Stateside Provisional Waivers Becomes Reality

Effective March 4, 2013, certain waiver applications, previously only available by application made outside the US have become available on a provisional basis by application made here in the US. The new law will benefit certain family members of US citizens (particularly spouses and unmarried children under age 21) who are ineligible to receive green cards within the United States because they face a three (3) or ten (10) year bar on their re-entry due to the fact that the previously spent 6 months or more in the US without authorization, and did not make a legal entry when they last entered the US.

Such family members are only able to receive green cards outside the US after the US citizen obtains an approved immigrant petition and a special waiver has been approved. To obtain a waiver an applicant must demonstrate that the US citizen spouse or child will suffer an extreme hardship if the family member is not allowed to return to the US during the period that they are barred. Under prior law, the waiver could only be applied for after the family member had departed the US, and the process could take up to a year to be processed, during which time the applicant was required to wait outside the US. If the waiver was denied, the family member was prohibited from re-entering the US legally for anywhere from three to ten years. As a result of the dangers of being stranded and separated from their families few people took the risk of returning home and applying for the waiver. As a result a whole class of individuals related to US citizens remained in limbo unable to legalize their status without significant risk.

The law as it now exists permits the US citizen to submit the waiver application while the foreign national relative is still in the United States, and the relative will be allowed to wait in the US until a decision on the waiver is reached. If the waiver is approved, the relative is still required to leave the US to obtain their green card abroad, but with the benefit of knowing that the waiver application has already been provisionally approved. To take advantage of the new law, called the provisional waiver process, the US citizen must first have filed and obtained approval of an immediate relative petition from USCIS and started the immigrant visa process through the US Consulate in their home country.

Those who were already near the end of their consular processing as of January 3, 2013 are ineligible for the provisional waiver and must file the waiver under the prior law, i.e., after they have departed the US. Another requirement of eligibility for the provisional waiver is that the foreign national must be present in the US at the time the waiver application is filed, and must have fingerprints taken through USCIS. Those who are in deportation proceedings must have the proceedings closed before they are eligible to apply. It is important to note that those foreign nationals who are ineligible to receive a green card for a reason other than unlawful presence in the US (such as a criminal conviction or misrepresentation) are not eligible for the provisional waiver and must follow the regular waiver process as it existed under the old law.

Having an approved provisional waiver does not give the foreign national any lawful status in the US and does not mean that a green card can be obtained within the US. The new law also does not change any of the existing standards for granting a waiver, and extreme hardship must still be shown in order to get a waiver approved. Even after approval of a provisional waiver within the US, it is still possible that a foreign national may not receive a green card if at the time of the consular interview other factors of inadmissibility to the US are discovered.

The waiver process is a complex and nuanced area of immigration law. We suggest that you consult with an experienced immigration attorney, such as counselors at Fletcher Tilton, PC, prior to commencing the immigrant process for your family member.

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