

Oops I'm Late! - Establishing Extraordinary Circumstances and Reasons for Forgiveness

I understand that the individual in these types of case now faces severe penalties in the form of a possible three- or ten-year bar from re-entry into the United States under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), codified at INA § 212(a)(9)(B).

Arises often as a result of an unpublished provision of the Inspector's manual which requires limiting of the I-94 to date of passport validity even if petition has longer period of validity.

Query whether Congress intended to make such individuals subject to the three- and ten-year bars for what is often a minor deviation from a history of law compliance because of an unintentional mistake should not produce such dire consequences for an innocent alien..

IIRIRA's provisions penalizing nonimmigrant workers who overstay their period of authorized stay were designed to punish intentional visa overstayers, not innocent individuals who overstay and accumulate periods of unlawful presence due to unintentional and minor oversights beyond their control.

IIRIRA's bar provisions were enacted to promote the national security goals of the United States and to encourage aliens to refrain from intentional immigration status violations. If applied to innocent individuals in the context of minor and unintentional mistakes, IIRIRA would undermine rather than support the efforts of individuals who consistently try to abide by U.S. immigration laws.

This concept is fully supported by 8 C.F.R. § 214.1(c)(4), which gives innocent aliens and the Service an escape route out of the harsh consequences that may result from IIRIRA's non-discerning provisions.

The Service bases its denial of Ms. Poliakova's extension application on USCIS regulations at 8 C.F.R. §214.1(c)(4). However, the following subsection of this regulation, 8 C.F.R. §214.1(c)(4)(i) is also relevant. The regulation in its entirety provides:

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application was filed, ***except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application***, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service find the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her Nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.¹

The provisions of 8 C.F.R. § 214.1(c)(4) give the USCIS discretionary authority to approve late applications for extension of stay when “[t]he delay was due to extraordinary circumstances beyond the control of the applicant **or** the petitioner” and the delay was justified under the circumstances.

Unfortunately, the regulation does not define “extraordinary circumstances,” and there has been extremely limited guidance regarding specific situations to which § 214.1(c)(4) should apply.

The USCIS should be willing to consider the relevant facts, find extraordinary circumstances, and view each case in a humanitarian light. The severe consequences of IIRIRA oftentimes force aliens to remain outside the United States for extended periods of time, creating extreme hardship for themselves, their families and their U.S. employers.

Expert opinion: In my 20 years of immigration practice I have found that the USCIS (and its predecessor legacy INS) has regularly exercised its discretion favorably and fairly. In some instances the facts were far less compelling than in the present case.

In my expert opinion, § 214.1(c)(4) provides a remedy against the unfair blanket application of IIRIRA to innocent individuals who satisfy its provisions. The instant case warrants this discretionary relief.

Strategies: MTR or New Petition

- The extraordinary circumstances that led alien’s single act of unwitting non-compliance with U.S. immigration laws (the unintentional missing of her I-94 extension deadline);
- The prompt action taken by everyone concerned to rectify the matter upon discovery of the lapsed deadline with a very quick submission of a belated extension application

¹ Emphasis added.

so that the delay was commensurate with the circumstances; and

- In the exercise of your discretion, the many positive equities in her case that far outweigh this single, truly aberrant instance of a lapsed deadline and the extreme hardship that she, her husband, children and her will suffer if this motion is denied;

Provide supporting letters showing history of compliance, good character and the USCIS' power to exercise a compassionate discretion

Under Doris Meissner, Memorandum to Regional Directors, et al., (HQOPP 50/4), Exercising Prosecutorial Discretion, November 17, 2000.

Discretion applies not only to the decision to issue, serve or file a Notice to Appear in removal proceedings, but extends to other discretionary enforcement decisions.

While the instant case involves a benefit decision rather than an enforcement decision, former INS Commissioner Doris Meissner has indicated in a Memorandum to Regional Directors that "benefit decisions involve significant discretion."

This memorandum lists several factors to be considered in exercising discretion including, among others, immigration status and history, humanitarian concerns, and the effect of USCIS action on future admissibility.

This list establishes a useful point of reference for consideration of the facts in the present motion, facts that point to extraordinary circumstances beyond the control of the applicant that are of less concern in the administration of the law than an enforcement or removal situation involving a willful lawbreaker.

"The statutory scheme defining and delimiting the rights of aliens is exceedingly complex. Courts and commentators have stated that the Immigration and Nationality Act (the "INA") resembles 'King Mino's labyrinth in ancient Crete,' *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d Cir. 1977), and is 'second only to the Internal Revenue Code in complexity' *Castro-O'Ryan v. I.N.S.*, 821 F.2d 1415, 1419 (9th Cir. 1987) (quoting E. Hull, Without

Justice for All 107 (1985)". *Chan v. Reno*, 95 Civ. 2586, (S. Dist. N.Y., LEXIS 3016, 1997).²

Consider first letter to ombudsman;
Consider mission statement of CIS

1. November 17, 2000 Commissioner's Policy Memorandum on Prosecutorial Discretion, and an April 21, 1980 memorandum issued by then Southern Regional Commissioner, Durward E. Powell, Jr., wisely stating that:
 - a) "The [government] decision maker in adjudicating applications and petitions should not attitudinally approach the process, either consciously or unconsciously, in an adversary process or looking for a reason to deny"; and
 - b) "[Adjudicators] with [their] broad knowledge of law and policy, [should] approach [applications and petitions] attitudinally, in a friendly professional manner, looking for a way to approve them".

² *See also*, *Castro-O'Ryan v. United States Dep't of Immigration & Naturalization*, No. 86-7502, 847 F.2d 1307 (9th Circuit, 1987).