HAKE & SCHMITT
ATTORNEYS AT LAW
P.O. BOX 540 (419 MAIN STREET)
NEW WINDSOR, MD 21776

BRUCE A. HAKE
BRUCE@HAKE.COM
BRIAN C. SCHMITT
BRIAN@HAKE.COM

IMMIGRATION LAW
(410) 635-3337
(410) 635-3133 (FAX)
HTTP://WWW.HAKE.COM/PC

September 29, 2015
By U.S. Priority Mail

Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
Department of Homeland Security
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W.
Washington, D.C. 20529-2140

Re: Major Problems With New USCIS Form I-612 [OMB No. 1615-0030]

Dear Ms. Dawkins:

Many persons admitted to the United States in J-1 or J-2 status under Section 101(a)(15)(J) of the Immigration and Nationality Act (INA) are subject to the two-year foreign residence requirement of INA § 212(e). Persons subject to that requirement have certain disabilities, including the inability to apply for an H or L visa stamp, the inability to apply for change of status, and the inability to apply for permanent residence or an immigrant visa. INA §§ 212(e) and 248.

INA § 212(e) sets forth three reasons why a J-1 or J-2 nonimmigrant can become subject to the foreign residence requirement, and it sets forth four ways in which such a person can obtain a waiver of the requirement. Two of those waiver categories (exceptional hardship and persecution) require filing of a form called the I-612 with the U.S. Citizenship and Immigration Services (USCIS). The other two waiver categories (no objection and interested government agency) do not involve the I-612 nor any other kind of USCIS application or petition form.

Our law firm has concentrated on Form I-612 hardship and persecution waiver applications for more than 20 years. We believe we have filed more I-612s than any other law firm in the world.

A new I-612 form just went into effect. It must be used on or after September 24, 2015. It is a disaster that already is causing injury to us and our clients. We insist that it either be withdrawn or be revised in accordance with the following comments. **If neither of these steps is taken by January 1, 2016, we will file a federal lawsuit seeking declaratory, injunctive, and mandamus relief and other remedies.**

The statutory and regulatory provisions concerning I-612 applications have not changed for decades. We do not believe that USCIS has legal authority for many of the changes on the

new form, and indeed we think some changes on the form are unconstitutional and unlawful, as explained below.

We were not aware of the Federal Register Notice and request for comments on the proposed changes to Form I-612 published at 79 Fed. Reg. 53720 (Sept. 10, 2014). We hereby submit these comments and concerns related to the new Form I-612 and the revised instructions to the form.

1. Acknowledgment of Appointment at USCIS Application Support Center is irrelevant, overbroad, and unnecessary

The new acknowledgment on page 5 of the new Form I-612 states:

Acknowledgment of Appointment at USCIS Application Support Center

I, _____ ,
understand that the purpose of a USCIS ASC appointment is for me to provide my fingerprints, photograph, and/or signature and to re-affirm that all of the information in my application is complete, true, and correct and was provided by me. I understand that I will sign my name to the following declaration which USCIS will display to me at the time I provide my fingerprints, photograph, and/or signature during my ASC appointment:

> ***By signing here, I declare under penalty of perjury that I have reviewed and understand my application, petition, or request as identified by the receipt number displayed on the screen above, and all supporting documents, applications, petitions, or requests filed with my application, petition, or request that I (or my attorney or accredited representative) filed with USCIS, and that all of the information in these materials is complete, true, and correct.***

I also understand that when I sign my name, provide my fingerprints, and am photographed at the USCIS ASC, I will be re-affirming that I willingly submit this application; I have reviewed the contents of this application; all of the information in my application were [sic] provided by me and all supporting documents submitted with my application are complete, true, and correct; and if I was assisted in completing this application, the person assisting me also reviewed this **Acknowledgment of Appointment at USCIS Application Support Center** with me.

Applicants for I-612 hardship and persecution waiver applications have never had to undergo biometric appointments at a USCIS ASC. Therefore, this language should be removed.

The new I-612 instructions, on page 2, state that the USCIS "may" require a biometrics service appointment. We have never seen this happen in more than 20 years of concentrating in this area, although USCIS has general regulatory authority to require an ASC appointment for any applicant, petitioner, beneficiary, or sponsor. 8 C.F.R. § 103.2(b)(9).

