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SUPPLEMENTARY INFORMATION: On November 29, 1990, the Immigration Act of 1990, Pub. L. 101–649 (IMMACT 90), was enacted. Section 301 of IMMACT 90 provides for relief from deportation, and the granting of employment authorization, to an eligible immigrant who is the spouse or unmarried child of a legalized alien granted temporary or permanent resident status pursuant to section 210 or 245A of the Immigration and Nationality Act (the Act), or permanent resident status under section 202 of the Immigration Reform and Control Act of 1986 (Cuban/Haitian Adjustment). This new program supersedes the administrative Family Fairness policy which began in November 1987. That policy allowed district directors to exercise the Attorney General's authority to defer deportation proceedings of certain family members of legalized aliens where compelling or humanitarian factors existed. On August 31, 1991, the Immigration and Naturalization Service (Service) published in the Federal Register at 56 FR 42948 a proposed rule to implement the provisions of section 301 of IMMACT 90, as it relates to the Family Unity Program. Subsequently, on February 25, 1992, the Service published in the Federal Register an interim rule at 57 FR 6457–6472 with request for comments. The interim rule as published on February 25, 1992 is adopted as final with amendments to 8 CFR parts 242 and 274a only. This final rule reflects the amendment to section 206 made by the Immigration and Nationality Technical Corrections Act of 1994, Public Law 103–416, § 206, 108 Stat. 4305, 4311–12 (1994). This rule also provides status under § 242.5 for children born to mothers granted status under the Family Unity Program who are authorized to depart and reenter the United States.

Comments

The discussion that follows summarizes the public comments submitted in response to the interim rule and explains the revisions adopted in the final rule.

Residency Since May 5, 1988

The interim rule provided that a qualifying family member would be eligible for Family Unity Program benefits if he or she had been in the United States on May 5, 1988, *and* had resided in the United States since that date. Several commenters asserted that no basis existed for the continuous residency requirement. They did not believe that this requirement had any statutory basis and that it was irrelevant whether an alien actually continued to remain in the United States after May 5, 1988.

Section 301(f) of IMMACT 90 states as follows:

> Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to obtain benefits under this section.

The statute now requires an applicant to have entered the United States before May 5, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90, or as of December 1, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(A), and also prohibits the admission of an alien for the purposes of obtaining Family Unity Program benefits. The Service interprets these two provisions as requiring an applicant for Family Unity Program benefits to have continuously resided in the United States since May 5, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90, or as of December 1, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(A). Further, the purpose of the Family Unity Program is to prevent the separation of families, and to provide a means by which qualifying family members already in the United States in illegal status can eventually apply for permanent resident status. The underlying administrative Family Fairness policy supports this premise. The Service created the Family Fairness policy as a means of precluding the separation of family members by deferring their deportation. The purpose of the policy was to allow family members to reside together in the United States until they could acquire legal status. Whether relating to the Family Fairness policy or the Family Unity Program, once a family member no longer resides with the family, the reason for which the status was granted no longer exists.

Therefore, the Service will retain the continuous residency requirement. In order to determine if the applicant has maintained a continuous residence in the United States since May 5, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(B) or (b)(2)(C) of section 301 of IMMACT 90, or as of December 1, 1988, in the case of a relationship to a legalized alien described in subsection (b)(2)(A), the Service will consider the factors set forth in *Matter of Huang,* 19 I&N 749, 753 (BIA 1988). In *Huang,* the Board of Immigration Appeals enumerated several factors which should be considered in determining whether an alien is returning from a temporary visit abroad, thereby retaining his continuous residency in the United States. These factors include the duration of the alien's absence from the United States; the location of the alien's family ties, the alien's property holdings, and job; and the intention of the alien with respect to both the location of his actual home and the anticipated length of his excursion. *Matter of Quijencio,* 15 I&N 95, 97 (BIA 1974); *Matter of Castro,* 14 I&N Dec. 492 (BIA 1973); *Matter of Montero,* 14 I&N 399, 400 (BIA 1973).

The Service will not interpret ''continuous residence'' as requiring ''continuous physical presence.'' A qualifying family member who meets the requirements of the Family Unity Program will be granted a 2-year period of voluntary departure. Voluntary departure is a form of relief from deportation and is available only to persons already in the United States.

Legalized Aliens/Applications After May 5, 1988

The interim rule provides that an alien who filed a legalization application on or before May 5, 1988, will be treated as having been a legalized alien as of May 5, 1988, for purposes of the Family Unity Program.

Section 301(a) of IMMACT 90 states as follows:

> The Attorney General shall provide that in the case of an alien who is [a qualified immigrant and the spouse or unmarried child of a legalized alien] as of *May 5, 1988* * * *. [Emphasis added]

Several commenters believe that the statute was never intended to exclude family members of legalized aliens who filed after May 5, 1988, from the Family Unity Program. They note that the filing deadline for the Special Agricultural Worker Program did not occur until November 30, 1988. They believe that an alien who filed a *timely* application after May 5, 1988, but before November 30, 1988, should also be treated as a legalized alien for purposes of the Family Unity Program.

Congress has acted to resolve this issue. Section 206(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103–416, 108 Stat. at 4311, amends section 301 of IMMACT 90 to distinguish the legalization program under section 245A of the Act and the Cuban-Haitian adjustment provision in section 202 of