations and the interests of those pursuing the provisional waiver process from within the United States in promulgating these regulatory changes. Accordingly, we urge DHS to amend the Proposed Rule to take these purposes and interests into account.

In 2018, Class Counsel filed a class action on behalf of noncitizens with final orders of removal and their U.S. citizen spouses, asserting that the Trump Administration's disregard for the provisional waiver process violates the Immigration and Nationality Act ("INA"), Due Process, Equal Protection, and the Administrative Procedure Act ("APA"). *Calderon v. Nielson*, 1:18-cv-10225-MLW (D. Mass.), Dkt. No. 27 (hereinafter "*Calderon*"). The Court denied the government's motion to dismiss and allowed all four claims to proceed. *Id.* at Dkt. No. 159; Aug. 23, 2018 Ruling Tr; May 3, 2019 Hr'g Tr. at 32-33; May 16, 2019 Hr'g Tr.; Dkt. No. 253 (May 17, 2019 Order). In 2019, the Court granted class certification, extending the impact of the lawsuit to hundreds or thousands of New England citizens and their noncitizen spouses who have embarked on the provisional waiver process. *See Calderon*, May 16, 2019 Hr'g Tr. at 13-15; *see also* May 3, 2019 Hr'g Tr. The litigation is pending with all claims moving forward.

The Calderon class is comprised of individuals with final orders of removal who have embarked on the provisional waiver process. As the Court has held, the 2016 provisional waiver regulations ***require*** DHS, acting through U.S. Immigration and Customs Enforcement ("ICE"),

to consider an eligible noncitizen's application for a provisional unlawful presence waiver before deciding to remove him or her from the United States. *See Calderon*, Dkt. No. 159 at 31, 35-36 ("The binding promises to United States citizens and their alien spouses in the provisional waiver regulations would be meaningless, and their purposes would be undermined, if ICE were not required to consider that an alien with a final order of removal is seeking a provisional waiver before requiring him or her to leave the United States."). The Court explained that by extending the provisional waiver regulations to noncitizens with final orders of removal, DHS allowed individuals pursuing an unlawful presence waiver to be considered for that relief *while in the United States*. *See* May 3, 2019 Hr'g Tr. at 35. ICE's failure to consider these noncitizens' pursuit of the provisional waiver process by detaining, arresting, and removing them as they embark on the process "effectively reverses that policy," and is grounds for violation of the APA. *Id.*

Accordingly, the Proposed Rule, the purpose of which is to "encourage these aliens to depart the country" (by USCIS's own admission) is directly contrary to what the Court has held in *Calderon*: that these individuals have a legally cognizable interest in remaining in the United States while they await the adjudication of their provisional waiver application.

I. The Provisional Waiver Regulations

A. Statutory and Regulatory Background

The Immigration and Nationality Act (INA) allows the noncitizen spouses of U.S. citizens to apply for lawful permanent resident status in the United States. 8 U.S.C. § 1151(b)(2)(A)(i). If the noncitizen relative is in the United States unlawfully but is eligible for "adjustment of status" under 8 U.S.C. § 1255, he may apply to "adjust" to the status of a lawful permanent resident without leaving the country. But if that noncitizen relative is ineligible or unable to adjust his status, he must leave the United States in order to apply for an immigrant visa at a U.S. consulate. Under that process, the noncitizen spouse must travel abroad to interview with a consular official and obtain an immigrant visa from the Department of State. But if he is subject to any grounds of inadmissibility described in 8 U.S.C. § 1182(a), he will not be permitted to immigrate to the United States unless a waiver of that ground is available and is granted in his case.

B. The 2013 Provisional Waiver Regulations

In 2013, USCIS promulgated regulations to allow certain relatives of U.S. citizens to seek provisional waivers of the "unlawful presence" grounds of inadmissibility 8 U.S.C. § 1182(a)(9)(B)(i)(II), making it possible for many undocumented spouses of U.S. citizens to remain in the United States for most of the process of seeking permanent residency. The regulations reduced the time that the noncitizen spouse would need to wait overseas from many months or years to a few weeks, making it possible for many more families to pursue lawful status. Then, in 2016, the agency expanded that process to make it available to noncitizens with final orders of removal—the precise class of individuals the Proposed Rule targets.

