March 28, 2014

Re: Docket number DHS–2014–0006
Comment submitted in connection with the Request for Public Input for the Retrospective Review of Existing regulations by the Office of General Counsel, Department of Homeland Security (DHS), 79 Fed. Reg. 10,760 (Feb. 26, 2014)

Ladies and Gentlemen:

I submit this comment in response to the Retrospective Review of Existing Regulations; Request for Public Input issued by the Office of the General Counsel, Department of Homeland Security (DHS) published in Volume 79, Number 38 of the Federal Register at page 10,760 on February 26, 2014. The focus of this comment is on regulations relating to INA § 216, 8 U.S.C. § 1186a.

I write as an individual immigration attorney admitted to practice law in the State of New York who has worked with immigrant victims of domestic violence for more than a decade.

Introduction

> The publications of [administrative] agencies themselves are in a number of instances found to be out of date or of too generalized a character. To all but a few specialists, such a situation leads to a feeling of frustration. Laymen and lawyers alike . . . are baffled by a lack of published information to which they can turn when confronted with an administrative problem. . . . [I]nformation should be made available, in orderly and readily accessible form, to the public. To bring such scattered materials together, to know which are superseded, and to fill in missing chapters is a task that only the agency involved can perform."[1]

The words of the famous Attorney General's Report, prepared under then Attorney General Robert H. Jackson and submitted to the Senate on January 29, 1941, resonate to a surprising degree with anyone wading into the morass that is the practice of immigration law in the 21st Century. In 1946, in response to the very concerns raised in the Attorney General's Report, Congress passed the Administrative Procedures Act[2] (the APA), which has served as America's foundational document on the creation of federal agency regulations ever since.

Immigration practitioners in 2014 are, of course, much better situated than their counterparts of 1941 were. With the advent of the internet, which has allowed for some extraordinarily user-friendly government websites, including www.uscis.gov, laypeople and lawyers alike have access to information in a way that people of 1941 may never have imagined.

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[1] The Attorney General's Committee on Administrative Procedure in Government Agencies, S.Doc. No. 8, 77th Cong., 1st Sess. (1941(the Attorney General's Report) at 25-26.

[2] Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-583, 701-706, 801-808, 3105, 3344, 6362, 7562).

Nonetheless, with inadequate, inaccurate and, at times, downright incomprehensible immigration regulations, U.S. Citizenship and Immigration Services (USCIS), and its predecessor agency, the Immigration and Naturalization Service (INS), have failed to live up to the promise of the APA.

Overview of the concerns relating to the regulations implementing INA § 216, 8 U.S.C. § 1986a

The focus of this comment is on the regulations implementing INA § 216, 8 U.S.C. § 1986a. In the notoriously confusing field of immigration law,[3] this statute manages to stand out as particularly incoherent. Unfortunately, rather than providing clarity, the regulations—along with a piecemeal collection of administrative decisions and policy memoranda—serve only to muddy the waters further. In this comment, I describe, among other things, (i) a "number of instances [where regulations are] found to be out of date," (ii) a "situation [that] leads to a feeling of frustration [among] all but a few specialists", and (iii) the failure of USCIS to make "information . . . available, in orderly and readily accessible form," and "[t]o bring . . . .scattered materials together" so that the general public might "know which [regulations and other guidance] are superseded" and which remain in effect.

Without even mentioning the hopelessly out-of-date regulations, a 2013 Ombudsman report captures many of the issues in the current administration of this statute:

> Since the enactment of INA section 216, the former Immigration and Naturalization Service (INS) and USCIS have issued more than a dozen guidance documents related to the processing of Form I-751, *Petition to Remove Conditions on Residence* (Form I-751 or I-751). Only two appear on the agency's public website under the topic "conditional residence." The Adjudicator's Field Manual (AFM) lacks comprehensive, up-to-date information on policies and procedures associated with Form I-751 adjudications. Petitioners and their representatives find it difficult to discern which I-751 guidance remains in effect and how to ensure its proper application. USCIS adjudicators, in turn, face considerable challenges understanding and applying the universe of I-751 policies and procedures. When such guidance is misapplied, spouses and children seeking immigration benefits and services may encounter a range of undue burdens, including placement into removal proceedings. In meetings with the Ombudsman's Office, stakeholders and USCIS staff identified the following areas of concern: ineffective notice and barriers to securing information, most notably proof of status, inconsistent and inefficient adjudications, and a need for enhanced processes concerning late and/or multiple filings and referral for removal.[4]

