NEW YORK COUNTY
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LAWYERS' ASSOCIATION

COMMENTS AND RECOMMENDATIONS ON NOTICE OF PROPOSED RULEMAKING BY THE U.S. CITIZENSHIP & IMMIGRATION SERVICES

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DHS DOCKET NO. USCIS–2012–0003

These comments were approved by the Executive Committee of the Board of the New York County Lawyers' Association on May 31, 2012.

The New York County Lawyers' Association Immigration and Nationality Committee

Kamal Essaheb
Chair, Comments Subcommittee

Gilbert C. Ferrer
Eugene J. Glicksman,
Committee Co-Chairs

COMMENTS ON NOTICE OF PROPOSED RULEMAKING
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Since its founding in 1908, the New York County Lawyers' Association has been a body guided by the principle of inclusion. The Association was one of the first bar associations to stress the idea of equality under the law, and to open its doors to women and members of racial, religious, and ethnic minorities who were excluded from other bar associations. It is a basic, founding tenet of the New York County Lawyers' Association that everyone should be treated respectfully, fairly, and equally under the law, regardless of their ethnicity, background, religion, or gender. The New York County Lawyers' Association stands second to none in vigorously supporting these ideals and principles, and the Association's Immigration and Nationality Committee represents these ideals and principles within its area of expertise.

The Immigration and Nationality Committee of the New York County Lawyers' Association submits these comments in response to the Notice of Proposed Rulemaking ("NPR") published by the U.S. Department of Homeland Security ("DHS") in the Federal Register on April 2, 2012 starting at page 19902. The proposed rule creates a process whereby certain immediate relatives of U.S. citizens are able to apply for a waiver of the unlawful presence bars before triggering them by departing the United States.

Introduction

Under longstanding immigration law, individuals who enter the U.S. without being inspected and admitted or paroled by an immigration official generally are not able to attain status as a lawful permanent resident ("LPR") while in the United States through the process known as adjustment of status. With limited exceptions, such individuals are required to leave the United States and attempt to obtain their green cards through consular processing.

A 1996 change to immigration laws made consular processing a risky endeavor, particularly to those with family ties in the United States. Among other drastic measures, the 1996 law barred from re-entry into the United States anyone previously present in the United States without lawful immigration status for more than six months. The bar is thus triggered by departure from the United States – the very act required for consular processing.

The Immigration and Nationality Act ("INA") does provide for a discretionary waiver of the bar, but only for those individuals who can demonstrate that denial of their admission as LPRs would cause "extreme hardship" to their U.S. citizen ("USC") or LPR spouse or parent. Under existing rules, the waiver application may only be presented after the individual triggers the unlawful presence bar, and only at the consulate abroad. Although approval rates of this waiver have been high in recent years, the risk of decade-long family separation in the event of waiver denial has prevented most potentially eligible waiver applicants from applying for it. As a result, tens of thousands of green card-

eligible individuals with immediate relative U.S. citizen family members have been "fenced in" inside the United States – where they are not eligible for adjustment of status.

The Association believes that the proposed regulatory changes represent a beginning in the process of alleviating these problems. However, the Association believes the proposed regulations are too narrow in their focus and too restrictive in their application and strongly urges the DHS to broaden this proposed regulatory change so as to include all of those who are statutorily eligible to file for the waiver of inadmissibility for unlawful presence, not merely the select few described in this proposal; to broaden the range of waivers for which pre-consular interview filing will be permitted; and to broaden the time period within which the waivers may be filed.

The Proposed Regulation

The proposed DHS regulation eliminates this risk of family separation for some family-based immigrant visa applicants. The regulation changes the method of processing of the unlawful presence waiver by allowing qualifying individuals to apply for it before departing the United States. Individuals whose waiver applications are approved would then be able to travel abroad, complete processing of their green card applications, and rejoin their families in the U.S.

In order to qualify for processing under the proposed regulation, an applicant must be the beneficiary of a petition that classifies him/her as an "immediate relative" of a USC, a category that includes:

- Spouses of USCs;
- Unmarried minor children (under 21 years of age) of USCs; and,
- Parents of USCs (where the USC is 21 years of age or older).

