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'Aging out' snarls U.S. resident status

By CATHY WOODRUFF THE ADVOCATE

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For more than five years, Ivan Pavlenko has been building a life in the United States.

He arrived here from Ukraine in 2004 with his mother, who married an Albany man in September of that year, and became part of a new family in America.

He worked an assortment of jobs, including stints with Price Chopper and Huck Finn's Warehouse, while attending Hudson Valley Community College and the State University at New Paltz, graduating with high honors from both colleges. Now, he aspires to a career in international law, is studying Spanish and Arabic and has one law school acceptance already in hand.

Since their arrival in the United States, both Ivan, known to his family as Vanya, and his mother, Tetyana Pavlenko Palmer, have complied with a series of deadlines for submitting paperwork, "biometrics" such as fingerprints, and fees associated with those requirements on the way to their goals of citizenship.

Pavlenko achieved a significant milestone in January 2006, when he received a form known as a Welcome Notice.

"This is to notify you that your application for permanent residence has been approved," it says. "It is with great pleasure that we welcome you to permanent resident status in the United States."

The notification also included a reminder that his residence was "conditional" and noted that he would need to apply for removal of the conditions within two years, which he did.

All seemed to be going well until he checked back with the U.S. Citizenship and Immigration Service in November. His latest resident visa, commonly known as a green card, was about to expire, and he'd still had no response to his application for removal of conditions.

That's when he and his family were stunned to learn that the future Pavlenko was charting with such energy was now in jeopardy. After years of languishing in review status, he was told by CIS staffers in Latham that he is disqualified from the "non-conditional permanent resident" status he has sought for years and could be tapped for deportation to Ukraine, where he no longer has any close family.

Pavlenko's offense? In March 2005, he had the nerve to turn 21 before federal immigration authorities had finished processing his application -- which they still have not done.

"I 'aged out,' using their term," Pavlenko told me. "And because I aged out, I was no longer eligible for permanent residence. I was stunned. My mom was stunned. I said, 'This is legally incorrect.' I said 'How can you punish me for your mistake?'"

At this point, I pause for a disclosure: Pavlenko is the step-son of Times Union Editorial Design Director Tom Palmer. We don't usually write about folks with such close connections to the newspaper, but we are making an exception in this case because it is so rare for immigrants facing legal issues with the U.S. government to go public.

In line with his ambition to study and practice law, a passion that he says is growing with immersion in his own case, Pavlenko is gathering a body of legal briefs, research and recent court decisions related to other families facing the same crisis.

It is unclear just how many foreign step-children are in the same fix, but an attorney with the nonprofit American Immigration Council in Washington, D.C., said she and her colleagues have been surprised at the broad response the organization has received since filing a brief with the U.S. Board of Immigration Appeals in November in a similar case.

Pavlenko is among foreign nationals from many countries who have emigrated to America with so-called K-2 nonimmigrant visas. They are the unmarried children (under age 21) of parents who came here as fiancées or fiancés of American citizens and were issued K-1 visas.

Since marrying Palmer in November 2004, the conditions attached to Tetyana Pavlenko Palmer's permanent residency have been removed, but her son's have not.

Attorney Emily Creighton of the American Immigration Council has heard many similar stories. "This is an issue that catches people off guard all the time," she said.

So far, in several cases heard by the Board of Immigration Appeals and federal courts, the government has persisted in its argument that K-2 children, even if they were under 21 when they came to the United States and met the prescribed deadlines to apply for permanent resident status and removal of conditions, cannot be granted immigrant status if they turned 21 before the agency's review process was finished.

Pavlenko, who now has studied stacks of legal briefs and decisions, can cite, perhaps, a half-dozen legal arguments to support his case, and he created a new blog just last week, ivanforusa.wordpress.com, to document his progress.

This is the bottom line underlying all of his arguments: Ejecting step-children of U.S. citizens and breaking up their families because they -- inevitably -- grew older during the government's glacial process for processing their applications is absurd and unfair.

A spokesman for the Citizenship and Immigration Service declined comment on Ivan Pavlenko's case or others of similar nature.

I am pleased to report that last week a decision from the Tenth Circuit of the U.S. Court of Appeals in the West unexpectedly buoyed spirits for Pavlenko and his family.

In a Colorado case remarkably similar to Pavlenko's, the appellate panel overturned rulings by an immigration judge and the Board of Immigration Appeals, concluding that "a K-2 visa holder who timely applies for an adjustment of status ... must be under 21 when he or she seeks to enter the United States, not when his or her subsequent application for adjustment of status is finally adjudicated."

The court said the immigration officials' contention that a person's status is dependent on the date when the application is finally decided "violates basic principles of common sense and fairness."

That's the best news yet in a string of promising developments, said Pavlenko's attorney, Jill Nagy of the Troy firm Bartle, McGrane, Duffy & Jones.

"The legal position that Immigration has been taking is not tenable, and I believe within a matter of weeks, they are going to change it," she said. "There have been other similar situations lately, and the agency has acted very sensibly."

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