Family-Based Immigration Outline (5/13/16)

I. Eligible for a Family-Based Petition?

a. Qualify as an immediate relative?
   i. Spouses of U.S. citizens
   ii. Unmarried minor children of U.S. citizens
   iii. Parents of U.S. citizens age 21 or older.
      1. If qualify as an immediate relative, then there is no waiting period between approval of the family-based petition (I-130) and eligibility to adjust status or consular process

b. Qualify under the family preference system?
   i. Adult children (unmarried and married) of U.S. citizens
   ii. Brothers and sisters of adult U.S. citizens
   iii. Spouses and unmarried children of LPRs
      1. See visa bulletin at *https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.*

c. Qualify for a fiancé visa?
   i. Have a fiancé in the U.S. who is a U.S. citizen
   ii. Have met the fiancé in person in the last two years (or can show exception)
   iii. Intend to marry within 90 days of entering the U.S.?

d. **Always Ask – Please list all relatives with any form of status in the U.S.?**

II. Family-Based Processing Options

a. Adjustment of Status
b. Consular Processing
c. Fiancé Visa

III. Eligible for Adjustment of Status

a. Entered the U.S. with inspection?
   i. *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)
      1. *Held*: For purposes of establishing eligibility for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) (2006), an alien seeking to show that he or she has been "admitted" to the United States pursuant to section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A) (2006), need only prove **procedural regularity** in his or her entry, which does not require the alien to be questioned by immigration authorities or be admitted in a particular status.
      2. Can include "waive-throughs"

3. Can include entering using a fake passport

ii. Proof of procedurally regular entry
    1. Ideally, will have:
        a. Stamp in passport
        b. Copy of visa
        c. I-94 (I-94's now available online at *https://i94.cbp.dhs.gov/I94*)
    2. What if client does not have these? Secondary evidence, such as:
        a. Affidavits of support
        b. Testimony of relatives (if in immigration court)

iii. Immigration Court v. Affirmative Application
    1. Immigration Court
        a. Secondary evidence usually worth a try
        b. Consider whether witnesses will be safe testifying (human trafficking issue)
            a. My Case
    2. Affirmative Applications
        a. Need to evaluate carefully likelihood of success if relying on secondary evidence
        b. **Client needs to be informed of risks (i.e. ending up in immigration court) so he or she can evaluate risks v. rewards**
            a. Group Question: Has anyone had experience with trying to prove eligibility for AOS in the affirmative context based on secondary evidence?

iv. **Always Ask: How *exactly* did you enter?**
    a. Client saying "entered illegally" is not enough to rule out adjustment of status possibility. For example, client could have used a fake passport to enter and the client would perceive this as illegal entry but it could still make him/her eligible for AOS.

b. If no procedurally regular entry, does INA § 245(i) apply?
    i. Must be beneficiary of approved petition filed on or before April 30, 2001
        1. Relevant petitions includes I-130s, I-360s, and several others
    ii. Petition must have been approvable when filed
    iii. Must pay $1,000 penalty fee
    iv. **Always Ask – Has anyone ever filed an immigration petition for you?**

c. If preference system applicant (not immediate relative), is person disqualified under INA § 245(c)
    i. **Worked without authorization (Ask)**
    ii. **Did not maintain lawful status (Ask)**
    iii. Various other disqualifications, such as aliens admitted in transit without a visa

1. **Ask: Is petitioner eligible for naturalization?** If so, then potentially the beneficiary could become an immediate relative and could be able to escape the AOS bars in INA § 245(c)

d. **Did person ever enter on a J visa? (Ask)**
   i. If so, could be subject to foreign residence requirement under INA § 212(e)
      1. Must be present in country of nationality or last residence for two years before eligible for AOS
   ii. Could apply even if person reentered country on a different visa (such as F visa) after coming on the J visa (if the two-year foreign residency requirement was not met)
      1. **My case**
      2. This is because the foreign residency requirement is not triggered for certain non-immigrant visas; is triggered by H and L visas
   iii. **Ask to look at person's J visa in passport**
      1. Usually will say on J visa whether it is subject to INA § 212(e)
      2. If it doesn't say, can request an Advisory Opinion from the State Dept.
      3. **Group Question: Has anyone had any experiences where it wasn't clear whether INA §212(e) applied? Did you request an advisory opinion? Did you proceed in a different way?**

e. Entry on B visa or Visa Waiver Program
   i. Nonimmigrant Intent Problem
   ii. AOS possible but 30/60 rule applies
   iii. Required to be an immediate relative if adjusting under VWP
   iv. **Never advise person to come to U.S. on B visa or Visa Waiver and then adjust**
      1. People want you to advise them to do this, since they perceive it as being faster
      2. **Group Question: What do attorneys do in the case of a person who is already here on a B visa and then wants to adjust? What sort of questions do you ask?**
   v. Fiancé visa as safer alternative for person who wants to come to the U.S. on nonimmigrant visa to get married and then adjust