The following language is troubling: "I will be re-affirming that I willingly submit this application; I have reviewed the contents of this application; all of the information in my application were[1] provided by me and all supporting documents submitted with my application are complete, true, and correct. . . ."

This language is overbroad and improperly intrudes into the lawyer-client relationship. This interferes with the lawyer's ability to gather documents for an I-612 hardship or persecution waiver application.

For example, this law firm routinely gathers background country conditions evidence for many of our cases, including official U.S. Government reports. We frequently gather I-94 data on the U.S. Customs and Border Patrol (CBP) online system. We produce a comprehensive annotated table of exhibits for most of our cases. We also produce a lawyer letter for every case. That letter summarizes the main features of the case, cites relevant administrative and federal court decisional law, and makes legal arguments. A non-lawyer layperson would not have the capability to generate this kind of table of exhibits or lawyer letter. Thus, the new attestation clause harms a client's ability to obtain zealous representation in I-612 hardship and persecution waiver applications.

The new attestation clause interferes with the I-612 hardship or persecution waiver applicant's right to representation. 8 C.F.R. § 103.2(a)(3). The ASC Acknowledgment Clause must be removed because it interferes with an I-612 applicant's regulatory and constitutional right to representation. The attestation and acknowledgment also create Fifth Amendment due process concerns.

The new ASC Acknowledgment requires the applicant to review the entire contents of the application prior to making the new re-affirmation, as well as when signing the Form I-612. This will require the lawyer to prepare and send the entire contents of the application to the client at least once on the eve of filing. If the applicant returns new materials, the lawyer will have to incorporate those and send the entire application back to the applicant yet again for certification.

This law firm historically has sent the affidavits and forms for signature. The applicant will send those back with any new documents they have obtained. The new form requires radically revised procedures that are an unduly burdensome intrusion into the lawyer's time and also into the client's time.

---

[1] This is a grammatical error. It should read "was" not "were."

Such an intrusion into a lawyer's time may reduce the number of waiver cases the lawyer can handle. Thus, the new ASC Acknowledgment can reduce access to lawyers who handle Form I-612 applications. In turn, that will reduce access to the benefits of a successful Form I-612 waiver application. This will cause unwarranted economic and psychological harm to both the clients and the lawyers.

An ASC appointment for reviewing and reaffirming the already-filed waiver application is also problematic because the applicant and ASC will not have a copy of the application in front of them. Indeed, the USCIS California Service Center frequently removes binders and rearranges materials in the application. It would be inappropriate to ask an applicant, who has already certified that the contents of the application are true, accurate, and complete, to do so again after the government has initiated the adjudication of the application.

What is the purpose of the second certification? What is the legal justification? It seems like punitive harassment founded on excessive distrust. It is not rationally related to any legitimate governmental purpose.

The reaffirmation step is also inappropriate because there is a lapse of time between filing and the ASC appointment. An I-612 hardship or persecution waiver applicant is required to notify DHS of changed circumstances material to his or her pending application. See 22 C.F.R. § 41.63(f). An applicant could have any number of non-material or material changes in circumstances from filing to the date of the ASC appointment notice that would make it so the applicant cannot re-affirm that all of the information in the application is still true. For this reason, the ASC Acknowledgment language and process should be removed from the new Form I-612.

2. Portions of the new Applicant's Certification are overbroad and unnecessary

The new Applicant's Certification on page 6 states, in pertinent part:

> I furthermore authorize release of information contained in this application, in supporting documents, and in my USCIS records to other entities and persons where necessary for the administration and enforcement of U.S. immigration laws.

A blanket authorization for the release of such information is inappropriate and could violate the Privacy Act in particular cases. For example, information about a U.S. citizen qualifying relative's medical condition should not necessarily be released to any other federal government agency under the Privacy Act. As another example, the release of materials from an I-612 persecution waiver application could endanger the lives of the applicant, the applicant's family, and/or others not related to the applicant. This is true even if such a release could be said to be necessary to the administration or enforcement of U.S. immigration laws.

It's also inappropriate to have an applicant execute a blanket release covering a U.S. citizen relative. If executed, the release would not comply with the Privacy Act, because that statute requires the U.S. citizen to personally authorize the release.

Therefore, this blanket release should be stricken from the new Form I-612.

The new Applicant's Certification on page 6 continues, in pertinent part:

> I certify, under penalty of perjury, that under the laws of the United States of America, that the information in my application and any document submitted with my application were provided by me and are complete, true, and correct.

