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WHAT THE PROPOSED PROVISIONAL WAIVER RULE MEANS FOR THOSE FACING 3- OR 10-YEAR BARS

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In the raging immigration debate concerning the millions of undocumented immigrants in the US, one important issue has received scant attention. We have yet to meet a person who has roots in the US who desires to choose to remain undocumented. Most are forced to remain undocumented even though they have a pathway to a green card due to a perverse Catch 22 effect in our immigration law as a result of the 3 and 10 year bars imposed under INA § 212(a)(9)(B).

Those who have remained unlawfully present in the US for 1 year or more face a 10 year bar to reentry if they depart the US. Similarly, those who have remained unlawfully present for more than 180 days face a 3 year bar to reentry if they depart the US. It should be noted that the term "unlawfully present" is a complex legal term and a discussion of this term is beyond the scope of this blog. These individuals, if they are the beneficiaries of an approved immigrant visa petition filed by a US citizen spouse or parent or a US citizen child (who is over 21), may often be unable to adjust their status in the US. Under INA § 245(a) one has to be inspected or paroled in order to qualify to adjust status to permanent residence in the US. Thus, a non-citizen spouse of a US citizen who previously surreptitiously crossed the border from Mexico into the US would be ineligible to adjust status because she was not inspected under § 245(a). Of course, there are exceptions to this rule too, which is beyond the scope of this blog and an article discussing these exceptions can be found here. This spouse would need to leave the US and apply for an immigrant visa at the US consulate in her home country. However, if she was unlawfully present in the US for 1 year or more, it would result in her triggering the 10 year bar to reentry. Although, under the current regime, she can apply for a

waiver under INA § 212(a)(9)(B)(v), she can only do so after she has departed the US.

Obtaining the waiver is no small matter because she has to demonstrate extreme hardship to the US citizen spouse if the waiver is denied. The emotional angst resulting from the separation of two spouses is not enough. She will need to demonstrate, in addition to the emotional issue, financial, cultural, political and health conditions, among many others, as well as the balancing of ties within and outside the US. *See Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999), *aff'd, Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001). Thus, this spouse will be rolling the dice if she departs the US to chance winning the waiver while outside the US. If the waiver is denied, she will be stuck outside the US and will be separated from her loved ones. Moreover, she can only demonstrate extreme hardship to a limited universe of qualifying relatives, which include a spouse or a parent. If she has US citizen children, under INA § 212(a)(9)(B)(v), she cannot demonstrate extreme hardship to them if she is separated.

It is not hard to see why there has been such a huge build up of the undocumented population in the US. Even while people may be eligible for permanent residence, they are unwilling to leave and chance a waiver from outside the US. While Congress enacted INA § 212(a)(9)(B) to deter overstays, it has had the exact opposite effect. People overstay, despite being approved for a green card, because of fear of facing the 3 or 10 year bars.

It is thus heartening that the Obama administration has proposed a rule that will be published in the Federal Register on January 9, 2012 in the form of a Notice of Intent to publish such a rule, which will permit intending immigrants to apply for a provisional waiver in the US prior to their departure from the US.

This rule, if published, will remove the uncertainty in leaving the US and being barred for 3 or 10 years if the waiver application is denied. Under the proposed rule, the waiver can be applied for while in the US. With the waiver in hand, the individual departing the US can more readily hope to reenter the US without facing the 10 year bar. This move has received thunderous applause from the immigration advocacy community and rightly so. In a time when Congress is virtually paralyzed and cannot even make small tweaks to improve the immigration system, the proposing of a smart administrative rule such as this one is consistent with the intent of the law. People subject to the 3 or 10 year bars still need to apply for the waiver and meet the rigorous "extreme hardship" standard, except that they can apply for it in the US prior to their departure. If they obtain the waiver, they can at least be assured of not triggering the 3 or 10 year bars upon their departure.

