United States Citizenship and Immigration Proposes Regulatory Change to Permit Processing of Unlawful Presence Waivers

Date: January 25, 2012

Original Newsletter(s) this article was published in: Blaneys on Immigration: January 2012

On January 6, 2012, the Department of Homeland Security ("DHS") announced that it was proposing a regulatory change that would allow spouses and children of U.S. citizens, who are in the United States but need an immigrant waiver of the unlawful presence bar, to apply for the waiver within the United States. On January 9, 2012, DHS published a Notice of Intent relating to these proposed changes, in the Federal Register.

Under the *Immigration and Nationality Act* [1] ("INA"), certain grounds of inadmissibility can bar aliens from being admitted to the United States or from obtaining an immigrant visa. However, the Secretary of DHS, through United States Citizenship and Immigration Services ("USCIS"), may waive some of those grounds.

Currently, aliens who are immediate relatives of U.S. citizens, applying for immigrant visas at consular posts, must apply for immigrant waivers while outside the United States, after a finding of inadmissibility is made by a consular officer in connection with their immigrant visa applications. As a result, U.S. citizen petitioners are often separated from their immediate relatives for extended periods.

The proposed regulatory change would allow spouses and dependent children of U.S. citizens to apply for a provisional immigrant waiver of the unlawful presence bars while they are still in the United States. If the provisional waiver is granted, the foreign national will then leave the United States and apply for an immigrant visa at a consular post abroad. If the alien is otherwise eligible for the immigrant visa, the consular officer may then approve the issuance of the visa so that the alien may enter the United States as a permanent resident.

There are two unlawful presence bars described under INA §212(a)(9)(B)(i). According to INA §212(a)(9)(B)(i)(I), an alien who was unlawfully present in the United States for *more than 180 days but less than one year*, and who then departs voluntarily from the United States before the commencement of removal proceedings, will be inadmissible *for three years* from the date of departure. According to INA §212(a)(9)(B)(i)(II), an alien who was unlawfully present *for one year or more* and then departs before, during, or after removal proceedings, will be inadmissible *for ten years* from the date of the departure.

The provisional waiver would only apply to the three- and ten-year unlawful bars mentioned above. Aliens who require immigrant waivers for one or more additional grounds of inadmissibility, such as fraud or willful misrepresentation or certain criminal offenses in conjunction with their immigrant visa applications, must continue to request those waivers while outside of the United States in accordance with existing procedures.

According to INA §212(a)(9)(B)(v), an immigrant waiver of the unlawful presence bars is currently available in the case of a spouse, son or daughter of a United States citizen, or of an alien lawfully admitted for permanent residence. However, the alien must establish that the refusal to grant the waiver would result in extreme hardship to the alien's U.S. citizen or lawfully resident spouse or parent. The proposed regulatory change would not modify the standard for assessing eligibility for unlawful presence waivers; it would only change the timing of when such a waiver could be obtained.

DHS also intends to limit who may participate in the provisional waiver program to immediate relatives who can demonstrate extreme hardship to a *U.S. citizen spouse or parent*. Immediate relatives who can demonstrate extreme hardship to a *U.S. permanent resident spouse or parent* may still qualify for a normal immigrant waiver but are not eligible to seek a provisional waiver under this program.

This provisional waiver process would not alter the requirement that an alien depart from the United States to apply for an immigrant visa.An alien who receives a provisional waiver of the unlawful presence bar would not gain the benefit of such waiver unless he or she departs from the United States. This is intended to prevent such aliens from seeking permanent residence from within the United States by means of adjustment of status.

While these are only proposed changes, they represent a step in the right direction for immediate relatives of United States citizens who have incurred an unlawful presence bar due a prior overstay.

---

[1] Pub. L. No. 82-414, Ch. 477, 66 Stat. 163.