IMMIGRATION POLICY CENTER
AMERICAN IMMIGRATION COUNCIL

July 25, 2011

SO CLOSE AND YET SO FAR

How the Three- and Ten-Year Bars Keep Families Apart

Most Americans take it for granted that marriage to a U.S. citizen and other family relationships entitle an immigrant to a green card, but there are barriers that often prevent or delay these family members from becoming lawful permanent residents, even if they are already in the United States. Among these barriers are the "three- and ten-year bars," provisions of the law which prohibit applicants from returning to the United States if they were previously in the U.S. illegally. Thousands of people who qualify for green cards based on their relationships to U.S. citizen or lawful permanent resident relatives leave the U.S. to obtain their green card are caught in a Catch-22—under current law they must leave the country to apply for their green card abroad, but as soon as they leave, they are immediately barred from re-entering the U.S. for three or ten years.[1]

The Secretary of Homeland Security may waive the bar to admission if extreme hardship to a spouse or parent can be established.[2] But there are no waivers available for others, even if it would mean hardship for U.S. citizen children. Unfortunately, current policies and interpretations of these provisions have made it difficult—and sometimes impossible—for many deserving applicants to obtain a waiver, especially if they initially entered the country illegally. Under current DHS policy, applicants must apply for the waiver from abroad, sometimes waiting months or years in another country before they learn whether the waiver has been granted and whether they will be permitted to return to their loved ones in the United States.[3]

In other words, immigrants who have a chance to legalize their status are not able to do so because of a combination of overly punitive immigration laws and the rigid interpretations of those laws currently followed by DHS and Department of State. Immigrants have to choose between leaving the country and taking the risk they might not be able to return, or remaining in the country illegally. Where waivers are available, many of the immigrants most likely to be able to show extreme hardship are afraid to leave the country precisely because of that hardship. For example, a wife with a disabled husband must choose between departing the United States to get right with the law or taking care of her U.S. citizen husband.

Many have argued that the process need not be so complicated or unforgiving and that changes in existing policy could allow for the consideration of waivers before the applicant departs the United States. In order to understand how this issue affects the immigration debate, this IPC Fact Check provides background on the three- and ten-year bar issue.

What Are the Three- and Ten-Year Bars?

Sections 212(a)(9)(i) and 212 (a)(9)(ii) of the Immigration and Nationality Act (INA) impose re-entry bars on immigrants who are present in the U.S. illegally for a period of time, leave the U.S., and want to re-enter lawfully. An immigrant who enters the United States without inspection (illegally), or who overstays a period of admission by more than 180 days, but less than one year, and who then departs the U. S. voluntarily, is barred from being re-admitted or re-entering the United States for three years. If an immigrant is in the country illegally for more than one year, a ten year bar to admission applies.

Who Must Leave the U.S. for a Green Card and Why?

U.S. citizens and legal permanent residents may petition for green cards for certain family members.[4] Sometimes the immigrant family members are outside of the U.S. when the petition is filed and when the visa becomes available, and sometimes those family members are already residing within the U.S. while they wait for their petition to be adjudicated and their visa to become available. Those in the U.S. may be here legally on a visa, or they may have come on a visa but that visa expired, or they may have entered the U.S. without proper documentation.

If the applicant for a family-based green card is the spouse, parent, or child under age 21 of a U.S. citizen (immediate relatives) AND if the applicant entered the U.S. with a valid visa (such as a visitor or student visa), that applicant may, in most cases, get their green cards in the U.S. through a process called "adjustment of status."[5]

However, all other people applying through the family-based system must go abroad and apply for their visa at a U.S. consulate in a procedure known as "consular processing." The adult children and siblings of U.S. citizens, as well as the spouses and children of legal permanent residents, must leave the country to get their green cards, whether they initially entered on a legal visa or not.[6]

Are Waivers of the Three- and Ten-year Bars Available?