For the reasons in the prior section, the phrase "the information in my application and any document submitted with my application were provided by me and are complete, true, and correct" should be stricken. Lawyers who represent applicants will frequently submit lawyer letters and other materials summarizing the case and cataloging the evidence. Such letters may included citations to legal authority and legal arguments not provided by the applicant.

In other words, this certification is absurd on its face. In 100% of I-612 cases it is <u>impossible</u> for any applicant represented by a lawyer to truthfully sign this certification. No federal court would uphold such a ridiculous demand from the government.

Also, it is absurd to require a certification that all documents submitted with the application are "complete." What is that supposed to mean? Every year the State Department releases its country reports on human rights. Does this language require an applicant to include all of the thousands of pages of the entire set of annual country reports? Does this language require an applicant to submit all 50 pages of an individual country report, when all that is relevant to the application is a single paragraph? This is preposterous.

Also, it is absurd to require a certification that all documents submitted with the application are "true, and correct." First, that is superfluous, because "true" and "correct" mean the same thing. Second, it is conceivable that a news report or other item of supporting evidence might contain a factual error of which the applicant was totally unaware.

A more accurate, useful, and intelligent certification would be something like this:

> I hereby certify that all documents supporting my application were obtained by me or my lawyer and that to the best of my knowledge all are complete and correct, except as otherwise specifically provided.

That is accurate. That would completely fulfill the interests of the Service in the certification. The Service would not lose anything by using a correct kind of certification like this. Indeed, the Service would foster efficiency and advance the U.S. public interest by using a correct version like this.

The new Applicant's Certification creates many other conceivable difficulties. For example, what if the applicant, on the brink of filing, simply refuses to sigh the certification on the ground that it is simply not completely true (as would be the case for 100% of applicants who are represented by a lawyer)? What does the lawyer do then?

3. Portions of the new Preparer's Certification are overbroad and unnecessary

The new Preparer's Certification states, in pertinent part:

> I completed this application based only on the responses the applicant provided me. After completing the application, I reviewed it and all of the applicant's responses with the applicant who agreed with every answer on the application.

As discussed above, a competent immigration lawyer with experience in I-612 hardship and persecution waiver applications will rely on materials outside of responses provided by an applicant. For example, the lawyer will cite decisional law and other legal authority, as well as make legal arguments. The lawyer may supply testimony from a non-applicant, such as a spouse, friend, colleague, neighbor, or expert physician. The lawyer will find good background evidence on the Internet, such as additional information about a client's medical condition. These materials are clearly not responses solely provided by the applicant. As such, the phrase "I completed this application based only on the responses the applicant provided me," should be removed from the Form I-612.

In other words, this certification is absurd on its face. In 100% of I-612 cases it is <u>impossible</u> for any lawyer to truthfully sign this certification. No federal court would uphold such a ridiculous demand from the government.

There are good arguments to be made for the lawyer simply striking out the Preparer's Certification. There are good arguments to be made for the lawyer striking out the Preparer's Certification and substituting a reasonable replacement. But an honest lawyer will be reluctant not to do his best to comply with official requirements, no matter how onerous. And the lawyer is required to zealously advocate for his client, so he will be reluctant to take any step that might prejudice a client through delay or other adverse action by the USCIS.

Properly prepared Form I-612 hardship and persecution waiver applications can run to hundreds of pages. It would be <u>impossible</u> for the lawyer to review with the client every single detail out of hundreds of pages of evidence. Any effort to do that would be incredibly wasteful

and inefficient. That demand interferes with the lawyer-client relationship. That demand reduces access to counsel and ultimately reduces access to the benefits of a successful I-612 waiver application.

4. The Preparer's Certification's "read" requirement is outrageous and absurd

The new Preparer's Certification continues, in pertinent part:

> I have also read the Acknowledgment of Appointment at USCIS Application Support Center to the applicant and that applicant has informed me that he or she understands that ASC Acknowledgment.

For all the reasons set forth above, this component of the ASC Acknowledgment is inappropriate and should be removed. Additionally, the USCIS does not have the authority to require that a lawyer communicate with a client in a particular way. For this additional reason, this part of the Preparer's Certification should be removed.