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[3] See, e.g., Laura Murray-Tjan, Immigration Law: Raise Your Hand If You Understand It, in Huffington Post, Feb. 12, 2014 (available at http://www.huffingtonpost.com/laura-murraytjan/immigration-law-raise-you_b_4766726.html) (last accessed March 26, 2014) ("Immigration law is almost impossible to master. It is a messy patchwork of compromises stitched together over decades; a shotgun wedding of often incompatible provisions. Whatever metaphor you pick, the reality remains: the Immigration and Nationality Act is complex, counter-intuitive, and just plain confusing.")

[4] Citizenship and Immigration Services Ombudsman, Improving the Process for Removal of Conditions on Residence for Spouses and Children, at 1, Feb. 28, 2013 (available at https://www.dhs.gov/publication/improving-process-removal-conditions-residence-spouses-and-children) (last accessed March 26, 2014).

Rather than continuing to pile on additional bits and pieces onto the existing cluttered field of guidance, the Department of Homeland Security should conduct a thorough review of its administration of INA § 216 and overhaul the regulations relating to this statutory provision.

Ironically, despite being plagued by terrible drafting and disorienting administrative guidance, at its core, INA § 216 is easy to understand. The purpose behind INA § 216 statute is to ensure that those seeking immigration status through marriage do so based on an actual familial relationship, not fraud.[5] The statutory mechanism through which this goal is accomplished is to grant the newly married (or newly a step-child) two years of conditional residence when obtaining immigration status based on a marital relationship that is less than two years old at the time of immigration.[6] Generally, in the 90-day period before the end of the two years conditional residence grant, a petition is filed by both conditional resident and sponsoring family member to remove the conditions so that the noncitizen may become a lawful permanent resident without temporal restrictions.[7] The initial statute provided exceptions to the joint filing requirement for divorce and extreme hardship.[8]

Soon after passing this anti-fraud legislation in 1986, Members of Congress noticed some unintended consequences. Among other issues, they realized that they had unwittingly created a trap for immigrant victims of domestic violence who ended up stuck in abusive relationships endangering themselves and often their children. An abused noncitizen granted conditional residence who required the signature of the sponsoring and abusive spouse (or step-parent) was not free to escape the dangerous relationship. Instead, he or she had to continue to live with the abusive family member until such time as the conditions on residence were removed. In 1990, in order to rectify this situation, Congress created a third exception to the joint filing requirement for victims who were "battered by or was the subject of extreme cruelty" by the sponsoring family member.[9] Petitions filed pursuant to these provisions are generally known as battered spouse or battered child waivers.

While the statute has been modified several times over the years, most recently in 2013,[10] the goals of the 1986 legislation and the 1990 amendment remain the same: ensuring that noncitizens are not obtaining immigration status through fraud while simultaneously allowing immigrants with genuine family relationships the opportunity to maintain their status even if

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[5] See Statement of then Senator Robert J. Dole, 132 Cong. Rec. S17316-02 (1986) ("The legislation we consider today [H.R. 3737 which became the Immigration Frauds Amendment of 1986] attempts to deter a growing problem with immigrant status derived from marriage to a U.S. citizens: marriage fraud."); see also INS memorandum, William R. Yates, "Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of Marriage", at 1 (April 10, 2003) ("The Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. 99-639 (November 10, 1986), were enacted to combat fraud perpetrated by aliens who marry only to obtain immigration benefits.")