A waiver of the three- or ten-year bar is available only where extreme hardship to an applicant's citizen or permanent resident spouse or parent can be established. Hardship to the immigrant himself is not a factor, and hardship to the immigrant's children is not a factor (even if the children are U.S. citizens).[7]

The current system for processing and adjudicating these waiver requests requires immigrants to leave the U.S. and receive a formal determination of inadmissibility by a U.S. consular officer before a waiver application can even be submitted.[8] Then the immigrants must apply for waivers of the three- or ten-year bar from outside the United States. In Ciudad Juarez, Mexico, one of the busiest consulates handling green card applications and waivers, there is currently a two to three month wait between submitting an application to the State Department and receiving a waiver interview with a USCIS representative. Approximately half of those applications can be decided immediately while the rest are sent to the United States for further review; the waiting time for that review can vary significantly, but averages at least another twelve months. Of course, not all waivers are granted, and those immigrants may not reunite with their family members for years. An appeal of a denied waiver can take up to 28 months or longer before the Administrative Appeals Offices adjudicates the appeal. This means longer periods of separation for family members.

What is wrong with the waiver process?
The current process is filled with inefficiencies and uncertainties. It prevents a portion of the unauthorized population from getting legal status. It breaks up families—often for a prolonged period of time. It also exposes thousands of people to violence and danger because most waivers are filed in Ciudad Juarez (approximately 75% of the 22,000 I-601 waivers filed in 2009 were processed through Ciudad Juarez), a consulate located along the U.S.-Mexico border. The city is wracked by drug violence, and the Department of State has issued travel advisories urging citizens to avoid Ciudad Juarez.

Other critical weaknesses in the system include:

- **Requiring adjudication of the I-601 waiver only AFTER departure from the United States.** The three- and ten-year bars to admissibility take effect only after an individual has left the United States. But USCIS officers may not consider waiver applications while an individual is in the U.S.—even if available evidence clearly establishes that departure from the United States will, in fact, make a waiver application necessary.

- **Processing delays even in the best of circumstances.** Approximately 49% of waivers are adjudicated and granted within seven days at Ciudad Juarez. The rest have to remain in Mexico for up to 12 months or until the waiver is approved. Overseas processing is enormously complicated and bureaucratic. An applicant must first meet with a consular officer from the Department of State (DOS), be told that a waiver is required, wait for the case to be referred, obtain and wait for the appointment with USCIS, wait for the adjudication, and then get a new appointment with DOS if the adjudication is granted. Current wait times for the initial appointment with USCIS are 2 to 3 months, meaning that even under the best of circumstances, an applicant will have to be outside the U.S. for at least 3 months.

Stanley and Francesca:
A Typical Waiver Application Process

1. U.S. citizen Stanley has been married to Francesca, a citizen of Mexico, for three years. Francesca entered the U.S. illegally and has remained illegally for 4 years. Stanley files with U.S. Citizenship and Immigration Services (USCIS) an I-130, Petition for Alien Relative, on behalf of Francesca. When they fill out the form (which establishes the validity of their relationship), they indicate that they will apply for the green card outside the country.

2. The I-130 is approved, but because Francesca is in the country illegally, she cannot apply for adjustment of status with USCIS. Instead, the I-130 is forwarded to the State Department's National Visa Center (NVC), which coordinates processing of the overseas permanent residence application and schedules the appointment with the U.S. consulate abroad. When Francesca has completed the steps with the NVC, she is given an appointment with the requested consular office—in this case, Ciudad Juarez.

3. Francesca must arrive in Ciudad Juarez a couple of days before her scheduled interview. She must first attend a medical clinic to secure a medical examination required for the interview. Francesca then appears for her interview as scheduled, at which time the U.S. consular officer makes the formal determination that Francesca is subject to the ten-year bar because she was in the country illegally for more than one year. Francesca must call and set up an I-601 wavier appointment. She may have to wait 2-3 months to be scheduled for the waiver appointment. She will be separated from her family. At her waiver interview in Ciudad Juarez, Francesca must pay the waiver fee and file an I-601 waiver so that she will not be subject to the ten-year bar. Francesca has already prepared this application, which she submits to the Citizenship and Immigration Services (CIS).