In many ways this is the most infuriating addition to the new I-612 form. Where does the USCIS think it gets the authority to demand this kind of wasteful, insulting, and infantilizing speech by a lawyer? Most of our clients are physicians and scientists who are completely literate in English. It would be completely sufficient for us to say something like this in a letter transmitting forms and affidavits for signature:

> **Be sure to read the Acknowledgment of Appointment at USCIS Application Support Center section on page 5 of the I-612 form. Contact me if you have any questions.**

That would be the intelligent way to address the Service's apparent concern. It would take a minute of the lawyer's time, a couple of minutes of the client's time, and perhaps a brief phone call about some details.

But instead, the form ridiculously dictates that the client—perhaps an extremely busy cardiologist—has to call the lawyer and be treated like an elementary school student, humiliating and harassing both client and lawyer and wasting much valuable time. It also would harm the U.S. public interest by disrupting a physician's time.

If a lawyer has to spend perhaps half an hour on every case for this ridiculous requirement, it will cost the lawyer thousands of dollars in time and opportunity costs every year, for no good purpose whatsoever. (We expect the average amount of time will be about half an hour, due to the need for explanations and questions.)

There are many other conceivable problems with the "read" requirement. For example, what is the lawyer to do if the client objects to the rigamarole of having the lawyer read him the requirement and insists that he can read it himself? That stance is almost certain to be taken by some of our firm's sophisticated and highly educated clients. What if the client is currently present halfway around the world in India? Must the lawyer or the client wake up at 3 a.m. to go through this ridiculous process?

The USCIS has no power to force a lawyer to make any particular kind of written or oral communications with a client. Further objections to this "read" requirement are set forth below.

5. Fundamental problem with the new certifications

A fundamental problem with the new certifications demanded of both the applicant and the lawyer is that they needlessly and crudely duplicate established law.

8 C.F.R. § 103.2(a)(2) provides (emphasis added):

> (2) Signature. An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. **By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.** Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Therefore, the applicant's certification is needlessly duplicative.

8 C.F.R. § 103.2(a)(3) provides (emphasis added):

> (3) Representation. An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.2 of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. A beneficiary of a petition is not a recognized party in such a proceeding. A benefit request presented in person by someone who is not the applicant or petitioner, or his or her representative as defined in this paragraph, shall be treated as if received through the mail, and the person

> advised that the applicant or petitioner, and his or her representative, will be notified of the decision. **Where a notice of representation is submitted that is not properly signed, the benefit request will be processed as if the notice had not been submitted.**

Thus, a lawyer's signature on the application form is already required.

8 C.F.R. § 292.4 provides (emphasis added):

> § 292.4 Appearances.
>
> (a) Authority to appear and act.
>
> An appearance must be filed on the appropriate form as prescribed by DHS by the attorney or accredited representative appearing in each case. The form must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation in order for the appearance to be recognized by DHS. The appearance will be recognized by the specific immigration component of DHS in which it was filed until the conclusion of the matter for which it was entered. This does not change the requirement that a new form must be filed with an appeal filed with the Administrative Appeals Office of USCIS. Substitution may be permitted upon the written withdrawal of the attorney or accredited representative of record or upon the filing of a new form by a new attorney or accredited representative. **When an appearance is made by a person acting in a representative capacity, his or her personal appearance or signature will constitute a representation that under the provisions of this chapter he or she is authorized and qualified to appear as a representative as provided in 8 CFR 103.2(a)(3) and 292.1.** Further proof of authority to act in a representative capacity may be required.

Thus, a lawyer's signature on a G-28 already constitutes a representation that he is authorized and qualified to appear as a representative. It is needlessly duplicative for the new preparer's certification to require a certification of the applicant's consent to the representation.

8 C.F.R. § 1003.102 provided (emphasis added):

> Grounds.

It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who falls within one or more of the categories enumerated in this section, but these categories do not constitute the exclusive grounds for which disciplinary sanctions may be imposed in the public interest. **Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law. A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:**

* * *

(c) **Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence.** If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures;

* * *

(i) **Knowingly or with reckless disregard falsely certifies a copy of a document as being a true and complete copy of an original;**

(j) **Engages in frivolous behavior** in a proceeding before an Immigration Court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act, provided:

(1) A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may

be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. **The signature of a practitioner on any filing, application, motion, appeal, brief, or other document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose.**

(2) The imposition of disciplinary sanctions for frivolous behavior under this section in no way limits the authority of the Board to dismiss an appeal summarily pursuant to § 1003.1(d).