[6] See Immigration Marriage Fraud Amendments (IMFA) of 1986, PL 99-639, 100 Stat 3537, §2(a), codified at INA § 216, 8 U.S.C. § 1186a; see current INA § 216(a) & (h), 8 U.S.C. § 1186a (a) & (h) (2014) (describes family sponsored immigrants to be granted "conditional permanent residence").

[7] See IMFA, PL 99-639, 100 Stat 3537, §2(a), codified at INA § 216(c)(1), (2) & (3) & (d), 8 U.S.C. § 1186a(c)(1), (2) & (3) & (d).

[8] See IMFA, PL 99-639, 100 Stat 3537, §2(a), codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

[9] The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat 4978 (1990), §701 codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

[10] The Violence Against Women Reauthorization Act of 2013, PL 113-4, 127 Stat 54, §806 codified at INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

their original sponsoring family members do not continue to participate in the immigration process.

List of problems in current regulations relating to INA § 216, 8 U.S.C. § 1986a

Below is a list of some, but by no means all, of the most egregious problems in the regulations relating to INA § 216, 8 U.S.C. § 1986a.

Problem #1: Inaccurate regulations that do not reflect the law

It is undisputed and axiomatic to our structure of government that "[r]egulations cannot trump the plain language of statutes."[11] Yet several regulations remain in place that have clearly been superseded by statutory amendments to INA § 216 8 U.S.C. § 1986a.

The most striking error of this type relates to a regulatory requirement for "evaluations" from "[l]icensed clinical social workers, psychologists, and psychiatrists" for "extreme cruelty" cases described in subparagraphs (iv), (v), (vi) and (vii) of 8 C.F.R. § 216.5(e)(3). The regulatory requirement for "evaluations" from "[l]icensed clinical social workers, psychologists, and psychiatrists" under 8 C.F.R. § 216.5(e)(3) was promulgated in 1991.[12] A little over three years later, this regulatory requirement was essentially abrogated by the Violence Against Women Act (VAWA) of 1994[13]. Section 4072 of the 1994 legislation replaced the regulatory "licensed professional evaluation" requirement with the "any credible evidence" standard of review for battered spouse and child waivers to INA § 216(c)(4).

While "[t]he conference report [relating to the 1994 legislation] contains no explanation of the battered spouse provisions,"[14] a conference report relating to relatively similar language in a bill that passed the House a year earlier[15] makes crystal clear the intention behind adding the statutory "any credible evidence" language. The 1993 House Judiciary Committee's conference report explicitly states:

> This section [section 242 from H.R. 1133, analogous to section 40702 of H.R. 3355 enacted as part of Pub. L. 103-322] ***overrides this regulation*** [8 C.F.R. § 216.5(e)(3)] by directing the Attorney General to consider any credible evidence submitted in support of

[11] Robbins v. Bentsen, 41 F.3d 1195, 1198 (7th Cir. 1994).
[12] See Federal Register Notice 56 Fed. Reg. 22635 (May 16, 1991).
[13] VAWA was first enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 445 (1994)
[14] Congress Passes Sweeping Crime Bill With Immigration Provisions, 71 Interpreter Releases 1177, 1180 (Sept. 4, 1994).
[15] Compare Section 242(a) of the 1993 bill H.R. 1133 ("In acting on applications under this paragraph, the Attorney General shall consider any credible evidence submitted in support of the application (whether or not the evidence is supported by an evaluation of a licensed mental health professional). The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.") with the language finally enacted in Pub. L. 103-322, §40702(a) in 1994 (adding the following two sentences to INA § 1216(c)(a) "In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.").

hardship waivers based on battering or extreme cruelty whether or not the evidence is supported by an evaluation by a licensed mental health professional.") [16]

Despite the statutory amendment enacted almost 20 years ago, the superseded regulations ***have never been amended to reflect the actual law that governs*** battered spouse and child waivers. Indeed, as if almost flaunting the 1994 statutory amendment explicitly designed to eliminate the licensing requirement, to this day USCIS continues to issue requests for evidence (RFEs) stating that an evaluation provided by a conditional permanent resident who sought therapy or counseling:

> must contain the following information:
> a. The evaluator's full name
> b. The evaluator's address
> c. The evaluator's license number
> d. The entity or authority who granted the license, certification, or registration
> USCIS retains the right to verify the professional's license, certification, or registration.[17]

The just-quoted 2013 RFE tracks almost verbatim the language of 8 C.F.R. § 216.5(e)(3)(v), despite the fact that this regulatory provision was superseded by a statutory amendment on September 13, 1994.

