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Commentary

USCIS takes step toward fairness for foreign nationals

On Jan. 9, U.S. Citizenship and Immigration Services, the immigration benefits branch of the U.S. Department of Homeland Security, announced in The Federal Register a notice of intent to change the visa application procedures for certain foreign nationals who cannot legalize their immigration status from inside the United States. This proposed change represents a significant step toward fairness and family unity.

By JILL A. APA
Special to
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As background, under certain circumstances, spouses and children of U.S. citizens and lawful permanent residents ("green card" holders) cannot obtain lawful status from inside the United States. In many cases, these individuals must leave the U.S. in order to process their immigration paperwork from a U.S. consulate located in their home country.

A common fact pattern involves foreign nationals who enter the United States without inspection. Under current U.S. immigration law, those individuals are considered to be "unlawfully present." The punishment for unlawful presence is particularly harsh, in that if an individual in unlawful presence remains in the United States for a period of at least six months, a subsequent departure will automatically trigger either a three- or 10-year bar to his return, depending on how long the period of unlawful presence spans.

Things become more complicated when, during a person's unlawful stay in the United States, he meets, falls in love with and marries a U.S. citizen. Because of the illegal manner of his last entry, the foreign national is not permitted to obtain an immigrant visa from inside the United States. Instead, he has to depart and process the paperwork from a U.S. consulate in his home country. The biggest problem is that when he leaves, the punishment for the prior unlawful presence will take effect and he will be banned from coming back to the U.S. for at least three years.

The only way to overcome the three- and 10-year unlawful presence bars is to file a special waiver application. This waiver requires the U.S. citizen spouse to prove that she will experience extreme and unusual hardship in the absence of her foreign national partner. Extreme and unusual hardship is a difficult standard to meet. Worse yet, the adjudications process for these waivers can take an unusually long period of time.

Under current policy, foreign nationals must apply for these waivers of unlawful presence from outside the United States. The applications may be filed only after the foreign national presents himself to a consular officer, and that officer has determined that the foreign national is inadmissible to the U.S. for a prior period of unlawful presence.

Ironically, once the consular officer makes that determination, he cannot then decide the waiver application. Instead, the application is shipped off to one of several USCIS offices for adjudication, which results in a long and frustrating game of paperwork ping-pong.

If the waiver is granted, the consular officers at the home post are notified and they are then able to issue the proper visa. Unfortunately, in most cases it takes several months, if not more than a year, to adjudicate these waiver applications. During that time, families are separated and forced to experience the severe emotional and financial struggles that inevitably follow, especially if children of the marriage are involved.

The recent announcement by USCIS is an attempt to change the waiver application process by significantly decreasing the amount of time that families in this situation must remain apart. It is critical to note that the extreme and unusual hardship standard for the waivers remains the same. Similarly, the law regarding the three- and 10-year bars is unchanged.

However, under the proposed streamlined application process, foreign nationals who find themselves in this difficult situation will be able to apply for a hardship waiver before leaving the United States. If approved, the foreign national will receive a provisional waiver that he may then present to the officers at the

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U.S. consulate in his home country. Once the consular officers determine that the individual is not subject to any additional grounds of inadmissibility and that prior unlawful presence is the only issue in the case, the visa may be issued right away.

This process eliminates the need to transfer the waiver application from the consulate to USCIS and wait months on end for a final decision. As stated in a recent USCIS press release, this change provides "a more predictable and transparent process and improved processing times, minimizing the separation of U.S. citizens from their families."

While the change will not be implemented until USCIS issues a final rule, this proposal generally has been viewed as positive by immigration lawyers and advocacy groups. Nonetheless, certain questions remain.

For instance, the change in policy becomes a benefit only if the provisional waiver is granted. The implications of a denied waiver application remain to be seen.

Filing a waiver application means that the foreign national must disclose to USCIS his address and identity as a person living in the United States in unlawful presence. If the waiver application is denied, that leaves the foreign national open to a risk of being threatened with deportation/removal.

What we don't know yet is how high of a risk this will present. In other words, USCIS has not mentioned whether the agency will automatically commence deportation/removal proceedings upon the issuance of a denial or whether officers will be instructed to utilize some form of prosecutorial discretion in these matters.

These questions demonstrate that, as with all monumental changes in immigration policy and procedure, the best approach is to provide cautious advice to clients and adopt a wait-and-see attitude until the new process becomes the norm.

Jill Apa is special counsel at Damon Morey LLP, in the firm's Labor & Employment Department, where she practices exclusively in the area of U.S. Immigration Law. She can be reached at japa@damonmorey.com.

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