* * *

(t) **Fails to submit a signed and completed Notice of Entry of Appearance** as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:

(1) Has engaged in practice or preparation as those terms are defined in §§ 1001.1(i) and (k), and

(2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. **Notwithstanding the**

> **foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name . . . .**

Lawyers are also subject to discipline under their local state rules of professional responsibility if they act dishonestly, fail to zealously represent their clients, fail to be candid toward a tribunal, or fail to take appropriate action if they discover that any submitted evidence is materially false. See, e.g., Maryland Rules of Professional Conduct, Preamble (zealous advocacy) and Rules 3.3 (candor toward the tribunal) & 4.1 (truthfulness in statements to others).

A lawyer's signature on an application filed with the USCIS is a weighty thing, subject to all of the requirements above. The preparer's certification on the new I-612 is insulting, overreaching, and entirely unnecessary in light of the above law.

6. The Preparer's Certification's "read" requirement is unconstitutional

In general, it is a violation of the First Amendment of the U.S. Constitution for the government to attempt to compel speech. A person has a First Amendment right both to speak and to decide not to speak.

A foundational decision of the U.S. Supreme Court is West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (holding that schoolchildren may not be compelled to recite the Pledge of Allegiance to the U.S. flag).

The decisional law in this area sometimes seems to protect the right not to speak more strongly in noncommercial rather than commercial contexts.

For example, in a noncommercial context, the Supreme Court has declared:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-97 (1988) (holding unconstitutional a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations).

But in a commercial context, involving lawyer advertising, the Supreme Court has declared:

> [The lawyer's] constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & 652 n.14 (1985) (upholding an Ohio rule that lawyer advertisements that mention contingent-fee rates must disclose whether percentages are computed before or after deduction of court costs and expenses).

The new I-612 form's mandate that lawyers "read" a long, dense, legalistic passage to every J-1 hardship or persecution waiver applicant is more similar to the compulsion of speech in noncommercial contexts such as Barnette and Riley than it is to the compulsion of speech in commercial contexts such as Zauderer. This is so, because the commercial compelled speech cases all involve statements made to the public at large, while the instant situation involves statements made in private between a lawyer and client who have a pre-existing contractual relationship. Therefore, the "read" requirement should be subjected by a federal court to strict scrutiny and rejected as violating the First Amendment.

The government has no compelling interest in forcing a lawyer to take time to read something to a client. The lawyer and the client have a fundamental right to decide for themselves how they choose to communicate. As demonstrated above, a lawyer is already subject to many rules, including the duty to be truthful toward a tribunal and to zealously advocate for his client. Therefore, a lawyer already has abundant duties that require him to warn a client about possible pros and cons of any action material to the representation. But the government has no authority to compel a lawyer to speak in any dictated way.

This issue of unconstitutionally compelled speech is entangled with the "read" requirement's violation of attorney-client privilege and attorney-client confidentiality.

7. The Preparer's Certification's "read" requirement violates the fundamental principles of attorney-client privilege and attorney-client confidentiality

In addition, the "read" requirement violates attorney-client privilege and attorney-client confidentiality, which are foundations of the American legal system. It is fundamentally none of the government's business what a lawyer and a client say to each other in confidence, nor may the government compel how a lawyer and a client communicate with each other.

See Nadia Kayyali, "Legal Community Disturbed About Recent Allegations of Spying on Privileged Communications," https://www.eff.org/deeplinks/2014/02/legal-community-disturbed-about-recent-allegations-spying-privileged (February 22, 2014). Here are excerpts from this article:

> The NSA [National Security Agency] appears to have been involved in the surveillance of privileged attorney-client communications, and the legal community is not happy about it. The New York Times reports that communications between an American law firm and its foreign client may have been among the information one of the NSA's "five eyes" intelligence partners, the Australian Signals Dictorate, shared with the NSA. The American Bar Association [ABA] has responded to these allegations by urging the NSA to clarify its procedures for minimizing exposure of privileged information—and rightly so. Surveillance of attorney-client communications is anathema to the fundamental system of justice established by our Constitution.
>
> * * *
>
> ABA president James R. Silkenat writes in his letter to NSA Director Keith Alexander: "The attorney client privilege is a bedrock legal principle of our free society." The privilege protects communications between attorneys giving their clients or potential clients professional legal advice or assistance and ensures that people can seek candid advice from a qualified attorney without fear their discussions will be used against them. It allows clients to prevent disclosure of privileged information by others, and to refuse to disclose that information themselves. As the Supreme Court held in Upjohn Co. v. United States: "The privilege recognizes that sound legal advice or advocacy . . . depends on the lawyer's being fully informed by the client."
>
> Attorneys are legally bound by ethical rules that require them to protect privileged information, and the erosion of the attorney-client privilege should seriously concern every member of the legal profession. The Supreme Court recognized in Strickland v. Washington that the 6th amendment "right to counsel is the right to the effective assistance of counsel," and that effective assistance

of counsel can be obstructed by "various kinds of state interference with counsel's assistance."[2]