Specifically, a noncitizen who has been unlawfully present in the United States for at least a year who departs and then seeks to return is ordinarily inadmissible (and thus barred from reentry) for 10 years. 8 U.S.C. § 1182(a)(9)(B)(i)(II).[1] The Attorney General, however, may waive this inadmissibility ground if denying admission would cause "extreme hardship" to a U.S. citizen or lawful permanent resident spouse or parent. *Id.* § 1182(a)(9)(B)(v).

Prior to 2013, a noncitizen spouse of a U.S. citizen had to remain outside the United States while he or she applied for an immigrant visa and an unlawful presence waiver—often for "well over a year." *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Proposed Rule*, 77 Fed. Reg. 19902 (Apr. 2, 2012). USCIS recognized that "the prolonged separation from immediate relatives … cause[d] many U.S. citizens to experience extreme humanitarian and financial hardship." *Id.*; *see also id.* at 19906 ("[A]n immediate relative's extended absence from the United States can give rise to the sort of extreme hardships to U.S. citizen family members that the unlawful presence waivers are intended to address and, if the waiver is merited, avoid."). It further acknowledged that, due to this hardship, "many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa." *Id.*

In 2013, USCIS created a special provisional, or "stateside," waiver process that allowed the noncitizen spouses of U.S. citizens to pursue permanent residency almost entirely from within the United States. By regulation, USCIS allowed these noncitizens to apply for and obtain a provisional unlawful presence waiver *prior* to departing for their consular interviews abroad. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule* ("2013 Final Rule"), 78 Fed. Reg. 535, 536 (Jan. 3, 2013). USCIS enacted the streamlined provisional waiver process for the express purpose of "reduc[ing] the overall visa processing time, the period of separation of the U.S. citizen from his or her immediate relative, and the financial and emotional impact on the U.S. citizen and his or her family due to the immediate relative's absence from the United States." 77 Fed. Reg. at 19907. The process further would "encourage individuals to take affirmative steps to obtain an immigrant visa to become [lawful permanent residents] as reduced waiting times abroad would render it an efficient, more predictable process, rather than one with unpredictable and prolonged periods of separation." *Id.*

However, the 2013 regulations authorized stateside provisional waivers only for noncitizens not subject to any inadmissibility ground other than the unlawful presence bar. Thus, they did not directly benefit individuals with final orders of removal, or their U.S. citizen spouses—*i.e.*, individuals that would be directly affected by the Proposed Rule.

C. The 2016 Provisional Waiver Regulations

In 2016, USCIS expanded the stateside provisional waiver program to cover, among others, those who have final orders of removal. A person who leaves the country with a final order of removal outstanding is inadmissible (and thus barred from reentry) for 10 years after his

[1] A noncitizen who has been unlawfully present in the United States for more than 180 days but less than one year who departs and then seeks to return is ordinarily inadmissible for 3 years. *Id.* § 1182(a)(9)(B)(i)(I).

removal or departure. 8 U.S.C. § 1182(a)(9)(A).[2] The Attorney General, however, may waive this requirement by granting permission to reapply for admission. *Id.* § 1182(a)(9)(A)(iii) (providing that the Attorney General may "consent[]" to the alien's application for readmission).

The 2016 regulation expressly extended the streamlined stateside provisional waiver process to cover individuals who would be subject to inadmissibility on the basis of a prior removal order. *See* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule ("2016 Final Rule"), 81 Fed. Reg. 50244, 50245 (July 29, 2016). USCIS included noncitizens subject to final orders of removal in the 2016 regulation in order to afford them and their U.S. citizen family members the same benefits of certainty and reduced financial and emotional hardship that the 2013 regulation had provided to others.

