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It's Been an Emotionally Trying Year of Uncertainty and Confusion for U.S. Citizens Married to Undocumented Immigrants

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It is a scary time to be an undocumented immigrant in the U.S. In the last four years under a Democratic U.S. Presidency, the U.S. has had more deportations occur under one Administration than in any other time in history – more than 1 million to date (FN 1). Despite the U.S. Immigration & Customs Enforcement's published June 2011 memo directing the use of "prosecutorial discretion" in low priority cases, only 1% of the cases of the over 300,000 under review in Immigration Courts nationwide have been granted this special relief that temporarily stays deportation (FN 2). Even those who want to fight for relief from removal in proceedings must wait years for their day in court. An average case in immigration removal court for Alaska-based immigrants remains pending for nearly 500 days before it can be resolved due to the backlog in available judges to handle all the cases, creating longer detention periods for some and applications for relief for others seem a distance dream (FN 3). States have also jumped into the traditional federal domain of immigration law in the past year, with 42 states and Puerto Rico having enacted 306 new restrictive immigration laws or immigration resolutions (FN4). But instead of promoting comprehensive immigration reform, even Democrats in the legislative branch have been leery to broach the subject in an election year. Yet, largely underreported is how the lack of meaningful immigration reform and state measures are taking a significant toll on the lives of U.S. citizens and their children, the families who live every day in fear that their loved one may not come home from picking up their child from school or even walking to the park because their spouse is undocumented.

Yet, in a surprising turn of events, a sign of hope for real immigration reform that benefits this particular audience - U.S. citizens who are married to undocumented immigrants - emerged earlier this year from the most unlikely of sources, the U.S. Department of Homeland Security (DHS).

For years, U.S. citizen spouses have lived with anger and frustration towards how the Federal immigration laws treat marriages to undocumented immigrants ("illegal immigrants"). Contrary to the popular misconception that if one is married to a U.S. citizen, the immigrant can easily obtain permanent residency, the process is not automatic and is far from easy. Spouses of U.S. citizens who cannot prove legal entry into the U.S. must leave the U.S. to process their marriage-based immigrant visa at a consulate abroad to gain U.S. permanent residency based on the marriage (FN 5). The act of traveling abroad may create a new set of problems for the immigrant

including long-term separation from their U.S. citizen spouse. If an immigrant spouse has been in the U.S. illegally for 180 days but under 1 year and departs the U.S. to interview for their green card at the U.S. consulate in their home country, the act of departing the U.S. - the ultimate catch 22 – triggers a three year bar to re-entering the U.S. (FN 6). If the immigrant has been in the U.S. illegally for one year or more and then departs the U.S. to interview for their green card abroad, the bar to re-entering the U.S. is 10 years. (FN 7). The only way around either of these “unlawful presence bars” is to apply for a discretionary “waiver” at the CIS office attached to the consulate abroad. This requires that the immigrant demonstrate that their U.S. citizen or lawful permanent resident spouse or parent would suffer “extreme hardship” if the immigrant is not allowed to return to the United States within that 3 or 10 year period and that the immigrant deserves the waiver (is a person of good moral character) through an act of discretion. (FN 8). The immigrant must wait outside of the United States while the case is pending. Current wait times for the waiver to be decided fluctuate from 3 months to 14 months of some consulates. This can be an exceptionally long time for a U.S. citizen spouse to be separated from their immigrant spouse, especially if the U.S. citizen spouse relies on their spouse’s financial contributions to the household or needs their spouse for the care of their younger children and cannot afford daycare and has no other family to help. Despite the potentially long waiting period and additional, realistic concerns for the immigrant spouse’s safety by returning to a violent or turbulent nation that s/he fled from as a child, U.S. citizens have been sending their spouses abroad soon after the law became effective in April 1, 1997 and unlawful presence (illegal days in the US) began to count for purposes of these bars (FN 9). Couples, to this day, take their chances and hope for a safe and successful adjudication abroad of their waiver so the immigrant spouse can return home.

DHS’ new provisional waiver proposal introduced in January 2012 would, if enacted, take away the most frustrating and scary part of the international waiver process – the long separation period awaiting a decision abroad. The new provision would allow the U.S. citizen spouse to file for the unlawful presence waiver while their immigrant spouse remains in the United States prior to the immigrant visa interview at the consulate abroad. (FN 10). Once the waiver is approved, the immigrant would then travel with a provisional approval notice to the U.S. consulate abroad for their immigrant visa interview. If all else goes well, the couple would only be separated for a matter of days or a few short weeks as opposed to months (as is standard practice now) for the processing of their green card abroad.

This new proposal does have its drawbacks. A significant omission is that this provision is only limited only to unlawful presence waivers and only to immigrants who are married to U.S. citizens, are being sponsored by U.S. citizen parent and are under the age of 21, or are a parent of a U.S. citizen adult child (considered “immediate relatives” under immigration law). Further, an immigrant is only allowed to use a U.S. citizen spouse or parent as the qualifying relative to demonstrate hardship towards in applying for the provisional waiver as opposed to a standard unlawful presence waiver filed outside of the U.S. (which allows for the broader qualifying relative category of permanent resident spouse or parent as well). For example, an immigrant who is married to a U.S. citizen who cannot make a strong hardship showing towards their U.S. citizen spouse but wishes to utilize their permanent resident parent for the hardship arguments, cannot qualify for this special in-country processing (the hardship must be to a *U.S. citizen* spouse or parent) and must file the waiver abroad.