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- **Uneven application of the extreme hardship standard.** Extreme hardship in the waiver context is determined by an analysis of the totality of the circumstances affecting the U.S. citizen or permanent resident relative who filed the petition. Over the years, case law has led to a series of generally considered factors, including family ties, age, health, financial impact and country conditions. Because the standard is subjective, it is open to a wide range of interpretations, making it difficult for applicants to know what materials or arguments should be submitted. This can extend the process significantly if you don't "get it right" the first time the waiver is submitted.

- **Inefficiency and high costs.** Posting additional U.S. officers overseas to adjudicate cases and shuttling applications for waivers between agencies costs the government money and time. The State Department currently charges USCIS $131 simply to receive and transfer each application for a waiver to USCIS.

4. If Francesca is lucky, her waiver will be granted in a few days or weeks. Approximately 51% of all waiver applications, however, are referred to other CIS offices in the United States or abroad for further consideration and adjudication. Francesca is told that there is insufficient evidence of extreme hardship to her husband Stanley and that her case will be referred to a USCIS office for further consideration. Francesca will have to remain in Mexico and wait for a response to her waiver application.

5. Up to one year later, Francesca, who has been unable to re-enter the United States, is asked to submit additional evidence to USCIS. Several months later she finally learns that her waiver has been approved. Approximately fourteen months have elapsed. She obtains a new appointment with the consulate and is granted admission as a lawful permanent resident.

What can be done?

- **Repeal three- and ten-year bars.** Congress can repeal the portions of the INA that created the bars in 1996, and this would eliminate the catch-22 inherent in obtaining a green card.

- **Allow applicants who entered as minors to adjust status within the U.S.** Immigrants who entered the U.S. as minors were often brought by their parents, due to no fault of their own. They may never have visited the country of their birth, have no support networks there, and may not even speak the language. These applicants should not be forced to return to a country they do not know and face the possibility of separation from their family members.

- **Adjudicate hardship waivers in the U.S.** It is possible to create a process that would minimize the length of time an immigrant would have to spend outside the U.S. and minimize the risk of being barred from re-entry. Hardship waivers could be processed in the U.S. Once the I-130 petition for a green card has been approved, the applicant could submit a hardship waiver application for pre-adjudication. USCIS could review, request additional evidence, and issue a recommended approval that would be transmitted to DOS for final adjudication. That way, when the immigrant leaves the U.S. to go to the

consulate, he would already know whether the hardship waiver has been conditionally approved.

- **Expand guidance on the extreme hardship standard.** USCIS is already engaged in a review of the extreme hardship standard based on complaints that it is not consistently applied. The agency should share the results of that review and solicit public feedback and comment and should then establish clear guidelines for making extreme hardship decisions. Centralizing all waiver adjudications within the U.S. could have the added benefit of ensuring greater quality control and a more consistent standard, especially if waiver adjudications were consolidated into a special unit within USCIS.

Conclusion

Critics of the three- and ten-year bar find the penalties themselves unnecessarily harsh, but the existence of a waiver for spouses and children means that many families can be re-united. The real issue involves the ease with which waivers can be processed. While there may be disputes about how far the agency can go to address the impractical and harsh consequences of the three-and-ten-year bar, numerous legal experts believe that the agency has the authority to determine waiver requests while the applicant is still within the United States. Taking this action promotes both family unity and government efficiency.

Revisiting current interpretations of laws like the three- and ten-year bars will not change the need for comprehensive immigration reform, but it will allow more people who are already eligible to obtain a green card the chance to do so without undermining existing laws.

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[1] 8 U.S.C. §§ 1182(a)(9)(B)(i)(I-II) (2006).
[2] 8 U.S.C. § 1182(a)(9)(B)(v)(2006).
[3] 8 CFR 212.7(a)(1)(i).
[4] *See "*Basics of the U.S. Immigration System." Immigration Policy Center Fact Check, November 2010.
[5] 8 U.S.C. § 1255 (2006).
[6] Ibid.
[7] 8 U.S.C. § 1182(a)(9)(B)(v) (2006).
[8] 8 CFR 212.7(a)(1)(i).