Solutions to Problem #1:

Remove subparagraphs (iv), (v), (vi) and (vii) of 8 C.F.R. § 216.5(e)(3). Add a sentence explicitly stating that USCIS shall consider any credible evidence.

Problem #2: defining the person who must suffer abuse in order to remove the conditions on residence

A conditional resident who has suffered abuse as well as a conditional resident whose child has suffered abuse may, according to the regulations, "request a waiver of the joint filing requirement."[18] In contrast, the current definition needlessly leaves out conditional resident sons and daughters whose parents have been abused, ignoring the reality that children of abused parents may endure significant suffering even if they are not directly abused.[19]

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[16] House Report (Judiciary Committee) No. 103–395, 103d Cong., 1st Sess, at 16 (Nov. 20, 1993) (emphasis added).
[17] Redacted Request for Evidence (RFE) dated October 17, 2013, issued by USCIS—California Service Center (on file with author).
[18] 8 C.F.R. § 216.5(e)(3).
[19] See, e.g. Vincent J. Felitti, et. al., Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults, 14 American Journal of Preventive Medicine 245 (1998) (reviewing adult health outcomes based on a variety of problems faced in childhood, including, under the category of "household dysfunction" the abuse of mothers and step-mothers); see also John McCarth and Angela Alsobrooks, The Invisible Victims of Domestic Violence, Washington Post, Feb. 15, 2013 (http://www.washingtonpost.com/opinions/the-invisible-victims-of-domestic-violence/2013/02/15/b684c5c4-7630-11e2-95e4-6148e45d7adb_story.html) (last accessed March 28, 2014) ("Twenty-two states and Puerto Rico have already explicitly addressed this issue in some statutory form, and the Maryland General Assembly is considering the Committing a Crime of Violence in the Presence of a Minor Act (HB478 in the House and SB861 in the Senate), which would create a new crime for those who commit a violent crime in the presence of a child. This bill is a good start. Maryland's current child abuse

Solution to Problem #2

Add the following language to the end of the first paragraph of 8 C.F.R. § 216.5(e)(3):

A conditional resident whose parent entered into the qualifying marriage in good faith, and who was battered or was the subject of extreme cruelty or whose child was battered by or was the subject of extreme cruelty or whose parent or step-parent was battered by or was the subject of extreme cruelty perpetrated by the United States citizen or permanent resident parent or step-parent of the conditional permanent resident may request a waiver of the joint filing requirement. The conditional resident son or daughter of a battered or abused parent, step-parent or child may apply for the waiver regardless of the citizenship or immigration status of the parent or child.

Problem #3: defining what constitutes battery and extreme cruelty

The statute allows a conditional resident who has been "battered by or was the subject of extreme cruelty perpetrated by" the sponsoring family member to file a battered spouse or child waiver.[20] The current definition of the kinds of abusive behavior that constitute battery or extreme cruelty found at 8 C.F.R. § 216.5(e)(3) is woefully inadequate. Current "[r]esearch has demonstrated that intimate partner violence is not a unitary phenomena,"[21] Yet rather than providing regulatory guidance based on current research involving the variety of forms of family abuse, the current regulations mention a few forms of physical and sexual violence and then invite adjudicating immigration authorities to abdicate responsibility for adjudicating what constitutes "extreme cruelty," stating that "[t]he Service is not in a position to evaluate testimony regarding a claim of extreme mental cruelty. . . . "[22]

