CHAPTER 5

IMMIGRATING THROUGH MARRIAGE

Introduction

The process of immigrating through marriage to a U.S. citizen or lawful permanent resident (LPR) alien has so many special rules and procedures that it merits a separate chapter in this book. For example, the Immigration Marriage Fraud Amendments of 1986 (IMFA) imposed severe restrictions on aliens who obtain or attempt to obtain permanent residence based on marriage to a U.S. citizen or LPR.[1] The most significant change IMFA made was to create a two-year "conditional residence" status for these alien spouses.[2] IMFA also imposed severe penalties on persons found to have entered into a sham, or fraudulent, marriage.[3] A sham marriage is one that the parties enter into not to establish a life together as husband and wife but rather to circumvent immigration laws.[4] IMFA's provisions were successful in making it more difficult to immigrate by way of a fraudulent marriage and less attractive to try. Fortunately, some of the harshest aspects of IMFA were tempered by later provisions of the Immigration Act of 1990.[5]

There are special civil and criminal penalties for the commission of marriage fraud. One civil penalty, for example, imposes an absolute prohibition from future approval of petitions on behalf of aliens who ever attempted or conspired to commit marriage fraud.[6] Aliens who have ever sought admission into the United States or any "other benefit" under the Immigration and Nationality Act (INA) by fraud or by willfully misrepresenting a material fact are inadmissible.[7] LPRs who file second-preference visa petitions within five years of obtaining permanent resident status must satisfy additional requirements if they obtained that status based on a previous marriage.[8] And harsh criminal penalties are imposed on persons who engage in marriage fraud.[9]

Aliens who marry while they are in exclusion, deportation, or removal proceedings must face a tougher standard when seeking adjustment of status.[10] In order to

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[1] Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, §5(b), 100 Stat. 3537, 3543.

[2] INA §216.

[3] INA §204(c).

[4] *Bark v. INS*, 522 F.2d 1200 (9th Cir. 1975).

[5] Pub. L. No. 101-649, 104 Stat. 4978.

[6] INA §204(c).

[7] INA §212(a)(6)(C)(i).

[8] INA §204(a)(2)(A).

[9] 18 USC §1546(a).

[10] INA §204(g).

adjust their status, the parties must establish through "clear and convincing evidence" that the marriage is legitimate.[11] If they cannot meet that burden, their immigrant visa petition will not be adjudicated until the alien spouse has resided outside the United States for two years.

In addition, the Legal Immigration and Family Equity Act (LIFE)[12] provided a form of temporary relief to spouses and unmarried children of LPRs who have been waiting over three years to immigrate. These persons may apply for a "V" visa or V status, which allows them to work and reside in the United States until they are able to obtain LPR status.[13] The LIFE Act also allows spouses who are married to U.S. citizens to enter the United States on a nonimmigrant K-3 visa rather than having to wait abroad for an immigrant visa.[14] These laws will be discussed in this chapter.

Conditional Resident Status

Basic Principles

Most alien spouses who immigrate through marriage to a U.S. citizen, and possibly even some who immigrate based on marriage to an LPR, must first obtain "conditional" permanent resident status before they achieve the "unconditional" rights of other LPRs. This conditional status is imposed on aliens who obtain LPR status based on a marriage that occurred within two years of their (1) entering the United States as a permanent resident, or (2) adjusting to permanent resident status within the United States.[15] Conditional status also is imposed on the alien spouse's children if they obtained immigrant status based on the parent's marriage, assuming the parent also acquired immigrant status based on that marriage.

During the two-year conditional residence period, these aliens have the same rights, privileges, and responsibilities as other permanent residents.[16] However, conditional permanent residents must take additional steps at the end of the second year in order to preserve permanent resident status.[17]

A conditional resident will be issued a permanent resident card (Form I-551) that appears similar to the "green cards" issued to other permanent residents. However, the cards differ in two important respects. First, to indicate the bearer's conditional resident status, the classification code on the front, or photo side, of the conditional

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[11] INA §§204(g), 245(c)(3).

[12] Pub. L. No. 106-553, §1(a)(2) (appx. B, H.R. 5548, §§1101–04), 114 Stat. 2762, 2762A-142 to 2762A-149 (2000).

[13] INA §101(a)(15)(V).

[14] INA §101(a)(15)(K)(ii).

[15] INA §216.

[16] 8 CFR §216.1.

[17] INA §216(d)(2).

resident's card is marked "CR" rather than "IR." Second, the card expires two years after the date of admission or adjustment.

At the end of the two-year period, the couple must file a "joint petition" to have the condition removed.[18] If U.S. Citizenship and Immigration Services (USCIS) grants this petition and removes the conditional status, the conditional resident spouse is accorded unconditional LPR status. USCIS, however, can terminate the conditional status at any time during the two-year period if it discovers that the marriage was dissolved or annulled, or if it determines that the marriage was entered into fraudulently.[19] If USCIS terminates the conditional status during the two-year period or denies the couple's joint petition to remove the condition, the conditional resident loses lawful immigration status and becomes subject to removal.