The relief is also not available to immigrant spouses of U.S. citizens if additional grounds of inadmissibility must be waived (such as prior misrepresentation or use of false documents to enter the U.S.)(FN 11). The in-country waiver can only be used to waive unlawful presence. The immigrant spouse cannot use the provisional waiver process and must file the waiver abroad and wait outside the U.S. for at least as long as the CIS office abroad takes to favorably decide the case (and perhaps, much longer, if the case is denied). Lastly, the new proposal is not an amnesty provision. It does not grant work authorization or lawful status to the immigrant awaiting U.S. Citizenship & Immigration Service's (USCIS) decision on the waiver. The immigrant may still be picked up by ICE at any time. It's a procedural policy shift, not a change in the law. The proposal is also not available to immigrant spouses of U.S. citizens if they are currently in removal proceedings. Heartbreaking to many is USCIS's refusal to allow immigrant spouses of U.S. citizens to apply for the provisional waiver process if the immigrant already has an appointment at a foreign consulate abroad for the immigrant visa interview and has not yet filed their waiver and may not have even left the U.S. yet for their interview.

Despite its limitations, this provision still just looks too good to be true. The dilemma weighing heavily on the mind and emotions of a U.S. citizen spouse contemplating filing an immigrant visa for their spouse now to start the process so their spouse may be first in line to file the waiver if the provisional process does become available (now expected by the end of 2012) is: "Should I expose her to immigration now if this isn't guaranteed?" This was a repetitive concern expressed in the January 6, 2012 USCIS hosted teleconference with the public discussing the proposed provision (FN 12). CIS diverted answering questions from U.S. citizens, immigration attorneys, and advocates on the call asking CIS, "Is this really going to happen?" All DHS representatives on the call could say was that the proposed policy was introduced in direct response to President Obama's Executive Order 13563 calling for "agencies to consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." (FN 13). This begs the question, what happens if a Republican assumes the Presidency in November? Will any positive policies in place be reversed?

Yet another DHS proposed procedural shift affecting U.S. citizens applying for inadmissibility waivers for their spouses soon followed the provisional waiver proposal announcement, again raising hopes. This latest proposal, which is now in the comment period prior to finalization as a regulation in the Federal Register, calls for pulling all foreign waiver adjudications from consulates abroad and consolidating all waiver filings into one central location ("lockbox") inside the U.S. (FN 14). This new proposal is expected to cut down on some of the long waiting periods at certain consulates abroad while also creating a more uniform adjudication of waiver cases. Since the waivers have been required, the system has seemed inherently flawed and unfair to many immigrants as the decisions seemed so inconsistent, largely depending on where they were born, a factor immigrants obviously cannot control. Immigrant visa waivers connected to pending foreign marriage-based immigrant visa cases are currently filed with the foreign USCIS office that is closest to the immigrant's home consulate. But the approval rate in Ciudad Juarez, Mexico ("CDJ") - which has seen the most waivers of any country in the world - is far higher than in Lima, Peru or Vienna, Austria or Manila, Philippines (FN 15). Certain offices like CDJ have officers who regularly decide only these cases whereas other USCIS offices worldwide

range in size (some being very small) and do not



see these cases very often or suffer from fluctuating staff or have different, unknown internal standards for adjudicating hardship. These factors have led to inconsistent adjudications. Besides the hope of more consistent decisions, with the new policy in place, USCIS expects the average turn-around time for waiver adjudications to average six months, a far cry from the backlog in Ciudad Juarez that can exceed a year, when this new proposal becomes effective.

It's understandable why so many U.S. citizens are hesitantly hopeful but mostly left with more questions than answers. First, many U.S. citizens are confusing the two proposals. The U.S. lockbox centralization of waivers does not grant the immigrant the option to stay in the U.S. while the waiver is pending. The waiver has to be filed as it is now, after the immigrant spouse travels abroad for their Immigrant Visa interview and only after the U.S. consulate officer determines that the spouse has triggered an unlawful presence bar and tells the spouse s/he may apply for a waiver. Their U.S. citizen spouse files the waiver at that point in the U.S. The immigrant must still stay outside of the U.S. until the waiver is approved in the U.S. and the consulate notifies the immigrant to continue processing of their immigrant visa and provides instructions necessary to follow before lawful re-entry into the U.S. Second, any new immigration proposal brings with it a high season for "notario" fraud and the unlawful practice of law. USCIS has already published an alert on its website warning immigrants and their families not to send in a waiver filing to USCIS now as the provisional waiver proposal has not turned into an actual procedural policy. But this hasn't stopped unlicensed immigration consultants from taking advantage of people's hopes and taking their money. As US CIS explains, a notario scam already exists:

Be aware that some unauthorized practitioners of immigration law may wrongly claim they can currently file a provisional waiver application (Form I-601) for you. These same individuals may ask you to pay them to file such forms although the process is not yet in place. Please avoid such scams. USCIS wants you to learn the facts about protecting yourself and your family against scammers by visiting uscis.gov/avoidscams (FN 16).