One of the most significant aspects of the regulations' deficiency in articulating what constitutes abuse involves the absence of any discussion of the role that coercive control plays in the kinds of behaviors that may give rise to a cognizable claim under this statute. The New York State Office for the Prevention of Domestic Violence web site, for example, explains: "Domestic abuse is ongoing, purposeful behavior that is aimed at dominating one's partner, and often one's children as well. It is also referred to as coercive controlling violence or simply,

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statutes require some level of physical or sexual injury for the child to be deemed a victim. But it shouldn't be necessary for a child to suffer a physical injury before we as a society are willing to protect him or her. With the adoption of this new statute, the courts would be empowered not only to punish the violent offender but also to order the offender to provide restitution to the child witness for any counseling required following the violent act.") (emphasis added); but cf. Nicholson v. Williams, 203 F.Supp. 2d 153 (E.D.N.Y. 2003) (holding that mothers' and children's due process rights were violated when children of mothers victimized by domestic violence were automatically removed from their mothers' custody by child protective authority).

[20] INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C).

[21] Joan B. Kelly and Michael P. Johnson, Differentiation among types of intimate partner violence: Research update & implications for interventions 46 Family Court Review 476 (2008), quoted in the New York State Office for the Prevention of Domestic Violence web site (available at http://www.opdv.ny.gov/professionals/abusers/index.html) (last accessed March 28, 2014).

[22] 8 C.F.R. § 216.5(e)(3)(iv).

coercive control."[23] Even Stark, a professor at the School of Public Affairs and Administration, Rutgers University, Newark Campus, has written:

> Work with battered women outside the medical complex suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children, and friends; and work. . . . [T] he unique profile of "the battered woman" arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.[24]

In sum, there is a great deal of research describing a variety of actions and behaviors recognized as constituting familial abuse, virtually none of which is delineated in the regulations on battery and extreme cruelty.

Solution to Problem #3

Write regulations on what constitutes battery and extreme cruelty based on current research on familial abuse.

Problem #4: No regulations on the appropriate time to file a waiver

Joint petitioners must file the petition to remove conditions "in the 90-day period before the second anniversary of the [noncitizen's] obtaining the status of lawful admission for permanent residence"[25] (hereinafter, the "90-day filing window"). The statute is silent, however, as to the period during which battered spouses and children may file a petition seeking to waive the joint petition requirement. While the Board of Immigration Appeals, has long recognized that the statute provides no requirements regarding the time period during which waivers may be filed,[26] there are no regulations explicitly acknowledging that the 90-day filing window applies only to joint petitions and that waiver petitions may be filed at any time until a final, non-reviewable order terminating residence is issued or the residence is abandoned.

Solution to Problem #4

Add language explicitly acknowledging that a waiver petition may be filed at any time after the grant of conditional permanent resident status and prior to the issuance of a final order of removal or the abandonment or relinquishment of resident status.

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[23] The New York State Office for the Prevention of Domestic Violence web site (available at http://www.opdv.ny.gov/professionals/abusers/coercivecontrol.html) (last accessed March 28, 2014) (internal citations omitted).

[24] Evan Stark, Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control, 58 Alb. L. Rev. 973, 986 (1995).

[25] INA § 216(d)(2), 8 U.S.C. § 1186a(d)(2).

[26] Matter of Anderson, 20 I. & N. Dec. 888, 890 (1994) ("The 90-day limit is not imposed for the filing of a waiver request.").

The waiver may be filed at any time (i.e., before, during or after the 90-day filing window applicable to joint petitions) until a final order of removal is issued or the noncitizen has abandoned residence.[27]

Problem #5: Problems regarding inclusion of sons and daughters in their parents' petitions

Pursuant to 8 C.F.R. § 216.4(a)(2), "[d]ependent children of a conditional permanent resident who acquired conditional permanent resident status concurrently with the parent may be included in the joint petition filed by the parent and the parent's petitioning spouse. A child shall be deemed to have acquired conditional residence status concurrently with the parent if the child's residence was acquired on the same date or within 90 days thereafter." There are a number of problems contained within those two sentences and, for noncitizens who obtained conditional permanent resident status through an abusive step-parent, there is the additional problem that they are not included in waiver petitions under the plain language of 8 CFR 216.5.