The "read" requirement in the new I-612 form is a patent example of unwarranted state interference with counsel's assistance.

8. Errors with the new Form I-612 instructions

8 C.F.R. § 103.2(a)(1) indicates that form "instructions are incorporated into the regulations requiring its submission." In other words, instructions on USCIS forms have the force of regulation. Unfortunately, the new Form I-612 instructions have many errors of law.

The "Who May File Form I-612?" section begins with "Exchange visitors (J-1)." This is incorrect because it is incomplete. See Form I-612 Instructions at 1. It should actually read "anyone subject to the two-year foreign residence requirement." Many individuals depart the United States after participating in a J-1 program and lawfully re-enter in another nonimmigrant status, such as F-1 or O-1, but they continue to be subject to the J-1 foreign residence requirement. Such persons are certainly eligible to file Form I-612, as this firm has done successfully many times.

Furthermore, individuals not present in the United States in J-1 status may also be eligible to file a Form I-612 hardship and/or persecution waiver application, as this firm has done successfully many times.

The phrase: "spouses (J-2) who are no longer married to the exchange visitors; or sons and daughters of the J-1 and/or J-2, who married or who are 21 years of age or older, may file this application to apply for a waiver of the two-year foreign residence requirement. . . ." is incorrect for two separate reasons. See Form I-612 Instructions at 1.

Reason 1: The plain language of INA § 212(e) does not make J-2 derivatives subject in the context of the principal alien's J-1 admission or acquisition of J-1 status. The legislative history of 8 U.S.C. § 212(e) contains no indication that Congress intended J-2 derivatives to become subject to the two-year foreign residence requirement.

Two administrative decisions (Matter of Gatilao, 11 I. & N. Dec. 893 (BIA 1966) and Matter of Tabcum, 14 I. & N. Dec. 113 (Reg. Comm'r 1972)) show that the INS and the Board of

---

[2] Presumably the 6th Amendment would not apply to the instant situation, under current law at least. But a U.S. immigration applicant or petitioner has rights to representation under the 5th Amendment and under USCIS regulations. Interference with the lawyer-client relationship undercuts the fundamental right to representation, and it may lead to the ineffective assistance of counsel.

Immigration Appeals (BIA) have held that a J-2 derivative is subject to the two-year foreign residence requirement if the J-1 is subject. The plain language of 8 U.S.C. § 212(e), however, takes precedence over these administrative decisions.

The same day that Matter of Tabcum was decided, the State Department amended its regulations to state that if an alien is subject to the two-year foreign residence requirement, so are his spouse and child. 37 Fed. Reg. 7156 (Apr. 11, 1972). The State Department offered no reason for the change and did not engage in formal rule-making under the APA as required by 5 U.S.C. § 553. This regulation is now found at 22 C.F.R. § 41.62(c)(4). The USCIS has issued a similar regulation at 8 C.F.R. § 212.7(c)(4). The USCIS did not engage in formal rule-making under APA 5 U.S.C. § 553.

These regulations run counter to the plain-language interpretation in the statute, set forth above. The USCIS (formerly INS) and the State Department have issued various public statements that if a J-1 is subject, the J-2 is also subject. This public interpretation is improper under the plain language of 8 U.S.C. § 212(e). Under the plain language of 8 U.S.C. § 212(e), J-2 derivatives are not subject even if the J-1 is subject. **Given the failure of both agencies to engage in formal rule-making under APA 5 U.S.C. § 553, both regulations are subject to invalidation in a declaratory judgment action.** For this reason, the language concerning J-2 derivatives should be completely removed from the form instructions.

