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Applying for a Waiver of the 10-Year Bar for Unlawful Presence in the U.S.

By Christopher A. Kerosky, Esq.

In 1997, Congress passed a very anti-immigrant law which was designed to penalize those who come without a visa to the U.S., or those who have a visa but who do not depart the US when their visas expire. The law applies a 3 or 10 year bar from entering the US for those who stay here without a visa, depending on how long they stayed.

For example, if an immigrant comes here with a six-month visa and the person stays past the visa expiration date, and then another six months, when they depart the US they are now subject to a bar of three years. This means that in most cases the person is not allowed to return to the US until after they have been home for three years. If an immigrant overstays their visa more than a year the penalty increases to a ten-year bar.

If an immigrant comes illegally to the US, and they stay more than one year here, they are also barred from coming back to the US for ten years – even if they came as a child.

The penalty applies even if the immigrant marries a US citizen.

The ten year wait would begin from the date the person leaves the US.

However, a person subject to the penalty may apply for a waiver if they have either a spouse or parents that are U.S. residents or citizens. (A child who is a US citizen or resident does not qualify.)

To obtain the waiver, one needs to prove "extraordinary hardship" would occur to the spouse or parents if the immigrant is not allowed to come back to the US. This is a difficult burden and a large percentage of these waiver applications are denied. The government does not consider the normal painful aspects of family separation and economic loss from deportation as "extraordinary". Therefore before an immigrant subject to the bar leaves the country, they should carefully consider their eligibility for the waiver and get competent legal advice.

To start the waiver process, a US Citizen spouse would file a relative visa petition for the immigrant subject to the bar. This visa petition process takes about 6-12 months and is the first step in asking for an immigrant visa for a spouse. After this is completed, there is another intermediate procedure through the National Visa Center in Vermont. After all this paperwork is completed and all fees and documents have been submitted, then the immigrant is required to attend an interview at the US Consular post nearest their residence abroad. In Mexico, these interviews are always at the US Consulate in Ciudad Juarez.

At the interview, the immigrant will be informed they are subject to the bar and only then can the immigrant apply for a waiver. The immigrant then needs to present an I-601 Application for Waiver of Inadmissibility based upon the hardship to the US spouse or parent. The form itself asks nothing about extreme hardship so it is up to you to supplement the form with declarations, other evidence of extreme hardship, and a legal brief explaining why you are eligible for the waiver. Without substantial documentation proving the hardship, the waiver is usually denied.

The waiver applications are usually pending over one year, while the immigrant is separated from his family overseas. In Mexico, they have a special "expedited" procedure that can take less time (a few months) if the waiver is granted; but even about 50% of the people applying for the waiver are required to wait in Mexico for over one year.

Even after all that waiting, a large percentage of the immigrants applying for the waiver are denied and then they are stuck outside the US for 10 years.

If the waiver is denied, you would have the right to appeal to the Appeals Office in Washington, DC but there is usually no point in making an appeal as the waivers are denied for reasons of fact, i.e. hardship found but not extreme, so the appeals unit cannot overturn the consul's decision unless there are errors of law. Very few cases are won on appeal in Washington.

In short, leaving the US and applying for this waiver or pardon of the 10 year penalty can be a risky and painful process involving separation from the family for over one year, and if the pardon is denied, over 10 years outside the US for the immigrant. All other options should be carefully considered before the immigrant leaves the country counting on this pardon.

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CHRISTOPHER A. KEROSKY of the law firm of KEROSKY PURVES & BOGUE has practiced law since 1984 and has been recognized as one of the top immigration lawyers in Northern California for the last six years by San Francisco Magazine "Super Lawyers" edition (2006-2011). He graduated from University of California, Berkeley Law School and was a former counsel for the U.S. Department of Justice in Washington D.C. He has had an office in San Francisco for 25 years along with seven other offices around the bay area and Los Angeles.

be a substitute for legal advice. We recommend that you get competent legal advice specific to your case. If you would like such advice from our office, call (415) 777-4445 (San Francisco); (916) 349-2900 (Sacramento) or (707) 433-2060 (Santa Rosa).