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By Shoba Sivaprasad Wadhia¹

Introduction

Congress has made family immigration a priority in statute but the unlawful-presence bars, also known as the three and ten-year bars, create unique barriers for family reunification that prevent many immigrants from legalizing their status through the existing immigration system. The three and ten-year bars prevent immigrants who have overstayed their visas or entered unlawfully from earning a green card even if they are otherwise capable of legally acquiring it. Removing or reforming the unlawful presence bars would remove a major legislative catch-22 that impedes the legalization of many unauthorized immigrants.

Take the example of Maria, a 23 year-old woman from Mexico who enters the United States without inspection and later marries the love her life, Mathew, a United States citizen. She can be separated from her husband for several years because of an unlawful-presence bar. In another example, Madthu, a 50 year old software engineer from India with a Master's degree in engineering enters the United States lawfully but overstays his visa for one year. She can be banned from returning to the United States for ten years after she departs.

¹ Shoba Sivaprasad Wadhia is the Samuel Weiss Faculty Scholar at Pennsylvania State University's Dickinson School of Law. Professor Wadhia researches the role of prosecutorial discretion in immigration law. Professor Wadhia is the founder/director of Penn State Law's Center for Immigrants' Rights, an immigration policy clinic and also teaches immigration-related courses at the law school. Prior to joining Penn State Law, Professor Wadhia was deputy director for legal affairs at the National Immigration Forum and an associate with Maggio Kattar, P.C., both in Washington, D.C.

This paper examines the background and consequences of the unlawful-presence bars, and explores possible policy changes that would mitigate its harmful impact on noncitizens and their families.

Background on Three and Ten-Year Bars

The Immigration and Nationality Act (INA)² is the primary legal source for U.S. immigration law. Created by Congress in 1952 and amended several times since, the INA lays out several paths for an immigrant to earn lawful permanent resident status (“LPR” or “green card”). Every path has three common elements. First, the person has to fit within one of several specific statutory categories of people. The main categories are family members of United States citizens or green card holders; those with specific occupational skills; refugees; and diversity visa lottery winners.

Second, the person cannot fit within any of the inadmissibility grounds, which cover unlawful presence, criminality, national security, public health, economic dependence, and immigration fraud, among others. Third, there are limitations on the number of immigrants admitted in any one year and from any one country, although certain family members of U.S. citizens are exempt from the numerical limitations.³ The majority of green cards are reserved for family members of green card holders and American citizens.⁴

If the person meets the above requirements for a green card, there are two procedures available for applying. One is to obtain a visa at the United States consulate in his or her home

² Immigration and Nationality Act of 1952, 8 U.S.C.S. § 1101-537.

³ *See generally* INA §§ 201-203. *See also*, INA § 212(a). Additionally, the Act lays out several temporary visa categories (including tourists, students, and workers). *See*, INA § 101(a)(15). Like with the categories leading to LPR status, those seeking a temporary visa must meet the qualifications of a particular category and cannot fit within the “inadmissibility” grounds. In some cases, there are numerical limitations on the number of temporary visas available.

⁴ *See generally*, INA § 201 Worldwide Level of Immigration and INA § 203 Allocation of Immigrant Visas

country. The other, available to certain noncitizens who are already present in the United States, is an adjustment of status, whereby the immigration paperwork is approved inside of the United States. Adjustment of status obviates the applicant's need to fly overseas, obtain a visa from an American consulate, and return.

The three and ten-year bars were created by Congress in 1996.⁵ They apply to persons who seek admission as a green card holder after accumulating 180 days or more of unlawful presence.⁶ The consequences of accumulating more than 180 days of unlawful presence can be a three or ten-year bar to admission into the United States depending on the number of days of unlawful presence accumulated.⁷ Importantly, the unlawful presence bars are triggered only by a departure. Thus, if a person is able to adjust status in the United States and avoid a departure, the bars do not apply. How and whether unlawful presence is triggered and accumulated is complex and guided by the statute and reams of guidance by the United States Citizenship and Immigration Services.⁸ More than 15 years after the enactment of the 1996 law there are still no binding regulations interpreting unlawful presence.

The three and ten-year bars create a procedural catch-22 for many people who are in the United States and who meet all the legal requirements for LPR status. Specifically, the INA says

⁵ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Division C, 110 Stat. 3009 (enacted September 30, 1996).

⁶ *See e.g.*, INA § 212(a)(9)(B) (ii) "Construction of unlawful presence For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."

