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Administrative Relief for Longtime Residents

Making Relief for Family Caregivers More Accessible

As part of a comprehensive "administrative relief" plan, the Biden administration must explore all tools to protect long-settled individuals. This includes making relief more accessible to individuals with significant caregiver responsibilities for their American children and spouses, but who face uncertain futures due to an inability to access existing legal pathways. Under our laws, certain undocumented individuals who have lived in the United States for 10 years, have passed criminal and other background checks, and whose removal from the country would cause exceptional and extremely unusual hardship to an American (or green card holding) family member may request cancellation of their removal before an immigration judge. Applicants for this form of relief are eligible for work authorization under longstanding regulations and can be granted relief and provided a green card once a number becomes available.

However, because individuals can only receive this relief through an immigration judge at the end of removal proceedings, the reality is that many potential candidates with strong cases – including family caregivers – effectively lack access to this crucial form of relief. The administration should implement changes to the current process to allow individuals to initiate claims with USCIS, which would make this form of relief more accessible by reducing fear and other existing barriers. Under this proposal, USCIS would conduct a preliminary review of the case to determine if certain eligibility requirements are met before ultimately referring the case to the immigration courts; however, importantly, the ultimate decision would still rest with an immigration judge, as mandated by current rules. Letters from both House and Senate leaders, as well as the American Psychological Association and Children's Defense Fund, have called on the administration to implement this form of relief.

1 What is Non-LPR Cancellation of Removal & How Does it Help Family Caregivers?

Under our laws, some undocumented individuals who find themselves in removal proceedings may already be able to "cancel" their removal if they have been in the U.S. for 10 years, if their removal would cause exceptional and extremely unusual hardship to a qualifying family member, and if they meet other eligibility requirements. This is sometimes informally called "ley de los diez años" in Hispanic communities. Although there are various ways in which the required ten years of continuous physical presence can be disrupted for purposes of this form of relief, in general, non-LPR cancellation of removal may be a natural fit for many long-settled individuals caring for children and spouses with acute needs because, on average, many have been physically present in the United States for well over 10 years. Relief under this provision means approved applicants will receive green cards, subject to an annual cap of 4,000. Applicants may apply for work permits while their cases are heard.

2 Why is the Family Caregivers Rule Proposal Needed?

Under the law individuals may only seek this relief when they are already in front of an immigration judge and the government is actively pursuing their removal. Many undocumented individuals, including DACA recipients, have long been considered such low enforcement priorities that the government rarely puts them into removal proceedings. The government may even decide not to initiate removal proceedings precisely because a person has U.S. citizen or LPR family members who depend upon them and who would experience particular hardship if the person was removed. As a result, the very facts that could make certain long-time undocumented residents strong candidates for cancellation of removal and a green card prevent them from being placed into removal proceedings where they would be able to request this form of relief. Because of this, such individuals unnecessarily remain undocumented for longer periods of time.

Recognizing this counterintuitive and counterproductive situation, some individuals who are not already in removal proceedings have undertaken the highly risky step – at times following poor advice from immigration practitioners – of filing asylum claims in the hopes of being referred to immigration court so that they can apply for this form of relief. This is a waste of USCIS resources, it distorts the available data on asylum adjudications, and it places applicants at risk of losing their ability to obtain cancellation of removal if the asylum claim is deemed to have been frivolous.

To address this, the U.S. Department of Homeland Security (DHS) and the U.S. Department of Justice's Executive Office of Immigration Review (EOIR) should work together on a joint regulation to facilitate access to the existing process. The regulation would allow potential applicants to request that USCIS review their non-LPR cancellation of removal claims before a decision is made regarding whether to place the applicant into removal proceedings and determine whether the applicant is eligible and potentially deserving of the relief. Moreover, if USCIS determines that the applicant meets certain threshold requirements for this form of relief, the agency would issue a Notice to Appear initiating the removal process and DHS would file a statement based upon USCIS's review that it would not oppose relief in the case, absent significant new circumstances. If USCIS determines that the individual does not meet the threshold requirement for relief, it would proceed consistent with its Notice To Appear guidance.

3 How does Non-LPR Cancellation of Removal Help Family Caregivers?

This proposal should be seen as part of a broader bundle of policies to protect long-term residents – in this case family caregivers – and should be pursued in tandem with solutions that allow the spouses of American citizens to apply for work permits and those to streamline access to work visas for those in certain occupations. This is largely because non-LPR cancellation will only be available to those with qualifying family relationships – a U.S. citizen or LPR spouse, child, or parent – and evidence establishing that exceptional and extremely unusual hardship will be suffered by that family member if removal of the applicant occurs, along with other requirements like showing good moral character, 10 years continuous physical presence, and passing criminal and security background checks. This proposal could enable thousands of the estimated 1.6 million undocumented parents without protection, who have resided in the U.S. for ten years or more and have a U.S. citizen minor child, to seek relief.

4 Isn't this Form of Relief Capped at a Very Low Number?

Congress has capped the number of non-LPR cancellation grants at 4,000 each year, which means that many individuals would not receive an official grant of relief and become an LPR for some time. While waiting, however, applicants are nonetheless able to apply for work permits under the applicable regulations so long as they do not become removable for a different reason. Once a number is available for them, an immigration judge would confirm that the individual remains eligible for non-LPR cancellation of removal and grant the application.

5 Wouldn't Individuals be Exposing Themselves to Deportation Risk?

Because individuals are only statutorily able to request non-LPR cancellation while they are in removal proceedings, this proposal does involve some risk of exposure to immigration enforcement. However, the proposal is designed to minimize that risk in several different ways while still expanding access to permanent protection from removal for individuals who would otherwise be unable to access such relief. First, because the strength of cancellation claims will be evaluated by USCIS before an individual is placed into removal proceedings, only cases that appear to be eligible for and potentially deserving of cancellation will be placed into the removal process. This entails less risk than filing meritless and potentially frivolous asylum applications with USCIS or otherwise turning oneself in to ICE in the hopes of being placed into proceedings. Second, for individuals who are not found by USCIS to be eligible for or potentially deserving of relief, USCIS only would initiate removal proceedings in accordance with the requirements set forth in the USCIS Notice To Appear guidance which contains important safeguards. Lastly, to promote efficiency and through an exercise of prosecutorial discretion, the mechanism being proposed would have DHS indicate in immigration court its "non-opposition" to the USCIS-supported request for cancellation of removal.