Specifically, the 2016 regulations note that the stateside provisional waiver process "encourage[s] individuals who are unlawfully present in the United States to seek lawful status after departing the country," "reduce[s] the hardship that U.S. citizen and [lawful permanent resident] family members of individuals seeking the provisional waiver may experience as a result of the immigrant visa process," and "offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver before departing from the United States." *Id.* at 50245-46. Thus, as a result of the 2016 stateside provisional waiver regulations, a noncitizen spouse of a U.S. citizen can remain in the United States while applying for waivers of inadmissibility associated with both his unlawful residency and his prior removal order. The applicant need only travel abroad once provisionally approved for both of these waivers.

D. The Stateside Provisional Waiver Application Process For Noncitizens With Final Orders Of Removal

Under the 2016 regulations, a noncitizen and his U.S. citizen spouse may follow a five-part process to allow the noncitizen to apply to become a lawful permanent resident with minimal time processing overseas.

First, the U.S. citizen spouse files a Form I-130, Petition for Alien Relative. USCIS may require an appearance at an interview to determine whether the U.S. citizen and noncitizen spouses have a bona fide marriage. *Second*, the noncitizen spouse files a Form I-212, Permission to Reapply for Admission into the United States After Deportation or Removal to seek conditional approval prior to their departure from the United States to reapply for admission if they will be inadmissible for having been previously removed or having departed with a final order of removal outstanding. 8 C.F.R. § 212.2(j); 2016 Final Rule, 81 Fed. Reg. at 50262. *Third*, once a Form I-212 is conditionally approved, a noncitizen spouse applies for a provisional unlawful presence waiver using Form I-601A, Application for Provisional Unlawful Presence

[2] The period is five years for noncitizens who were removed or departed under expedited removal orders or after removal proceedings initiated upon arrival in the United States, 8 U.S.C. § 1182(a)(9)(A)(i), and 20 years in the case of a noncitizen convicted of an aggravated felony, *id.* § 1182(a)(9)(A)(ii).

Waiver. *Id.*; 8 C.F.R. § 212.7(e). Prior to filing an I-601A, the noncitizen must also pay the immigrant visa processing fee to the Department of State. 8 C.F.R. § 212.7(e)(5)(ii)(F)(1). *Fourth*, once the noncitizen obtains a provisional unlawful presence waiver, he or she must go abroad to appear for an immigrant visa interview at a U.S. consulate, 8 C.F.R. § 212.7(e)(3)(v), after which the Department of State may issue an immigrant visa if no other inadmissibility grounds apply. *Fifth*, the noncitizen travels to the United States with his or her immigrant visa. Upon admission to the United States, the noncitizen becomes a lawful permanent resident.

In sum, these regulations allow an otherwise eligible individual who is the spouse of a U.S. citizen—and who lives in the United States unlawfully and with a final order of removal outstanding—to demonstrate the bona fide nature of his marriage, prove his eligibility for the necessary waivers of inadmissibility, depart the country briefly to obtain an immigrant visa, and then return to the United States to rejoin his family as a lawful permanent resident. All in all, the provisional waiver application process shortens the time that a noncitizen applicant is separated from his family from years to approximately one month.

II. The *Calderon* Class Action

Lilian Calderon, 32 years old, is a Guatemalan immigrant and mother of two who was brought to the United States when she was three years old. In January 2018, Calderon and her husband visited USCIS near their home in Rhode Island to take the first step towards becoming a lawful permanent resident, as permitted by the 2016 provisional waiver regulations. Immediately after her successful interview with USCIS officials, Calderon was suddenly arrested by Immigration and Customs Enforcement (ICE) and sent to a detention facility in Boston.

On February 5, 2018, the ACLU of Massachusetts, with support from the ACLU of Rhode Island, sought Ms. Calderon's immediate release and a court order blocking immigration officials from deporting her until she had an opportunity to apply for and receive decisions on her waivers of inadmissibility as part of the process made available to her by 8 C.F.R. § 212.7(e). The filing argued that Calderon's detention violated her constitutional rights. The next day, Judge Mark Wolf of the District of Massachusetts temporarily barred ICE officials from deporting Calderon while her lawsuit is pending. On February 13, ICE released Calderon from detention, allowing her to reunite her with her husband and young children.

