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IMMIGRATION LAW

Expert Analysis

Provisional Waiver Offers New Options for Mixed-Status Families

Immigration is at the forefront of this year's presidential election, and the candidates are expected to debate how the country should handle the large number of undocumented immigrants. Since 1996, while the number of undocumented immigrants has grown considerably, the opportunities to regularize one's status have narrowed, even for those who have a U.S. citizen spouse. In fact, in our daily practice of representing U.S. employers who sponsor foreign workers, we often find that there is a misconception that an undocumented person who is married to a U.S. citizen can "fix" his/her immigration status in a relatively straightforward manner.

While this may be true in some circumstances, in most cases the reality is that immigration has become more and more difficult over the past 20 years as Congress has passed laws that have made the "path to citizenship" more difficult and complicated than ever before. This article will explain some key changes that occurred in 1996 and created "mixed status" families (where one spouse is a U.S. citizen or permanent resident, i.e., green card holder, and the other is undocumented), along with recent regulations that provide some relief.

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Background

Prior to 1996, it was possible for a U.S. citizen who married an undocumented immigrant to file paperwork on behalf of his or her undocumented spouse, who could, in turn, "fix" or "adjust" his/her status fairly easily. At the time, the ability to adjust status, which means obtaining lawful permanent residence (green card) without the need to depart the United States, was available to a foreign national married to a U.S. citizen even if that foreign national was not in lawful immigration status. INA §245(c)(2), 8 U.S.C.A. §1155(c)(2). Generally, finalizing one's green card application from within the United States is preferable to the alternative of applying for an immigrant visa at a U.S. Consulate or Embassy overseas, which requires exiting the United States and is a much more difficult, time-consuming and complex path to lawful permanent residence.

> Despite the introduction of the provisional waiver in 2013 and the recent August 2016 expansion, mixed-status families still face a tough road.

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 enacted major changes to immigration laws that negatively impacted the ability of undocumented spouses to finalize their green card applications stateside. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). First, the 1996 law created two separate classes of undocumented immigrants—those who entered the United States via a legitimate port of entry (e.g., an airport or recognized U.S. land border) and were properly inspected by Customs and Border Protection (CBP), and those who "entered without inspection (EWI)" (e.g., crossed into the United States via a river, desert, etc.) and thus were

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not considered to have been lawfully admitted into the United States.

IIRAIRA implemented this distinction by introducing a new concept of "admission," replacing the former concept of "entry," for purposes of determining whether a foreign national is deportable. INA §101(a)(13)(A), 8 U.S.C.A. §1101(a)(13)(A), as added by IIRAIRA §301. As a result, only those undocumented spouses who were properly inspected and admitted or paroled upon entering the United States were eligible to apply for their green cards from within the United States, without the need to travel abroad, as eligibility for this benefit is generally conditioned upon a proper admission. INA §245(a), 8 U.S.C.A. §1155(a). Spouses who entered the United States without inspection, whom we'll call "EWI spouses," now had to face a difficult and lengthy visa application process at a Consulate or Embassy overseas.

IIRAIRA also introduced two significant new grounds of inadmissibility in the form of "three-year" and "10-year" bars for persons who were "unlawfully present" (typically referred to as "undocumented") in the United States. Specifically, the new bars provided that an individual who was unlawfully present for more than 180 days was barred, once he or she voluntarily left the United States, from returning to the United States for three years; unlawful presence for 365 days or more subjects the person to a bar of 10 years.[1] Thus, even if an EWI spouse of a U.S. citizen was prepared to depart the United States and apply for an immigrant visa (green card) at a U.S. Consulate or Embassy abroad, she/he now faced an additional hurdle in the form of a three- or, more likely, a 10-year bar on returning to the United States.

Another negative change was the sunset of Section 245(i) of the Immigration and Nationality Act,[2] which was a standalone measure passed by Congress before IIRAIRA[3]; it was originally set to expire on Oct. 1, 1997, but was extended to Jan. 14, 1998.[4] Section 245(i) allowed undocumented immigrants who were otherwise eligible for permanent residence to file their green card applications in the United States upon the payment of a $650 fine (later raised to $1,000) notwithstanding minor previous immigration violations (such as falling out of lawful nonimmigrant status, or working without authorization). When 245(i) expired on Jan. 14, 1998, EWI spouses not only became ineligible to file their green card applications stateside, but also became subject to the three- and 10-year bars if they departed the United States. Although separate legislation later reinstated 245(i) for a brief period, it has not been available since April 30, 2001.[5]

The combination of the new concept of admission and the three- and 10-year bars, coupled with the sunset of 245(i), forced many mixed-status families deeper into the shadows, as departing the United States to apply for an immigrant visa abroad meant a lengthy and possibly permanent separation.