Reason 2: Notwithstanding the fact that J-2s are not statutorily subject to the foreign residence requirement, the proper procedure for the J-2 derivatives listed above to obtain a waiver is to ask the State Department Waiver Review Division (WRD) to act as an interested government agency (IGA) and recommend the waiver. See http://travel.state.gov/content/visas/en/study-exchange/student/residency-waiver/ds-3035-faqs.html (which describes eligibility and the process). This is called a "J-2 request." This kind of IGA waiver application is filed directly with the WRD. If the WRD issues a favorable recommendation, it will send it to the USCIS Vermont Service Center (VSC). The VSC will issue a receipt notice followed by an approval notice. There is no need to show hardship or persecution in these interested-government agency requests. Form I-612 is never involved in these waiver applications.[3] For this reason, the language concerning J-2 derivatives should be removed from the form instructions.

---

[3] There is some confusion in this area because when the USCIS issues receipt and decision notices in no objection and IGA waiver cases, it prints "I-612" on the I-797 notices. Because no objection and IGA cases are more common than hardship or persecution cases, some lawyers and government officials routinely refer to no objection and IGA decision notices as "I-612s." That is an error, because the I-612 form is not used in those categories of cases, and indeed no USCIS application or petition form is used in those categories of cases. Reportedly the USCIS prints "I-612" on notices in those cases because the I-797-generating software requires that every notice be tied to some official USCIS form.

The instructions continue: "If you do not include your J-2 spouse or J-2 children, your J-2 spouse or J-2 children will not receive waivers with you and each person will have to file a separate Form I-612." This statement is incorrect given the discussion about why J-2 derivatives are not statutorily subject to the two-year foreign residence requirement. Additionally, this statement is internally inconsistent with the form instructions which also state: "**NOTE:** J-2 spouses still married to the J-1 exchange visitor and unmarried children under 21 years of age may not file this application on their own behalf." In essence, the instructions make a misstatement of the law and then the same instructions contradict the original legally erroneous statement with a second legally erroneous statement.

Page 2 of the form instructions reads: "If an appointment is necessary, the notice will provide you the location of your local or designated USCIS Application Support Center (ASC) and the date and time of your appointment or, if you are currently overseas, instruct you to contact a U.S. Embassy, U.S. Consulate, or USCIS office outside the United States to set up an appointment. If you fail to attend your biometric services appointment, USCIS may deny your application." The language concerning individuals abroad is impractical. If the applicant is not represented by counsel, it is unclear how the USCIS could direct an applicant abroad to appear for a biometrics appointment. Of course, denying an application on that basis alone would be unfair and improper.

9. Privacy Act errors

There is another error on page 7 of the new I-612 instructions. Under the USCIS Privacy Act Statement section there is a paragraph that states:

> PURPOSE: The primary purpose for providing the requested information on this application is to apply for a waiver of the two year foreign residence requirement under INA section 212(e)(iii).

INA § 212(e)(iii) makes those coming for graduate medical education subject to the two-year foreign residence requirement. It has nothing to do with the statutory basis for a hardship or persecution waiver.

There is another error in the Privacy Act Statement section. The USCIS claims the public reporting burden is estimated to be 20 minutes. It is obviously ridiculous to claim that the reporting burden for this new 8-page form (which was only 2 pages for decades) is only 20 minutes, especially in light of the fact that it requires the client to review every item of evidence and to waste time listening to the lawyer read the ASC section.

10. Another problem with the new I-612: treatment of qualifying relatives

An applicant for an I-612 exceptional hardship waiver must prove exceptional hardship to a U.S. citizen or permanent resident spouse and/or child. If there are several such qualifying

relatives, then hardship to all of them counts. For example, if a person subject to the J-1 foreign residence requirement (who might not currently be in J-1 status) has a permanent resident spouse and several U.S. citizen children, the spouse and all of the children are qualifying relatives, the hardships to each of which must be considered.

The new I-612 is murky about the way it addresses this basic law.

Page 2 states:

> List all J-2 dependents that are included in this application. If you need extra space to complete this section, use the space provided in **Part 8. Additional Information.**

This is immediately followed by boxes requesting basic information, including immigration information, for a spouse (if any) and for up to three children (if any). This is confusing, because many people (such as one of our key staff members) will assume that those boxes are only for J-2 dependents, when that is obviously not the case.

Moreover, the statement about J-2 dependents is not accurate; it should say "J-2 (or former J-2) dependents."