In April 2018, the ACLU of Massachusetts, together with law firm WilmerHale, and attorney Kathleen Gillespie filed a class action suit on behalf of Calderon and other immigrants and their U.S.-citizen spouses whose lives have been upended by DHS's efforts to detain and remove noncitizens who were pursuing lawful status under the 2016 provisional waiver regulations.

On August 23, 2018, Judge Wolf denied the government's motion to dismiss the Petitioners due process claim. *Calderon*, Dkt. No. 159 at 4 ("In addition, petitioners have stated a plausible claim that they are being deprived of their right to procedural due process. The court finds that ICE may only remove petitioners after considering the fact that they are pursuing those waivers and the policies codified in the provisional waiver regulations."). This Court found that Petitioners plausibly alleged a pattern of conduct in which ICE arrested, detained, and removed

(or attempted to remove) noncitizens seeking lawful status through their U.S. citizen spouses without considering their efforts to gain lawful status under the 2016 provisional waiver regulations. In May 2019, Judge Wolf denied the government's motion to dismiss on the remaining claims and granted class certification, extending the impact of the lawsuit to hundreds or thousands of New England citizens and their noncitizen spouses. May 16, 2019 Hr'g Tr. at 9 ("Petitioners' allegations concerning President Donald Trump's statements and policies allege a plausible claim that racial animus was one reason for the Executive Order."); *see also id.* at 12:16-23 ("[A]lthough the INA grants the executive the authority to remove aliens present unlawfully, the INA and regulations issued pursuant to it impose limiting requirements as well. In particular, as this court has held, DHS's failure to consider an alien's participation in the provisional waiver process before instituting an enforcement action would violate the Constitution and the INA by nullifying the provisional waiver process itself."); *id*. at 42:17-21 ("I understand the argument in the way that I view the petitioners' position and the rulings that I've made. They don't argue that the 2016 regulations didn't result from a process that complied with the APA. They argue that they're not being followed or they weren't being followed.").

III. <u>The Proposed Rule Would Adversely Impact the Calderon Class Members</u>

A. The Proposed Rule Directly Undermines The 2016 Provisional Waiver Regulations

The Proposed Rule directly undermines the 2016 provisional waiver regulations, the prevailing purpose of which is to enable immigrants with final orders of removal—like the Calderon class members—to seek lawful status without prolonged separation from their U.S. citizen spouses and U.S. citizen children. *See Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule* ("2016 Final Rule"), 81 Fed. Reg. 50244, 50245 (July 29, 2016) (2016 provisional waiver regulations was designed to avoid the "extreme", "significant emotional and financial hardship that Congress aimed to avoid when it authorized the waiver"); USCIS Website ("process was developed to shorten the time that U.S. citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas to become lawful permanent residents of the United States."); *Calderon*, Dkt. No. 159 at 31-32 (citing same). ICE must consider an immigrant's pursuit of the provisional waiver process in any removal decision, and a decision to remove cannot be solely based on the immigrant having a final order of removal. *Calderon*, Dkt. No. 159 at 36 ("The binding promises to United States citizens and their alien spouses in the provisional waiver regulations would be meaningless, and their purposes would be undermined, if ICE were not required to consider that an alien with a final order of removal is seeking a provisional waiver before requiring him or her to leave the United States.").

The *Calderon* class includes individuals with final orders of removal who have been released on an order of supervision, and therefore affected by the Proposed Rule. Currently, those class members are generally eligible to apply for an employment authorization document ("EAD"). In fact, Title 8, section 1231(a)(7) expressly permits noncitizens on orders of supervision to obtain work authorization if they "cannot be removed" *or* if their removal is "otherwise impracticable or contrary to the public interest." ICE already improperly impedes *Calderon* class members' access to work authorization by making them apply to USCIS for work

authorization instead of exercising its own authority to issue employment authorization at the time that it releases noncitizens on orders of supervision. *See* 8 C.F.R. § 241.4(d)(2), (j).