In addition, the applicant must show that denial of his/her re-entry into the United States would cause "extreme hardship" to a U.S. citizen spouse or parent. The applicant must also not be subject to any other grounds of inadmissibility.[1] Those whose applications are approved are granted "provisional" waivers of the unlawful presence bar, which would essentially convert to a waiver upon the applicant's departure from the United States.

Committee Comments

The Committee welcomes this DHS initiative as one that will undoubtedly alleviate the hardship suffered by thousands of mixed-status families. Based on the experiences of its members, the Committee respectfully submits the following comments to enhance the scope and implementation of the proposed regulation.

[1] The proposed regulation imposes other, more technical, eligibility requirements. For instance, applicants must be older than 17 (the unlawful presence bar is not triggered by unlawful presence accrued while younger than 18). Some of these technical requirements will be addressed as needed in our comments.

Comment 1: USCIS should issue clear guidance that it will not place applicants for the proposed provisional waiver in removal proceedings.

The proposed regulation benefits individuals with U.S. citizen immediate relatives who, but for a technical violation of immigration law, are eligible to obtain LPR status. For the reasons noted above, these individuals are not able to obtain their LPR status in the United States, and are discouraged from departing the United States and applying for a green card overseas due to the risk of decade-long family separation. The aim of the proposed regulation is a humanitarian one – to encourage family unity, and to bring individuals with U.S. citizen family members out of the shadows and into the fabric of American society.

This aim is contradicted by the language of the NPR. While the NPR states that "USCIS does not envision issuing Notices to Appear (NTA) to initiate removal proceedings against aliens whose provisional waiver applications have been approved," the NPR makes no such assurances for those applicants whose waiver applications are denied.

The lack of such assurance is problematic. The proposed regulation represents an invitation for individuals who are unlawfully present to make an application to USCIS. This is a class of individuals who are categorically removable from the United States. Issuing such an invitation to this vulnerable class without addressing the threat of removal undercuts the effectiveness of the proposed regulation, and contradicts the essence of what it seeks to achieve.

Comment 2: USCIS should continue to exhibit prominently, on its website and other materials, the proposed provisional waiver.

New York City-area immigration law attorneys report receiving calls and other inquiries from potential applicants whose understanding of the proposed regulation grossly overstates its actual scope.

The Committee observes that USCIS has prominently exhibited the proposed regulation on its website in recent weeks. Committee members observe that web pages related to the proposed regulation were often found to be linked from USCIS's homepage in recent weeks, and that USCIS has published FAQ's, posters, and other materials informing potential applicants about the coverage of the proposed regulation, and the fact that the proposed regulation is not yet in effect.

The Committee lauds USCIS for its efforts on this public education front, and urges the agency to continue its efforts as implementation of the proposed regulation nears.

Comment 3: The proposed regulation should be broadened to cover preference relatives who are beneficiaries of petitions with current priority dates.

While the Committee applauds this agency effort to promote family unity for immediate relatives of U.S. citizens, it observes that other family members of U.S. citizens and permanent residents experience the same hardship. In particular, beneficiaries of First Preference, Second Preference, and Third Preference family-based petitions are statutorily eligible for the unlawful presence waiver at INA 212(a)(9)(B)(v), if they can

show that their USC or LPR spouse or parent would suffer the requisite extreme hardship. This hardship is no less painful for these families.

The Committee recommends that the proposed regulation be amended to include any preference relative with a current priority date, so long as the applicant can establish that his/her spouse or parent (whether a USC or LPR) would suffer the requisite hardship required by INA 212(a)(9)(B)(v).

Comment 4: The proposal should include immediate relatives whose qualifying LPR family members would suffer extreme hardship.

The Committee observes that while the proposed regulation nominally covers immediate relative parents of U.S. citizens older than 21, it effectively does not. The proposed regulation's limitation that the extreme hardship be suffered by a U.S. citizen parent or spouse essentially implies that immediate relative parents only qualify under this proposed regulation if they themselves have a U.S. citizen parent. While the Committee acknowledges the diversity of the status composition of immigrant families, it submits that this particular configuration – a U.S. citizen adult, who has an out-of-status parent, who in turn has a U.S. citizen parent – is an unlikely one.