Apparently, if and when the rule takes effect, which under the formal rule making process may take some time, it will be limited to immediate relatives of US citizens who are seeking a § 212(a)(9)(B)(v) waiver of unlawful presence based on hardship to a US citizen, although the petitioning US citizen and the one to whom extreme hardship exists need not be the same (so that, for example, it appears that the parent of a 21-year-old US citizen petitioned for by that son or daughter would qualify if seeking a waiver based on extreme hardship to a US citizen parent, the grandparent of the petitioning relative). It appears that the rule will not cover people who are not immediate relatives of a US citizen (such as the over-21-year-old son or daughter of a US citizen who is petitioned for by their parent and not protected by the Child Status Protection Act), or whose qualifying relative for the waiver is a lawful permanent resident. It also will not cover people who need some other sort of waiver in addition, such as a waiver under INA § 212(i) for fraud. It is not entirely clear whether the proposed rule would cover people who in addition to a waiver under § 212(a)(9)(B)(v) need to obtain permission to reapply for admission because their departure will execute an order of removal and create inadmissibility under INA § 212(a)(9)(A), but it would seem that it should, since such applications for permission to reapply can already be filed in advance under existing regulations-- the actual proposed rule may clarify this when it comes out. We do urge the USCIS to at least include sons and daughters of US citizens who do not qualify as immediate relatives. A child who has turned 21, and who may not be protected under the Child Status Protection Act, still remains very much part

of the nuclear family especially in hard economic times when their parents are still the lifeline. These adult children, technically referred to as sons and daughters, would otherwise qualify under DREAM Act legislation, and may at least be able to take advantage of this provisional waiver if the proposed rule is adjusted to allow them to do so.

Although this new proposed rule may be portrayed as some sort of radical innovation by immigration restrictionists, it is actually nothing of the sort. The governing regulations, specifically 8 C.F.R. § 212.2(j), have long provided that one who is consular processing an immigrant visa, and will need permission to reapply for admission because his or her departure will execute an order of deportation or removal and create inadmissibility under INA § 212(a)(9)(A), can file the Form I-212 application for permission to reapply in advance of departing from the United States, and "shall receive a conditional approval depending on his or her satisfactory departure." That is, people who will be subject to the 5- and 10-year bars based on executed removal and deportation orders (the length of the bar can vary depending on the circumstances of a removal order) have long been able to apply for advance waivers of those bars before they leave the US to consular-process an immigrant visa. This new proposed rule would simply update the regulations to create a similar procedure for the parallel 3- and 10-year bars created by IIRIRA (the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996"), for people who remove themselves from the United States after being unlawfully present even though there may have been no removal proceedings against them. It can therefore be seen as a long overdue technical fix. However, it remains to be seen how long the rule making process will take, which includes notice and comment. There is also bound to be opposition to the rule. The USCIS still has to publish rules from the enactment of IIRIRA provisions in 1996! Hopefully, the Obama administration will give this high priority as the promulgation of such a rule may even reduce the undocumented population in the US.

This technical fix could also reduce inefficiency in the era of *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), especially if accompanied by an additional change in the proposal relating to potential issues of fraud. Under *Quilantan*, entering the United States at a port of entry with the permission of an immigration officer is sufficient to create eligibility for adjustment of status as an immediate relative of a U.S. citizen, regardless of whether one's entry was procedurally proper, as long as the entry did not involve a knowing false claim to U.S.

citizenship. Many people who were waved through the border as passengers in a car or the like have little corroborating evidence of their manner of entry. Absent this regulation, if such a *Quilantan* entrant is married to a U.S. citizen and is denied adjustment because USCIS rejects their testimony regarding manner of entry, they will effectively be forced to request that removal proceedings be commenced against them so that they may testify before an Immigration Judge and seek to establish their manner of entry by credible testimony as Ms. Quilantan did in her case. Under the new procedure, some such *Quilantan* entrants may decide that it is simpler to seek an advance waiver of inadmissibility, as long as their qualifying relative's particular form of extreme hardship is such that a brief trip abroad to pick up an immigrant visa will not be intolerable. If the advance waiver is approved, the already overcrowded immigration court system would then be spared the necessity of hearing testimony regarding the applicant's manner of entry. One caveat, however, is that the current version of the proposal, which excludes waivers of fraud-related inadmissibility under INA § 212(i), could lead potential applicants and their attorneys to fear a potential finding of fraud inadmissibility by a consulate where the circumstances of the applicant's prior entry into the United States are murky and difficult to prove (making it hard to refute an inaccurate consular suspicion that some fraud may have been committed). The potential efficiency would be much greater if the USCIS proposal were modified to allow either advance waivers under INA § 212(i), or at least an advance finding that no fraud was committed by an applicant. Otherwise, *Quilantan* entrants within the U.S. may be reluctant to give up their right to have an Immigration Judge (and if necessary the BIA) adjudicate their contention that they did not commit fraud in their entry, and to instead be at the mercy of an effectively unreviewable determination by a consular officer.