Limiting employment authorization to those who are eligible to apply to only those who can show that "their removal from the United States is impracticable" would by itself preclude most of the class from seeking work authorization. Indeed, by USCIS's own admission, the Proposed Rule "will encourage these aliens to leave the country." *See* "DHS Proposes to Limit Work Permits for Aliens with Final Orders of Removal," USCIS Website, *available at* https://www.uscis.gov/news/news-releases/dhs-proposes-to-limit-work-permits-for-aliens-with-final-orders-of-removal.

The Court has held that ICE's wholesale disregard of the provisional waiver process does not accord with the prevailing purpose of the Immigration and Nationality Act or its regulations to keep the family unit together. Just as DHS's failure to consider the provisional waiver process in their detention and deportation decisions is "arbitrary and capricious" and in violation of the APA, the Proposed Rule is similarly not tied to the purpose of the immigration laws and represents the "abandonment of the binding promises" provided by the 2016 Provisional Waiver Regulations. *See Calderon*, May 3, 2019 Hr'g Tr. at 33.

By failing to consider noncitizens' pursuit of the 2016 provisional waiver regulations, this Proposed Rule suffers from many of the same fatal violations that DHS committed against the *Calderon* class. As the Court has made explicit, noncitizens with final orders of removal who are pursuing the provisional waiver process are entitled to be considered for the relief of a provisional waiver while in the United States and failure to take into account the provisional waiver application process may constitute a violation of the APA. *See* Calderon, May 3, 2019 Hearing Tr. at 35.

B. The Proposed Rule Would Cause the Calderon Class Members Extreme Economic Hardship

The *Calderon* class members would suffer extreme economic hardship if they could not work. They would entirely have to rely on their U.S. citizen spouses or work unlawfully to support their families.

The *Calderon* class members who would be affected by this Proposed Rule have all started the provisional waiver process. All class members have filed a form I-130, the first step in seeking lawful status through their U.S. citizen spouse. Some class members have filed a form I-212, the second step in the process. And others are awaiting adjudication on their form I-601A, which grants approval of the provisional unlawful presence waiver. The *Calderon* class members have invested significantly in the provisional waiver process by way of USCIS application fees and associated legal fees, in accordance with DHS's *own* regulations. Currently, the filing fee for Form I-130 is $535.00; the Form I-212 is $930; and the Form I-601A $930. USCIS Website. These costs do not include attorneys' fees.

In addition, having an unexpired EAD is often required by states in order to obtain a driver's license. *See, e.g.* https://www.mass.gov/guides/massachusetts-identification-id-requirements ("Unexpired employment authorization document (EAD) issued by DHS, Form I-766, or Form I-688B.")

Furthermore, by denying work authorization to the *Calderon* class members, DHS is increasing the chance that they could be found inadmissible as a "public charge" at the consulate.[3] *See* 8 U.S.C. § 1182(a)(4). It would be counterproductive and contrary to the purposes of the provisional waiver regulations to deny access to work authorization to the *Calderon* class members who remain in the U.S. while pursuing their provisional waivers.

So long as the *Calderon* class members are undergoing the provisional waiver process, DHS should not impose any new rule that would cause further economic hardship. By making EADs nearly impossible to obtain, and therefore imposing further financial hardship, the Proposed Rule would deter class members from continuing to pursue the provisional waiver process, or would encourage them to work without authorization in order to survive while pursuing lawful status. Having relied on DHS's own regulations, DHS should not implement a rule that undoes all the progress these class members have made in their pursuit of the provisional waiver.

IV. Conclusion

Class counsel opposes the Proposed Rule because it directly undermines the purpose of the 2016 Provisional Waiver regulations. We urge DHS to withdraw the Proposed Rule from consideration, or at a minimum, to amend it to reflect the purposes of the provisional waiver regulations and the interests of U.S. citizens and their spouses who are pursuing the provisional waiver process.

Sincerely,

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[3] While we understand that the Department of State is currently enjoined from applying its new public charge rule at U.S. consulates and embassies abroad, this is not a permanent injunction and could be vacated at any time. *See* https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html.

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