Immigration attorneys continue to struggle to undo the damage done by notarios (unlicensed consultants, unsupervised document preparers & paralegals, and notaries) who do not know the law, routinely set up shop in ethnic communities taking cash from immigrants and their families, and expose undocumented immigrants to immigration when they fail to qualify for any benefit. With all the confusion, scams, and the fluctuating political climate affecting true immigration reform, U.S. citizen spouses of an undocumented immigrant will continue to ride the rollercoaster of emotional ups and downs trying to follow the law and figure out the process. Knowing how and when to take the right course of action is getting more and more difficult to discern.

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FN1. "ICE Prosecutorial Discretion Initiative: Latest Figures", Transactional Records Access Clearinghouse, available at <http://trac.syr.edu/immigration/reports/278/> (A special Immigration and Customs Enforcement (ICE) program (for Prosecutorial Discretion) has resulted in the closure of 2,609 cases with a backlog reduction less than one percent of the 298,173 cases pending before the Immigration Courts as of the end September 2011).



FN2. Morton, J., "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities

of the Agency for the Apprehension, Detention, and Removal of Aliens”, Field Office Director Memorandum, Policy Number: 10075.1, FEA Number: 306-112-0026 , U.S. Immigration & Customs Enforcement, (June 17, 2011); See also ”Holding DHS Accountable on Prosecutorial Discretion”, American Immigration Council, AILA Infonet Doc No. 11110947 (Posted 11/10/11), See also “Immigration”, Transactional Records Access Clearinghouse, available at <http://trac.syr.edu/immigration/> (During FY 2011 ICE initiated removal proceedings against 188,770 individuals who were charged only with violating immigration rules (83.4% of cases) and were not deportable for criminal violations or other high factors ICE claimed as its priority).

FN3. Transactional Records Access Clearinghouse, Immigration Court Backlog Statistics, available at http://trac.syr.edu/phptools/immigration/court_backlog/ (current as of May 7, 2012) (revealing average backlog for pending cases in Oregon immigration court which handles all Alaska-based removal cases).

FN4. “2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)” National Conference of State Legislatures, GO 23960 (Posted December 2011), available at <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx>

FN5. INA section 204(a), 8 U.S.C. 1154(a); 8 CFR 204.1 and 8 CFR 204.2.

FN6. 212(a)(9)(B)(i)(I), 8 U.S.C. 1182(a)(9)(B)(i)(I)

FN7. 212(a)(9)(B)(i)(II), 8 U.S.C. 1182(a)(9)(B)(i)(II); See also *Matter of Rodarte-Roman*, 23 I. & N. Dec. 905 (BIA 2006)(Act of departure triggers the bars)

FN8. INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v).

FN9. “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act”, Interoffice Memorandum, HQDOMO 70/21.1 (*AFM* Update AD 08-03), U.S. Citizenship & Immigration Services (May 6, 2009) at p. 13.

FN10. “Notice of Proposed Rulemaking: Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives”, U.S. Citizenship & Immigration Services (USCIS), CIS No. 2519-2011, DHS Docket No. USCIS-2012-0003, RIN 1615-AB99 (March 12, 2012), available at <http://www.regulations.gov>; See also “Notice of Intent”, 77 Fed. Reg. 5, 10-40-1043 (01/06/2012) (to be codified at 8 C.F.R. pt. 212), AILA InfoNet Doc. No. 12010660 (posted Jan. 9, 2012).

FN11. See 212(a) of the INA, 8 U.S.C. 1182(a) for grounds of inadmissibility.

FN12. Transcript of USCIS Teleconference: USCIS To Propose Changing The Process For Certain Waivers Based On Unlawful Presence” U.S. Citizenship & Immigration Services (January 6, 2012 1pm EST), available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3b9f2fdadcce4310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

FN13. *Id.* See also “Notice of Proposed Rulemaking” at p.44.

FN14. “Form I-601 Centralized Lockbox Filing” Stakeholders Teleconference, Office of Public Engagement, U.S. Citizenship & Immigration Services (March 9, 2012, 3 p.m. EST).

FN15. “I-601 Waivers of Inadmissibility: Does the Current Process Work? When is Hardship Extreme? Do Alternative Models Exist?” CIS Ombudsman Roundtable, U.S. Citizenship & Immigration Services (updated December 26, 2011), available on <http://www.dhs.gov/files/publications/cisomb-roundtable3.shtm> (citing reported approval rates of 54% in the Bangkok District, 50% in the Rome District, and 84% in the Mexico District, the three districts encompassing the smaller international CIS offices deciding the waivers)..

FN16. “I-601 Provisional Waiver Is Not in Effect” USCIS Alert, www.uscis.gov (updated 5/3/2012)