⁷ Beyond the scope of this paper but worth noting is the "permanent" bar. The "permanent" bar applies to a person who attempts to enter the United States without authorization after more than one year of unlawful presence or following a previous removal order. *See* INA § 212(a)(9)(C) Aliens unlawfully present after previous immigration violations.

⁸ *See e.g.*, Donald Neufield, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director, Refugee, Asylum and International Operations Directorate, Pearl Chang, Acting Chief, Office of Policy and Strategy, 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 (May 6, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF

that in order for a person to adjust to a green card status inside the United States, he or she must be admitted or paroled and have maintained a lawful status.⁹ Thus, using the examples in the introduction, people like Maria who entered without inspection or Madthu who overstayed a temporary visa are ineligible to adjust even if they have met the other requirements for a green card. The three and ten-year bars are automatically triggered by forcing people like Maria and Madthu to travel to a consulate and apply for an immigrant visa outside the United States. Although Maria and Madthu may satisfy the substantive requirements for a green card, both of the procedures for applying for that green card are blocked.

Notably, the INA exempts minors, asylum seekers, battered women and children, trafficking victims and certain family members from the three and ten-year bars.¹⁰ Likewise, the statute contains an unlawful presence waiver in the case of noncitizens who are able to show “extreme hardship” to a spouse or parent who is a green card holder or United States citizen.¹¹ Absent from the waiver scheme is hardship to a child who is a lawful permanent resident or United States citizen or to the applicant.¹²

“Extreme hardship” is not defined in the immigration statute or regulations but rather is guided by agency interpretations. While the separation of a family member may sound agonizing enough on its own, the term “extreme hardship” has been interpreted rigidly to include

⁹ There are some exceptions for immediate relatives and other small groups.

¹⁰ INA § 212(a)(9)(B)(iii) Exceptions. The agency takes the position that these exceptions do not apply to people who face the “permanent” bar.

¹¹ See INA § 212(a)(9)(B)(v) “Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.”

¹² These waivers are unavailable for individuals who face the “permanent bar.” Those who face a permanent bar must wait outside the United States for at least 10 years before they can apply for a discretionary waiver from the agency.

something more than “normal” hardship caused by deportation. Some of the factors used by the agency to determine whether an applicant has proven that a qualifying relative will suffer “extreme hardship” are cultural, financial, health and educational factors. In one seminal Board of Immigration Appeals case addressing “extreme hardship,” the agency held:

The factors deemed relevant in determining extreme hardship to a qualifying relative include, but are not limited to, the following: the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.¹³

To illustrate, if Matthew from the example above suffers from a serious medical condition that requires treatment in the United States and regular care from his wife Maria, she might be able to document the “extreme hardship” Matthew would suffer if she were barred from entering the United States as a result of the three and ten-year bars. Like most of the waivers featured in immigration law, the applicant must also prove that he or she qualifies for a waiver as a matter of discretion. In this way, hardship to a family member may be insufficient, especially if the applicant has a background that the agency finds adverse or undesirable.

In 2013, the Department of Homeland Security created a process by which qualifying spouses, children, and parents of U.S. citizens could apply for an “extreme hardship” waiver “provisionally” with United States Citizenship and Immigration Services before leaving the United States.¹⁴ This relatively new process fosters family unity by reducing the period of time

¹³ Matter of Anderson, 16 I&N Dec. 596 (BIA 1978), *available at* <http://www.justice.gov/eoir/vll/intdec/vol22/3380.pdf>; *see also*, Shoba Sivaprasad with Michael Maggio, *Extreme Hardship For*

an applicant has to wait at a consulate outside the United States before obtaining a waiver. Importantly, the provisional waiver program did not change the law nor did it modify the agency's interpretation of unlawful presence or extreme hardship. Rather, it lowered the bureaucratic hurdles by providing more certainty and allowing some of the processing to take place before the individual departs the United States.

Reforming the Three and Ten-Year Bars – Legislative Solutions

Eliminating the three and ten-year bars through legislation is the best option for solving this problem. Eliminating the bars would not provide a formal benefit or independent immigration status to noncitizens in the United States and certainly would not be an amnesty. Rather, eliminating the three and ten-year bars would enable individuals who are legally eligible for a green card under current law to travel to a consulate without fear of triggering a bar, attend a visa interview, and enter the United States with a green card. In some cases, the immigrant applicant could even adjust his or her status without leaving the United States.

