

The topic of this article has been previously touched upon in my columns, directly or not so directly. This time, it was indeed a question from a reader which triggered the need to address this issue more specifically.

Question: "Hi Legal Corner,

I am a devoted fan of CityMasala and I am especially in tuned with the Legal Corner. I have a few questions. I am a US citizen married to an "Undocumented" illegal immigrant with a child. Is there anything that can be done to try and obtain my husband's status here in the USA . My husband has obtained a tax ID number and we have documentation (taxes) proving he has been paying taxes here in the USA for at least 8-10 years. So there is absolutely nothing that can be done?

We have gotten some advise from legal representation and we were advised nothing can

be done so far. We were also told that if we try to do something there is a possibility that a 10 year ban can be placed. So out of fear we don't want to do anything.

Do you have any advice for us?

Thanks," (name withheld for privacy)

Answer:

First of all it is important to determine exactly what you meant by using the term "undocumented" illegal immigrant. The term is sometimes confusing as it is used interchangeably (by common people), it is important that we ensure we are referring to the similar meaning.

Some people use the term undocumented alien to refer to people who initially entered the U.S. legally but later failed to maintain status and as such have been acquiring unlawful presence ever since. On the other hand, the term is used by some others to refer to those individuals who entered U.S illegally i.e. sneaked in through the border without getting inspected. In other words their entry was neither legal nor fraudulent they just crossed the border without having being inspected by the Custom Border Patrol.

If your husband had made his initial entry in the U.S. legally but has just stayed on beyond his authorized stay then he is most certainly eligible for adjusting his status while staying in the U.S. The process of adjustment of status, which will also require filing of the immediate relative petition simultaneously as part of the process, should not take more than 4-5 months of time from the date of filing.

On the other hand, if your husband falls in the latter category and he sneaked in through the border without getting inspected at all then, yes, you do have a problem. Current law does not have any relief available for people who entered without inspection, irrespective of the fact that they may have a U.S citizen spouse, children or other strong ties in the U.S. The only EXCEPTION to this general rule is those people who fall under the protection of 245(i).

In such a situation even if you, being an immediate relative, file a petition for him (based on which he will seek adjustment) he will not be allowed to adjust his status while in the U.S. but will be sent back to his home country to re enter the United States via consular processing. On the other hand, the minute he leaves the United States he will be subject to a bar on re entry for 10 year. However, if he is a beneficiary of any petition filed for him prior to April 30, 2001, he does not have to go through all of this and he may be able to adjust while living in the U.S.

If your husband is someone who entered without inspection, and does not qualify for 245 (i) benefit, then he can acquire permanent residency through consular processing not adjustment.

Consular processing, however, will not be easy as he will be facing the bar on re entry. The only way for him to overcome the bar will be though a Hardship Waiver. Hardship waiver is something which you as his spouse will have to file with the U.S. consulate in his home country. You will need to identify all the reasons showing extreme hardship on you and your children if your husband is not allowed to return. Whether the waiver is granted or not will depend upon how strong a case you have presented and what is the extent of your hardship.

If I knew additional/specific details about your situation, I would have been able to go in specific details in terms of what to do and how to strategize your husband's case. Nevertheless, with the limited information, the above details should be able to address the basic issues present in your husband's case.

Ms. Syed is a practicing attorney with Perez and Associates, specializing in immigration law. Please send your questions concerning immigration issues to legal@citymasala.com

IMMIGRATION