PRACTICE POINTER:

I-539s for U nonimmigrants and Passport Requirements

ASISTA has received a number of reports about a new trend for RFEs and NOIDs for U-based I-539 Applications to Extend Nonimmigrant Status (hereinafter "I-539s"). Practitioners report that these RFEs and NOIDs ask for proof that the applicant had a valid passport at the time of filing the I-539, and many of them request an I-192 waiver of inadmissibility to cure the lack of passport.

USCIS's reasoning in these RFEs and NOIDs varies, but in general, they apply the criteria for general I-539s requiring that the applicant be admissible and have a valid passport at the time of filing[1] to U-based I-539s. ASISTA disagrees with this reasoning and is considering strategies for administrative advocacy on this issue, but in the meantime, we suggest the following tips:

FOR ALL U VISA CLIENTS:

1. Advise all U nonimmigrant status/visa clients in writing to maintain a valid passport both while their I-918 and I-192 are pending as well as during the entire 4-year period of admission in U nonimmigrant status and six months after the expiration of their U status, in accordance with INA 212(a)(7)(B)(i)(I).

2. If the U petitioner does not have a passport at the time of filing the I-918 or cannot renew their expired passport while the I-918 is pending, request a waiver of INA 212(a)(7)(B)(i)(I) on Form I-192. If that ground is waived at the time of the I-918/I-192 approval, then it should be not be an issue for the subsequently filed I-539.

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[1] See 8 CFR 214.1(a)(3)(i) ("Every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States, must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. . . The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter . . . ")

BEFORE FILING THE I-539:

3. If the client is filing Form I-539 and does not have a valid passport and cannot obtain one, file a statement from the client explaining why s/he does not have a passport. In your cover letter, explain that your client's explanation satisfies the form instructions for the I-539 ("If a required passport is not valid when you file Form I-539, submit an explanation with your application"). Also, cite 8 CFR 103.2(a)(1) ("The form's instructions are hereby incorporated into the regulations requiring its submission") to explain that the form instructions are regulations in themselves and provide that the remedy for lacking a passport at the time of application is submitting an explanation.

IN RESPONSE TO RFE OR NOID:

4. If you have already received an RFE or NOID on this issue, explain that the passport and admissibility requirements for general I-539s at 8 CFR 214.1(a)(3)(i) do not apply to U-based I-539s. This regulation only permits the application of the inadmissibility waiver under INA 212(d)(3), the general nonimmigrant waiver provision. However, Congress created a special waiver provision under INA 212(d)(14) for U nonimmigrants, as well as a statutory right to extension of status under INA 214(p)(6). USCIS's application of 8 CFR 214.1(a)(3)(i) against U nonimmigrants would result in their ineligibility for extension of status because almost all U nonimmigrant waivers are granted under INA(d)(14). This result would be directly contrary to Congressional intent and to the statutory right of U nonimmigrants to extend their stay.

If you have further questions, please submit a Technical Assistance request to ASISTA for individual assistance.