IV. Helping Client Evaluate Different Options

a. Adjustment of Status v. Consular Processing
   i. AOS usually preferable, since client gets to remain with family in the U.S.
   ii. However, in some circumstances consular processing could be safer. For instance, if someone is here on a tourist visa or under the visa waiver program, then they could avoid allegations of fraud by consular processing
   iii. **Group Question: Can anyone think of any other reasons why consular processing might be preferable to adjustment of status in a particular case?**

b. Fiancé visa v. getting married first (then consular processing)
    i. Fiancé visa can often get person here faster
        1. You are essentially skipping the NVC step
    ii. Fiancé visa will likely be more expensive
        1. Will require $1,070 AOS fee
        2. Attorney fees will generally be greater, as two steps of representation required
    iii. **Where does client want to get married? (Ask)**
        1. If in the U.S., the fiancé visa could be a good option
    iv. **Does client want a big, expensive wedding? (Ask)**
        1. If so, then fiancé visa might be difficult, as date of wedding could be difficult to plan (processing time of I-129F and at consulate can vary)
        2. Many of my fiancé visa clients have a "courtroom" wedding when they come on the fiancé visa, and then plan for a bigger celebration later

c. Dual-Intent Visa and then Adjustment of Status
    i. Dual-intent doctrine applies to H, L, O and P visas. If client has a job opportunity in a specialty occupation and they have a spouse or fiancée in the U.S., they could come initially on an H1-B visa and then potentially apply for adjustment of status at a later date.
    ii. **Ask: Is client looking to work in the U.S.? What does client do for work?**

d. K-3 Visas
    i. K-3 visa is for persons who have pending I-130. If the K-3 petition is approved before the I-130, it allows the beneficiary to enter the U.S. for the purpose of adjusting status. Meant to promote family unity when I-130's had really long processing times.
    ii. My experience with K-3 visas is that they are not worth filing. The problem is that if the person is scheduled for an interview on the K-3 and then the I-130 is approved, the consulate will no longer issue the K-3.
    iii. **Group Question: Has anyone had any more positive experiences with K-3 visas?**

e. VAWA Adjustment
    i. Could be eligible if you are the spouse of a USC or LPR, the parent of a USC, or child of a USC or LPR
    ii. Need to show abuse
    iii. In the consultation context, attorney could be made aware that VAWA could be an option if petitioner does not come to consult, indicating possible lack of willingness to petition (although this is not always the case)
        1. **Ask in this case – Has there been any abuse?**
            a. **My case**

f. Alternative Routes to Adjustment of Status
    i. U visa and T visa
        1. Usually require physical presence in U.S. with T or U visa for 3 years
    ii. Cuban Adjustment Act or HRIFA
        1. CAA requires that the applicant is a Cuban citizen, has been admitted or paroled, and has been in the U.S. for a year
        2. HRIFA requires that a Haitian applicant have been physically present in the U.S. since 1995
    iii. Asylum
        1. Can apply for AOS one year after grant of asylum status
    iv. Others

g. Derivatives
    i. Generally include minor, unmarried children and spouses of the beneficiary
    ii. Determine if derivative will immigrant at same time as principle beneficiary or will "follow to join"
    iii. **Ask: Does the beneficiary have a minor, unmarried child or a spouse who wants to immigrate with him or her?**

V. Waivers

a. Inadmissibility – Important to determine inadmissibility issues as soon as possible (**at the consultation if possible**)
    i. The reason is that if certain non-waivable grounds of inadmissibility apply, client may not want to go forward with case at all
        1. Example of false claim of USC on I-9 - May not always to be able to determine this at the consult because may need to request I-9 from employer; critical because false claim of USC is not waivable
            a. **Ask – Have you made a false claim of USC?**
            b. **Ask – Have you ever filled out an immigration form for your employer or a past employer?**
        2. Other biggest non-waivable inadmissibility issue that I see is the permanent bar (INA § 212(a)(9)(C))
            a. **Questions to Ask**
                a. Were you ever deported?
                b. Did you stay in the U.S. without status for more than a year?
                c. Did you enter without inspection after doing one of these things?
                d. Alternatively, have potential client list entries and exits in questionnaire in order for attorney to make permanent bar determination
        3. It is in the interest of both attorney and client to resolve these issues as soon as possible – client does not want to pay for work that will not do

him/her any good; attorney does not want to be put in position of having to issue client refund after performing work

b. What is the best way to determine potential inadmissibility issues at consult?
    i. Written questionnaires?
        1. Advantages – Can be fairly comprehensive
        2. Disadvantages – Client does not always read carefully or understand
    ii. In-person questioning by attorney?
        1. Advantages – Easier to determine if client understands questions
        2. Disadvantages – Difficult to be as comprehensive

    iii. My recommendation
        1. Combination of the two
            a. **My Method** – In person questioning for primary issues followed by online questionnaire for secondary issues
            b. **Group Question – How do other attorneys determine at consults whether inadmissibility grounds apply?**

c. Determining eligibility for waiver
    i. I-601A
        1. Have qualifying relative who is a USC spouse or parent (LPRs are not qualifying relatives at the moment)
        2. Must show extreme hardship
        3. Only can waive unlawful presence
            a. **Items to determine at consult**
                a. Is there a qualifying relative?
                b. Does three or ten-year bar apply?
                    1. Confirm that permanent bar does not apply
                c. Confirm that **no other ground of inadmissibility applies**
            b. **Talk about state-side processing at consult**
                a. Timelines
                b. Benefits

    ii. I-601
        1. Have qualifying relative
            a. Who a qualifying relative is depends on the ground of inadmissibility – for criminal grounds, includes USC or LPR spouse, son, daughter, parent, or fiancée (K visa petitioner)
        2. Must show extreme hardship for criminal grounds
        3. **To Discuss at Consult in Consular Processing Case**
            a. Client needs to understand that the processing of an I-601 waiver (as opposed to an I-601A waiver) will require additional time spent abroad

1. This is likely a bigger deal for beneficiaries who are in the U.S. than for beneficiaries who are abroad – **could be a deal breaker as to whether the client wants to proceed at all**

iii. I-212

1. Can waive certain inadmissibility grounds due to prior deportation order
    a. **Ask - Has the beneficiary ever been order removed?**
2. Does not require a showing of extreme hardship to a qualifying relative – instead USCIS looks at positive and negative factor such as the reason the applicant was deported, the applicant's moral character, etc.

VI. Questions and Group Discussion