This is confusing enough, but it is especially confusing when read in light of Part 4 of the new form (all of page 4). This section includes boxes for information about only one qualifying relative. This is incorrect and confusing, because as noted above, there may well be more than one qualifying relative. In addition, this section is needlessly duplicative of the boxes for family members on pages 2 and 3. These two sections should be consolidated and revised.

11. Errors on the USCIS I-612 summary page

If one goes to the USCIS website at www.uscis.gov, the main link on the home page goes to a page with links to official USCIS forms. The link for the I-612 goes to a summary page that includes information on place of filing and certain other details, and it contains links to the form itself and to the official instructions. That summary page contains several legal errors.

First, it provides as follows:

> Purpose of Form. For certain exchange visitors (J-1 and J-2 visas) and their families to apply for a waiver . . . .

That is incorrect. As explained above, one does not need to be in J-1 status to apply for a J-1 hardship or persecution waiver, and J-2 derivatives cannot apply directly for a waiver by using Form I-612.

Second, it provides as follows:

> If you are filing Form I-612 for one of the following reasons:
>
> 1. A request by an interested U.S. Government agency (IGA); or
>
> 2. A written statement from your country of nationality or last foreign residence that it has no objection (no objection); or
>
> 3. A request from a state's department of public health, or its equivalent, to the Department of State (DOS) to work in a medically underserved area (Conrad Waiver Program)
>
> Information on how to apply can be found on the Department of State website.

That is incorrect. As explained above, IGA and no objection waiver applications are not filed on Form I-612 and no official USCIS application or petition form is ever used in such cases. Also, the Conrad waiver program is only one of many such IGA programs for foreign medical graduates that require three years of service.

12. Additional miscellaneous errors on new I-612 instructions

There are three additional miscellaneous errors on page 1 of the new I-612 instructions:

1. The instructions say "If you are an exchange visitor, you are subject to the foreign residence requirement if . . . ." It should say: "If you are (or were) an exchange visitor . . . ."

2. The instructions state that if you're uncertain about whether you're subject to the foreign residence requirement, you should contact your responsible program officer or the nearest U.S. embassy or consulate. That is bad advice. J-1 responsible officers and U.S. consular officers are not the persons with the expertise and authority to determine whether someone is subject to the foreign residence requirement. Annotations about the foreign residence requirement made by those persons on DS-2019 forms or J-1 visa stamps are often wrong and are not legally binding. Instead, if one is uncertain about whether one is subject, the appropriate course of action is to submit an advisory opinion request to the State Department's WRD, or to make an argument directly to USCIS in a benefit application or petition. The USCIS and the WRD have

each separately claimed that it is the agency responsible for determining whether a person is subject.

3. At the bottom of the page, the instructions state: "If you do not include your J-2 spouse or J-2 children, your J-2 spouse or J-2 children will not receive waivers with you and each person will have to file a separate Form I-612." This is incorrect for two reasons. First, as noted above, it should say "J-2 (or former J-2) dependents." A person does not need to be in J-2 status to obtain a waiver derivatively through an I-612 application. Second, as noted above, J-2s are not permitted to file Form I-612 in any circumstance.

13. Conclusion

The new Form I-612 and instructions, if left to stand, will harm many innocent applicants. It will also hurt this law firm and others. Given the large number of errors and problems created by the new Form I-612 and instructions, the USCIS must immediately revert to the old form and instructions, or modify the new form to respond to the comments in this letter. The prior form and instructions worked well for years. As noted above, if the USCIS has not made such changes by January 1, 2016, we will bring an action in federal court for declaratory and mandamus relief and for other appropriate remedies.

If you wish to discuss this letter with us, please contact Brian Schmitt at 410-635-3337 or brian@hake.com.

Respectfully submitted,

Bruce A. Hake

Brian C. Schmitt

cc:

The Honorable Jeh Johnson
Secretary of Homeland Security
Washington, D.C. 20528

The Honorable Leon Rodriguez
Director, USCIS
20 Massachusetts Ave., N.W.
Washington, D.C. 20529

January Contreras
Office of the Citizenship and Immigration Services Ombudsman
Department of Homeland Security
Mail Stop 0180
Washington, D.C. 20528

Kathy A. Baran
Director, USCIS California Service Center
24000 Avila Rd.
Laguna Niguel, CA 92677

U.S. Citizenship and Immigration Services
Regulatory Coordination Division
Office of Policy and Strategy
20 Massachusetts Ave., N.W.
Washington, D.C. 20549-2140