Problem #5A: "dependent children"

It is not clear what the phrase "dependent children" means, nor is it clear why a noncitizen "son or daughter"[28] must also be a "child."[29] As noted above, the central idea in the creation of conditional permanent residence and provisions for removing the conditions is to "deter immigration-related marriage fraud."[30] Presumably, whether a conditional resident is a dependent child of 17 at the time the petition to remove conditions is filed or is a married 22 year old, USCIS will have the same opportunity to review the bona fides of the marriage which led to the conditional permanent resident status of the step-daughter or step-son in reviewing the petition to remove the conditions from the residence of the conditional resident parent.

Problem #5B: requirements for including sons and daughters in their parents' petitions

In a similar vein, there does not seem to be a rationale for limiting the inclusion of children in their parents' petitions to those who "acquired conditional permanent resident status concurrently with the parent" or "within 90 days thereafter."[31]

With respect to joint petitions, the relevant statutory language does not even seem to contemplate any separate filings by conditional permanent resident sons or daughters. Specifically, in describing the joint petition to be filed "[i]n order for the conditional basis established under subsection (a) of this section for a[noncitizen] spouse or a[noncitizen] son or

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[27] Note that this suggested sentence incorporates the sentence "The waiver may be filed at any time (i.e., before, during or after the 90-day filing window)" from USCIS Adjudicator's Field Manual, Chapter 25.1(c)(2) and the phrase "final order of removal" from USCIS Adjudicator's Field Manual, Chapter 25.1(k).

[28] A noncitizen "son or daughter" covered by INA § 216, 8 U.S.C. § 1186a is defined at INA § 216(h)(2), 8 U.S.C. § 1186a(h)(2).

[29] For purposes of Titles I and II of the Immigration and Nationality Act, the term "child" is defined at INA § 101(b), 8 USC 1101(b).

[30] Preamble to the Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat 3537.

[31] 8 C.F.R. § 216.4(a)(2).

daughter to be removed"[32] the requirements listed relate only to a petition filed by the noncitizen "spouse and the petitioning spouse."[33] In other words, whereas spouses as well as sons and daughters receive conditional permanent residence, only spouses appear to be required to file joint petitions with their sponsoring family member to remove the conditions on residence.

The statute relating to waivers is ambiguous on the inclusion of sons and daughters in their parents' petitions.

In light of both the statutory purpose (deterrence of marriage fraud) and the plain language of the statute (at least relating to joint petitions), there does not seem to be a basis for limiting the inclusion of conditional permanent resident sons and daughters in their parents' petitions to remove conditions to those who acquire conditional permanent status at the same time as or within 90 days of their parents' acquisition of conditional permanent resident status.

Problem #5C: sons and daughters are included in joint petitions but not waiver petitions

Language allowing for the inclusion of sons and daughters in their parents' petitions is only found under 8 C.F.R. § 216.4 relating to joint petitions. 8 C.F.R. § 216.5 relating to waivers has no language indicating that sons and daughters may be included in their parents' petition. This omission for waiver petitions makes no sense and, indeed, is not followed by USCIS. Rather, as a practical matter, children who otherwise meet the regulatory criteria for inclusion in joint petitions are routinely treated as included in their parents' waiver petitions to remove conditions.

Summary of Problems #5A, #5B and #5C

Limiting the inclusion of sons and daughters in their parents' petitions to "dependent children," those who acquired status at the same time as or within 90 days of their parents, or those whose parents file joint petitions creates additional petition preparation time and cost for conditional permanent residents and additional adjudicatory work for USCIS without furthering any policy objectives or conforming to any statutory requirement.

Solution to Problems #5A, #5B and #6C

Remove from 8 C.F.R. § 216.4(a)(2) the phrase "dependent children" and the requirement that sons and daughters must have acquired conditional status concurrently or within 90 days of their parents in order to be included in their parents' petitions. Add a sentence to 8 C.F.R. § 216.4 and to 8 C.F.R. § 216.5 indicating that sons and daughters, regardless of age or marital status, who obtained conditional permanent resident status based on the same marital relationship as their parents are automatically included in their parents' petitions to remove conditions.