In our daily practice, we are often contacted by clients who learn of a family friend or colleague who is engaged to marry or has married an undocumented immigrant, who perhaps arrived in the United States at a very young age and for all intents and purposes is American. When we are asked to assist, we often find that people are shocked to learn that the time, process and cost of assisting the newlywed couple depends largely upon the manner in which the new spouse initially entered the United States.

Provisional Waiver in 2013

So what relief is there for EWI spouses who trigger the three- or 10-year bar when applying for an immigrant visa overseas? Until 2013, the only way around the bar was to apply for a waiver once the EWI spouse had departed the United States and was living overseas. This meant a significant separation during the lengthy adjudication of the waiver and the possibility of a permanent separation if the waiver was denied.

The waiver succeeds only if the immigrant spouse can prove that he and his U.S. citizen spouse will suffer "extreme hardship" if forced to live apart, with extreme hardship loosely defined as hardship that is above and beyond the typical hardship that an average husband and wife face if forced to live apart or if the U.S. citizen spouse must relocate abroad.[6] INA §212(a)(9)(B)(v), 8 U.S.C.A. §1182(a)(9)(B)(5). Assuming the waiver is approved, the EWI spouse remains overseas to complete his or her immigrant visa processing at a U.S. Embassy or Consulate.

In response to the harsh and lengthy family separations that occurred when EWI spouses departed

the United States to apply for a waiver abroad, a new, provisional waiver was introduced in 2013. 78 Fed. Reg. 536 (Jan. 3, 2013). The provisional waiver process allowed EWI spouses (and other qualifying immediate relatives of U.S. citizens) to apply for the waiver in the United States, thus enhancing family unity by affording EWI spouses the opportunity to have their waivers pre-adjudicated. Assuming the waiver is approved, the EWI spouse departs the United States with the approved waiver in hand before completing the process of obtaining an immigrant visa at a U.S. Consulate or Embassy.

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Unfortunately, the provisional waiver program has been underutilized, as preparing the waiver application and demonstrating "extreme hardship" is typically a significant undertaking. Often, preparation involves many hours of labor, research, and engaging outside experts, and applicants too often do not have the means to retain counsel. Also, adjudication of provisional waivers has been inconsistent, as USCIS began denying applications (with denial rates as high as 21 percent) where it had a "reason to believe" the applicant may be subject to additional grounds of inadmissibility. In our view, USCIS did not receive sufficient training on the various grounds of inadmissibility and thus applied the "reason to believe" standard incorrectly, resulting in denials for applications that should have been approved.

Expansion of Waiver

On Aug. 29, 2016, the provisional waiver rule was expanded with two key changes.[7] First, USCIS removed the "reason to believe" standard, so applications can no longer be denied based on this assessment. 81 Fed. Reg. 50244, 50253, amending 8 C.F.R. 212.7(e)(4). Second, eligibility for the provisional waiver has been expanded to include the parents of U.S. citizen or Lawful Permanent Resident adult (21 and older) children if the application warrants a favorable exercise of discretion and meets all other regulatory requirements.

The new rule also makes eligible the beneficiaries of Employment-Based, Diversity Lottery and Special Immigrant Petitions. This is a major expansion; According to the final rule, the number of eligible applicants may be as high as 100,000 individuals.

The Road Ahead

Despite the introduction of the provisional waiver in 2013 and the recent August 2016 expansion, mixed-status families still face a tough road. As long as the EWI spouse is ineligible to apply for his green card in the United States, and 245(i) remains unavailable, mixed-status families that wish to legalize the status of the EWI spouse must go through the arduous process of applying for a waiver, either in or outside the United States.

On the positive side, the 2016 incarnation of the rule has eliminated the "reason to believe" standard, which we believe will result in an increase of applications and of approval rates going forward. However, we are also concerned that this liberalization will increase the risk for some applicants if they overlook other admissibility issues, such as prior misrepresentations or criminal issues, that could prevent their return to the United States.

1. INA §212(a)(9)(B), 8 U.S.C.A. §11829(a)(9)(B).
2. INA §245(i), 8 U.S.C.A. §1255(i).
3. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, §506(b), 108 Stat 1724, (Aug. 26, 1994), effective Oct. 1, 1994.
4. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, §111(a), 111 Stat. 2440, 2458 (1997).
5. LIFE Act Amendments of 2000, Pub. L. No. 106–554, §1502(a)(1)(B), 114 Stat. 2763, 2763A-324 (2000).
6. On Oct. 7, 2015, U.S. Citizenship and Immigration Services (USCIS) posted proposed guidance on what constitutes extreme hardship for purposes of seeking a waiver of inadmissibility, and sought public comment through Nov. 23, 2015. See https://www.uscis.gov/sites/default/files/USCIS/Outreach/Policy%20Review/DRAFT_Extreme_Hardship_Policy_Manual_Guidance_for_public_comment.pdf.
7. 81 Fed. Reg. 50244 (Jul. 29, 2016), effective on Aug. 29, 2016. An earlier proposed rule was published at 80 Fed. Reg. 433338 (July 22, 2015).