USCIS to Allow Stateside Filing of Waivers

Recently, the Obama administration announced a proposed change to existing rules that will improve the lives of many American families who are in limbo due to the 3 and 10 year bar which US immigration law imposes on those who depart the country after being "unlawfully present" (see article in our last newsletter). Under the current law, a foreign national spouse of a US citizen cannot apply for a green card from within the US if he or she did not make a legal entry into the United States. To get a green card, the foreign national must leave the US and if they have been unlawfully present in the US for more than 180 days, will trigger a 3 year bar on re-entry at the time of departure. Unlawful presence of 365 days or more triggers a 10 year bar on re-entry. While this bar can be waived, in order to do this, the foreign national must prove that his or her qualifying relative will suffer extreme hardship due to his or her absence. These waivers take quite some time to be processed and are very difficult to obtain. Historically they could not be applied for prior to departure which would result in the foreign national having to remain in their home country for an extended period of time. Worse yet, if the waiver is denied, the foreign national must wait out the 3 or 10 year inadmissibility period overseas, separated from his or her US spouse and loved ones. Consequently, few people, otherwise eligible for green card processing based on marriage to a US citizen have taken the risk of returning to their home country and have remained essentially in limbo.

Under the new rule, the U.S. Citizenship and Immigration Services (USCIS) will begin to process waiver applications for the 3 and 10 year bar here in the United States prior to the foreign national's departure. If the waiver is approved, the foreign national will still have to leave the US to apply for the green card in their home country, but this process will only take a few months and will result in a quicker reunification of the foreign national with his or her American family. If the waiver is not approved, the foreign national will most likely not departure the US and will remain with their family here, not able to legalize their status. With the recent announced policy of prosecutorial discretion, it is less likely that such individuals will be placed in removal proceedings as Department of Homeland Security (DHS) is focusing its removal and enforcement efforts on those foreign nationals who are convicted criminals, represent threats to public safety, or are suspected of fraud. If a foreign national is present in the US without immigration status but has not otherwise violated the law, DHS may choose not to initiate removal proceedings against him or her. Although officially USCIS states that the new process will not change existing standards it uses to adjudicate "extreme hardship" waivers, there is a possibility that the standard may, in fact, become less strict and result in a higher number of waiver approvals.

It is important to note that the "stateside" waiver process will only be available to undocumented spouses and unmarried children under age 21 of US citizens, but will not extend to spouses or children of green card holders, children 21 and older, married children of any age, or siblings of US citizens. These categories of unlawfully present foreign nationals will still have to apply for the waiver abroad unless they qualify through a prior amnesty program.

When the new rule comes into effect in a few months, it will allow many undocumented foreign nationals to come out of the shadows and legalize their status in the US, to work lawfully and pay taxes, and to avoid lengthy periods of separation from their US citizen spouses and children. If you or someone you know is married to an undocumented foreign national who would like to legalize their status in the US, now might be a good time for them to come see us for a consultation to evaluate how this procedural change might benefit them.

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