[32] INA § 216(c)(1), 8 USC 1186a(c)(1) (first sentence).
[33] INA § 216(c)(1)(A) & (B), 8 USC 1186a(c)(1)(A) & (B).

That said, conditional permanent resident children should retain the option to file separate petitions as there are a variety of circumstances in which their parents will either not file petitions to remove conditions or may file petitions that may not be approved.

Problem #6: limited mechanism for correcting errors

Sometimes, a noncitizen is wrongly granted conditional permanent residence rather than permanent residence even though he or she was married to or became the step-child of the sponsoring U.S. citizen or permanent resident more than two years before being admitted as an immigrant (if traveling to the US from abroad) or adjusting status (if applying from within the United States). Indeed, this kind of mistake is sufficiently common such that the USCIS Adjudicator's Field Manual cautions:

> It is extremely important that inspectors and adjudicators be very conscious of the date of the marriage at the time the alien is admitted or adjusted. It is not unusual for an alien to be issued a conditional resident immigrant visa by a consular officer shortly before the second anniversary, but to apply for admission after that second anniversary. Likewise, an applicant for adjustment might file a Form I-485 (or even be interviewed regarding such application) prior to the second anniversary, but not be granted adjustment until after that second anniversary. In such cases, the alien should be admitted, or adjusted, without conditions (see 8 CFR 235.11(b) regarding the authority of inspectors to amend the visa classification on an immigrant visa in such situations).[34]

Although regulations create a process for federal government employees to correct errors on immigrant visas [35] and a process for correcting to errors on resident cards,[36] there is no explicit mechanism for a noncitizen who has been wrongly classified as a conditional permanent resident to correct the misclassification.

Solution #6

Add language to 8 C.F.R. § 264.5 to create a mechanism for a noncitizen to seek a correction the "conditional" classification where the noncitizen was admitted as a permanent resident from abroad or adjusted status to permanent residence within the United States more than two years after the qualifying marriage with his or her spouse or between his or her parent and step-parent. Current paragraphs (e) through (i) of 8 C.F.R. § 264.5 could be re-lettered to begin at (f) and end at (j), and then a new paragraph (e) could be added as follows:

> *A noncitizen who was admitted or adjusted to permanent resident status more than two years after the qualifying marriage that gave rise to his or her residence but was adjusted or admitted as a conditional permanent in error shall apply for a Permanent Resident Card with proof of date of adjustment or admission to conditional permanent resident status and proof of the date of the qualifying marriage more than two years before the date of adjustment or admission.*

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[34] USCIS Adjudicator's Field Manual, Chapter 25.1(a).
[35] See 8 C.F.R. § 235.11(b).
[36] 8 C.F.R. § 264.5(b), (c).

In addition, concurrently with the addition of the suggested new paragraph (e), current 8 C.F.R. § 264.5(a) could be amended by removing the second to last "or" and adding the words "or paragraph (e) of this section. The amended paragraph could read as follows (where the changes are indicated by strikethrough for the word to be deleted and by bold and underlining for the words to be added):

> *Filing instructions. A request to replace a Permanent Resident Card must be filed in accordance with the appropriate form instructions and with the fee specified in 8 CFR 103.7(b)(1); except that no fee is required for an application filed pursuant to paragraphs (b)(7) through (9) of this section,* ~~*or*~~ *paragraphs (d)(2) or (4) of this section,* ***or paragraph (e) of this section****.*

Any procedure created to challenge the "conditional" classification as an error on the Department of Homeland Security, or any division thereof, should be free. Further, there should be no time limit relating to when a noncitizen may avail himself or herself of the procedure.