Another solution would be for Congress to drop the word “extreme” from the requirements for a waiver or include additional qualifying family members within the waiver scheme. By dropping “extreme” from the waiver requirements, “hardship” would be interpreted more broadly. Likewise by adding the applicant or a child regardless of immigration status to the list of qualifying relatives under the waiver, more individuals would be eligible to apply to waive the three and ten-year bars.

Waivers of Inadmissibility, FLORIDA BAR ASSOCIATION, 21ST ANNUAL IMMIGRATION LAW UPDATE (2000).

¹⁴ Provisional Unlawful Presence Waivers, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last visited June 7, 2014).

Reforming the Three and Ten-Year Bars – Administrative Solutions

Another solution would be for the agency to interpret the term “extreme” less rigidly when adjudicating unlawful presence memos. As described in one unofficial and controversial memo issued by United States Citizenship and Immigration Services:

To increase the number of individuals applying for waivers, and improve their chances of receiving them, CIS [United States Citizenship and Immigration Services] could issue guidance or a regulation specifying a lower evidentiary standard for ‘extreme hardship.’ This would promote family unity, and avoid the significant human and financial costs associated with waiver denial decisions born of an overly rigid standard.¹⁵

A second solution would be for the agency to expand the waiver to the spouses and children of lawful permanent residents, which currently only applies to immediate relatives of United States citizens. Similarly, the waiver program could be extended to people who face a bar to admission because of unlawful presence or other reasons. Currently the program can only be used by individuals whose only bar to admission is unlawful presence.

A third solution would be to enable certain individuals who entered the United States without inspection the ability to travel on advanced parole, essentially granting travel authorization, which would thereafter allow them to apply for adjustment of status if they are otherwise eligible. Notably, the Board of Immigration Appeals has already held that persons who return to the United States on advanced parole after applying for a green card can adjust notwithstanding the three and ten-year bars because they have satisfied the requirements of adjustment as a parolee.¹⁶ Importantly, the individual would still have to meet all the substantive requirements for a green card.

¹⁵ Draft memorandum by United States Citizenship and Immigration Services on Administrative Alternatives to Comprehensive Immigration Reform (undated) (on file with author) .

¹⁶ *Matter of Arrabally and Yerrabelly*, 25 I&N DEC. 771 (BIA 2012), *available at* [http://www.justice.gov/eoir/vll/intdec/vol25/3748%20\(final\).pdf](http://www.justice.gov/eoir/vll/intdec/vol25/3748%20(final).pdf)

Finally, the agency can exercise its prosecutorial discretion by providing parole in place to certain individuals so they can adjust to a green card status in the United States without having to travel to a consulate and face the bars.¹⁷ As a reminder, adjustment is available only to those who have been paroled or admitted so any person who enters without inspection (EWIs) is ineligible to adjust unless they are granted parole in place. One paroled, such individuals would have to remain in the United States in order to adjust status. To illustrate, DHS could determine that certain immediate relatives of United States citizens such as Maria in the example above should be granted parole in place and thereafter the ability to apply for a green card without leaving the United States. This would be less costly than the advanced parole option above because it would not require the individual to travel outside the United States and return on a separate document. Importantly, parole in place does not function as a separate immigration benefit nor does it make the requirements for a green card any less rigorous. Instead, parole in place functions as a form of prosecutorial discretion by enabling the agency to act in its discretion to protect people with strong family ties from separation or deportation.¹⁸

Importantly, none of the administrative solutions outlined above would require a change to the immigration statute but rather could take place through a variety of administrative tools such as rulemaking or the creation of a guidance document. These options are intriguing, consistent with the current immigration statutes, and aimed at keeping families together.

¹⁷ See INA § 212(d)(5)(A), which expressly grants discretion to parole “any alien applying for admission to the United States.” See also, Margaret Stock, Parole in Place: What it is and what it isn’t, The Hill, Congress Blog (Dec. 19, 2013, 3:00pm), <http://thehill.com/blogs/congress-blog/homeland-security/193560-parole-in-place-what-it-is-and-what-it-isnt>.

¹⁸ See e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONNECTICUT PUB. INT. L. J. 243 (2010) (reprinted in IMMIGR. & NAT’LTY L. REV., William S. Hein & Co.)

Conclusion

The three and ten-year unlawful-presence bars are arbitrary or at the very least unrelated to whether the individuals are legally eligible for a green card. Exclusionary rules should be applied to individuals who do not qualify for a formal benefit or relief from removal, or those who constitute the agency's highest enforcement priorities. The current three and ten-year bars do neither. Instead, they create unnecessary hurdles for would-be green card holders and others that impede family reunification goals.