Law Watch

Mental Competence in the Context of Immigration Proceedings

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The immigration laws of the United States have many underlying assumptions based upon the cultural and historic values of the various governments who have formed them. Some of those assumptions are relatively obvious—bigamous marriages are not legal for immigration purposes even if they are legal in the country where they took place. Some assumptions are so basic that it is hard to spot them. One of those underlying but difficult assumptions is in the mental competency of the participants. As with the majority of underlying assumptions, no one pays attention to them until there is a problem. How mental incompetence is handled in different situations shows much about how little mental problems are considered by the law and by those who enforce them.

One of the basic processes under the immigration laws is the visa petition filed for a relative. There must be a petitioner who is a U.S. citizen or lawful permanent resident. That person files a petition to have a relative (parent, spouse, child, or sibling) enter the United States on a permanent basis—in other words, as a lawful permanent resident. Once a petition is approved by the Bureau of Citizenship and Immigration Services (BCIS), there may be a wait of anywhere from a few months to many years before the paperwork is completed, the quota number is reached, and the foreign relative can be admitted as a lawful permanent resident. At any point before the foreign relative is admitted, the petitioner has the power to revoke the petition. The petitioner does not have to give a reason to the government. The petitioner merely needs to say that he or she no longer wants the foreign relative to come. That power over the foreign relative ends when the foreign relative is admitted to the United States, but not before. Similarly, if the petitioner dies before the foreign relative is admitted, the petition dies and the foreign relative cannot normally continue immigrating to this country. There are exceptions for some individuals such as widows or widowers of U.S. citizens, battered spouses, and children of U.S. citizens and lawful permanent residents and others, but the topic is beyond the scope of this paper.

A concept implied by the law is that the petitioner must want the foreign relative to come to the United States at the time the foreign relative goes through his or her final interview with the immigration authorities and is admitted to this country. Given the long waits between petition approval and this final interview, much can happen. In addition to the obvious sorrow of a death, accidents and illness can affect the mental competency of either the petitioner or the foreign relative. Previous papers have dealt with the issues confronting foreign relatives with mental or physical disabilities. What happens when the petitioner can no longer speak for himself or herself? The immigration laws and regulations give no clear guidance. Instead, local and regional offices as well as various Attorneys General and other high officials issue guidance from time to time, some of it official, but often unofficial and issued on a case-by-case basis.

Generally, if a petitioner has an official court-appointed guardian, that person may speak on the petitioner’s behalf. Certainly, if the guardian can produce a will or other document showing the intent of the petitioner to have the foreign relative come to the United States, that is extremely helpful. Because the petitioner may not be able to attend an immigration interview, the guardian should also present evidence that the petitioner is alive. Remember, the petition dies with the petitioner in most cases. The guardian should also be prepared with the name, address, and telephone number of the nursing home or other care facility so that the immigration official can call and confirm the information presented on the petition.
If the petitioner appears competent enough to appear for an interview, the immigration officer must determine if the petitioner still desires the foreign relative to become a lawful permanent resident. Where the petitioner suffers from a hidden or periodic mental disability such as may be induced by drugs, unmedicated or undermedicated schizophrenia, panic attacks, or other causes, the interview may be problematic. If the petitioner states that he or she no longer wants the foreign relative to immigrate then the immigration officer must deny immigration to the foreign relative. Generally, the immigration officer will ask to speak with the petitioner without the foreign relative being present. Generally, the immigration officer will request a second officer to be present as a witness and ask the petitioner to sign a formal request to withdraw the petition. If the petitioner returns the next day and states that he or she wants to continue with the petition, it is too late. The petitioner would need to refile the petition and wait the additional months or years the category demands.

If the petitioner makes inconsistent or contradictory statements about his or her intentions, the immigration officer has a problem. Generally, the officer must find that the petitioner wants the foreign relative to come to the United States, meaning that the burden is on the petitioner to show that this is his or her intention. Inconsistent statements do not support a finding of this positive intent. In most cases, the immigration officer can be convinced that a postmortem of the interview is in order. Letters from doctors or mental health professionals outlining the illness or disability of the petitioner are useful to explain the inconsistent behavior. However, the immigration officer must be convinced of the petitioner’s intent. If the petitioner’s problem can be controlled by medications, the immigration officer normally would be willing to accept an explanation and a positive statement from the petitioner.

What if a petitioner withdraws a petition while temporarily incompetent? Is there any possibility of restoring the previously withdrawn petition and thus avoiding a long wait to reimmigrate the foreign relative? Possibly, but it is difficult to do. First, a showing would have to be made that the person was mentally incompetent at the time he or she withdrew the petition. Second, it would have to be shown that the person was now competent and likely to remain so throughout the remainder of the process. Third, the interests of justice require that the incompetent withdrawal of the petition be ignored. While the first two steps are difficult, the last is particularly problematic and depend at least in part upon more general principles put in place by the Attorney General. Presently, Attorney General Ashcroft has applied a rule of strict interpretation on his immigration officers, making it less likely that a formal withdrawal would be overlooked.

Another area where mental capacity can be problematic is in applications for asylum or other extraordinary relief to allow that person to remain in the United States. Asylum applications are normally twofold: a person makes an affirmative application to the Asylum Office and appears for an interview. If the asylum officer does not believe that the person qualifies for asylum, the person is referred to an immigration judge who has complete authority to grant or deny the application on the basis of an independent review of the evidence and testimony. The asylum applicant must show that he or she has a reasonable fear of persecution on account of one of five grounds (the objective element). The law also requires the applicant to show that he or she is afraid of persecution (the subjective element). Most asylum applications rely quite heavily on the testimony of the applicant to support both elements.

When a person does not have the mental capacity to testify, relatives, friends, and others may gather testimony and other evidence to show that the objective element of an asylum application is met. However, the subjective element is much more difficult. Cases in the immigration courts have stated that an individual must at least testify that everything contained in the asylum application is true. As the asylum application asks why a person is afraid and presumably contains an answer from the applicant, the person is confirming that he or she has a subjective fear. Thus, the person must meet minimum competency standards. He or she must understand an oath to tell the truth and answer basic questions asked. If the applicant cannot state that he or she has a subjective fear of returning to his or her home country, technically, an application for asylum cannot be sustained. In this situation, the immigration judges and government attorneys are often willing to look for other humanitarian forms of relief, such as deferred action status, that do not require the testimony of the applicant. Cases may be administratively closed to allow for consideration of such relief. If no other relief is available, the representatives of the applicant must make the argument that the person’s legal guardian may testify on the applicant’s behalf. How successful those arguments would be is difficult to say, but would likely involve substantial court action.