This is particularly troublesome because immediate relative parents may conceivably qualify for the unlawful presence waiver through hardship suffered by an LPR spouse. The NPR provides no basis for this distinction, the only apparent effect of which is to impose this unnecessary limitation on eligibility for immediate relative parents. Other members of the immediate relative class (spouses and unmarried minor children of U.S. citizens) can "use" their petitioning family member as the qualifying family member for purposes of the unlawful presence waiver, but immediate relative parents cannot. INA 212(a)(9)(B)(v) would accept a showing of hardship from an LPR spouse, but the proposed regulation shortcuts this possibility, without basis or justification.

The Committee recommends that the proposed regulation be amended to conform squarely with the eligibility requirements of INA 212(a)(9)(B)(v).

Comment 5: The proposed regulation should be amended to remove the limitation on second applications.

The proposed regulation disqualifies from re-application anyone whose provisional unlawful presence waiver was denied. The NPR provides no basis for this restriction.

The Committee notes, and USCIS apparently acknowledges, that "notarios" and unscrupulous fraudsters are promoting and misrepresenting the scope of the proposed regulation. The Committee further notes that many applications will be made by unrepresented individuals who may not be in a position to submit a compelling waiver application. Considering the above, it would be unfair to disallow an applicant a second chance to submit an application properly, when the first submission was made ***pro se*** or with the assistance of a non-attorney. The Committee submits that any inefficiencies stemming from re-adjudication would be fully compensated by the second fee.

Comment 6: The proposal's joint requirements that (1) an applicant for the provisional waiver have a case pending with the Department of State [proposed 8 CFR 212.7(e)(2)(v)], but (2) not be scheduled for an immigrant visa interview [proposed 8 CFR 212(e)(3)(iv)] may create timing issues for practitioners.

Should the proposed regulation take effect, tens of thousands of long-time United States residents with immediate relative U.S. citizen family members will immediately and simultaneously become eligible to benefit from it. The existing infrastructure of legal services, private or non-profit, may not be sufficient to meet this initial wave.

The proposed regulation imposes certain timing rules that make meeting this wave even more difficult. By requiring that an applicant initiate consular processing and pay the immigrant visa fee before applying for the provisional unlawful presence waiver, the proposed regulation compels the applicant to set into motion a process that culminates in either a consular interview or abandonment of the immigrant visa application. By further requiring that a consular interview not be scheduled by the time the waiver application is filed, the proposed regulation unduly restricts the window for filing the waiver application.

The Committee submits that this is problematic. Waiver applications, especially ones that must meet a legal standard such as "extreme hardship," are time-consuming endeavors that require individualized assessment. For some applicants, this assessment can involve a prolonged analysis of various family characteristics that is ultimately weighed against the "extreme hardship" standard. The assessment is particularly important in light of USCIS's failure to provide clear guidance as to whether it will issue NTA's to individuals whose applications are denied.

The Committee recommends that the proposed regulation's timing rules be relaxed to accommodate the individualized circumstances of potential applicants. The Committee proposes that an individual be eligible to apply for the provisional unlawful presence waiver as soon as he/she obtains approval on a petition establishing him/her as an immediate relative.

Comment 7: The proposed Form I-601A application form should address all inadmissibility grounds.

The Committee commends USCIS for creating a new form for submission of provisional unlawful presence waiver applications to minimize confusion and encourage administrative efficiency. Unlike Form I-601, the proposed new form does not have a questionnaire addressing all potential bases of inadmissibility. A ***pro se*** applicant who is unfamiliar with inadmissibility grounds may submit the application (and obtain approval of the unlawful presence waiver) completely unaware that he/she may be barred from re-entry on the basis of another ground of inadmissibility of which he/she was not aware, and that the Form I-601A did not address.

The Committee recommends that Form I-601A be enhanced by incorporating a detailed questionnaire, similar to that of Form I-601, aimed at uncovering other potential grounds of inadmissibility.

Conclusion

The Committee applauds the efforts of USCIS in proposing this regulation, and in taking an important step towards unifying individuals with their immediate relative U.S. citizen family members. The Committee recommends that this same humanitarian approach should be extended to all families that suffer the same hardship, and not merely those who meet the INA's definition of "immediate relative."