> Problem #7: giving conditional resident status to step-sons and step-daughters obtaining status more than two years after the qualifying marriage in certain circumstances

Where a spouse becomes a conditional resident based on obtaining immigrant status within two years of a qualifying marriage, that conditional resident's sons and daughters are automatically granted conditional resident status when admitted or adjusted as residents, even as well, even if the sons and daughters are adjusted or admitted more than two years after the qualifying marriage. While I cannot identify the regulation that compels this practice, without specifying the regulation on which the denial is made, USCIS routinely denies applications for replacement resident cards for sons or daughters granted conditional residents in contravention of the statutory requirements of INA § 216, 8 U.S.C. § 1186a with the following words:

> Your card was issued with a Correct Code of Admission as a CR2. Per regulations, if a conditional resident child enters (or adjusts) more than two years after the qualifying marriage and their immigrant parent entered as a conditional resident then the child is also a conditional resident.[37]

While, as noted, the regulation mandating this result is a mystery, my best guess is that the practice is based on a misreading of the language in INA §§ 216(a)(1), (h)(1), (h)(2) and (h)(3), 8 U.S.C. § 1186a(a)(1), (h)(1), (h)(2) and (h)(3). Regardless of the source of this interpretation, the (admittedly convoluted) language of INA § 216, 8 U.S.C. § 1186a neither compels such an interpretation nor allows for it.

> Solution to Problem #7

Currently, 8 C.F.R. § 216.1 has only a single paragraph. That paragraph, except for the final sentence, could be designated as paragraph (a). A paragraph (b) could be added as follows:

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[37] Letter denying Form I-90, Application to Replace Permanent Resident Card, dated December 17, 2012, issued by USCIS—Nebraska Service Center (on file with author).

Where multiple family members are immigrating to the United States, whether by adjustment of status or admission on an immigrant visa, based on an immigrant petition filed by a U.S. citizen pursuant to INA § 201(b)(2), 8 U.S.C. § 1151(b)(2) or a lawful permanent resident pursuant to INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) or as a fiancé or fiancée of a U.S. Citizen, each family member will be adjusted or admitted as either a conditional permanent resident or a permanent resident without conditions depending on with the qualifying marriage took place more than two years prior to such adjustment or admission. If a spouse is adjusted or admitted as a conditional resident because the qualifying marriage took place less than two years prior to adjustment or admission, any son or daughter of the conditional resident admitted or adjusted more than two years after the qualifying marriage took place shall nonetheless be admitted or adjusted as a permanent resident without conditions. Similarly, if a son or daughter of a parent whose qualifying marriage occurred less than two years prior to the adjustment or admission as a conditional permanent resident, the parent of that conditional resident (who is the spouse of the petitioning U.S. citizen or lawful permanent resident) adjusted or admitted more than two years after the qualifying marriage took place shall nonetheless be admitted or adjusted as a permanent resident without conditions.

Then, taking the last sentence from current paragraph (a) of 8 C.F.R. § 216.1, a paragraph (c) could be added as follows:

The conditions of section 216 of the Act shall not apply to lawful permanent resident status based on:
(i) a self-petitioning relationship under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act or based on eligibility as the derivative child of a self-petitioning spouse under section 204(a)(1)(A)(iii) or 204(a)(1)(B)(ii) of the Act, regardless of the date on which the marriage to the abusive citizen or lawful permanent resident occurred;
(ii) a grandchild of a grandparent whose qualifying marriage occurred less than two years prior to the adjustment or admission as a conditional permanent resident, where the grandchild is immigrating pursuant to INA § 203(d), 8 U.S.C. § 1153(d) as the child of a son or daughter as such term is defined at INA § 216(h)(2), 8 U.S.C. § 1186a(h)(2); or
(iii) a widow or widower, a son or daughter of a widow or widower, or a grandchild of a widow or widower immigrating pursuant to INA § 204(l), 8 U.S.C. § 1154(l) or section 1703 of Public Law 108-136.

Conclusion

In light of the many issues highlighted in this comment, I urge the Department of Homeland Security to undergo a thorough review of all regulations and guidance relating to INA § 216, 8 U.S.C. § 1186a.

Yours sincerely,
Julie E. Dinnerstein