Alien Spouses Affected

The conditional residence provision only affects alien spouses whose marriage occurred less than two years before they either were admitted to the United States as LPRs or adjusted status here. The law applies only to alien spouses who are the direct beneficiaries of an immigrant petition.[20] In other words, it affects beneficiaries of immediate-relative or second preference petitions that are based on marriage to a U.S. citizen or LPR. It does not affect aliens who enter the United States through derivative means, such as aliens who are accompanying or following to join a family member who has been granted an employment-based immigrant visa. Similarly, it does not apply to the alien spouse of a third-preference immigrant (a person immigrating as a married son or daughter of a U.S. citizen), nor to the alien spouse of a fourth-preference alien (a person immigrating as a brother or sister of a U.S. citizen).

Only aliens who either adjust their status or are admitted to the United States as immigrants within two years of the date they were married will be subject to the conditional residence requirements. It is important to keep this time frame in mind when advising clients who have delayed filing for an immigrant visa or adjustment of status. Because visas issued by U.S. consulates are valid for six months,[21] it might be possible for an alien who has been granted an immigrant visa within two years of the marriage date to time his or her entry into the United States so that the admission occurs at least two years after the marriage date. When being admitted, the alien should inform the inspector that he or she is entering as a permanent resident without conditions. Alternatively, if the alien will be adjusting status in the United States and USCIS schedules the adjustment interview within two years of the marriage that qualifies an alien for adjustment, the alien may request that it be rescheduled.

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[18] 8 CFR §216.4(a). The requirements for the joint petition are discussed *infra*.

[19] INA §216(b).

[20] INA §216(g).

[21] INA §221(c).

Children Affected

The law also affects alien children who immigrate legally to the United States within two years of their parent's marriage, assuming the parent also immigrated based on that marriage.[22] Like their immigrating parent, these children enter the country as conditional residents and will need to petition at the end of two years for the condition to be removed.

Given that the alien parent is married to a U.S. citizen or LPR, the alien's children can immigrate in one of three possible ways. First, the citizen or LPR spouse can adopt the children if they are under 16 and have resided with the adopting parent for at least two years.[23] Such a child would be entering with no conditions, since the relationship with the citizen petitioner is independent of the marriage of the child's parent. Second, the citizen or LPR spouse can file a stepparent petition on behalf of his or her stepchildren.[24] Stepchildren who obtain LPR status within two years of the marriage are granted conditional status. A third alternative is that after the alien parent becomes a conditional resident, the parent can file second-preference visa petitions on behalf of his or her children.[25]

Moreover, some dependent children who acquire immigrant status through their parent's marriage are not subject to the conditional residence requirements because their parent is not an "alien spouse" as defined in the statute.[26] For example, if the alien parent marries a U.S. citizen but acquires LPR status by a means other than the marriage (*e.g.*, he or she immigrates on an employment-based visa), the alien does not fall within the category of "alien spouse" and is therefore not subject to conditional residency. The U.S. citizen spouse in such a marriage could file a stepparent petition for the alien spouse's children. Even though the children would be gaining immigrant status based on the parent's marriage to a citizen that took place within two years of the alien's entry to the United States, the children would not be considered "alien sons or daughters" because the parent does not meet the definition of an "alien spouse."

Children who enter as conditional residents will have to follow requirements similar to those their alien parents must follow to remove the conditional status after the two-year period.[27] If the alien parent's status is terminated during these two years based on divorce, annulment, or a determination by USCIS that the marriage is fraudulent, the conditional resident status of the children will terminate also.

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[22] INA §216(g)(2).

[23] INA §101(b)(1)(E).

[24] INA §101(b)(1)(B).

[25] INA §203(a)(2).

[26] INA §216(g)(1); J. Puleo, INS Comm'r, "Legal Opinions of Issues Relating to the Immigration Marriage Fraud Amendments of 1986" (Jan. 18, 1990), reported and reprinted in 67 Interpreter Releases 159 (February 5, 1990).

[27] INA §216(a)(1).

Termination of Conditional Status by the USCIS

USCIS may terminate an alien's conditional status at any time during the two-year period if it determines that: (1) the alien entered the qualifying marriage to procure an immigrant visa; (2) the qualifying marriage has been judicially annulled, dissolved, or terminated, other than through the death of a spouse; or (3) a fee or other consideration was given for filing the immigrant visa petition, other than fees to an attorney for preparing the petition.[28] Before making such a finding, USCIS must send a formal written notice to the conditional resident notifying him or her of the agency's intention to terminate the status.[29] If USCIS is terminating the conditional status based on damaging information that the alien cannot reasonably be expected to know, USCIS must provide the alien an opportunity to review and rebut the evidence on which it is relying.[30] After providing the alien an opportunity to challenge this finding, USCIS may issue a notice of termination.

When USCIS issues the notice of termination, the alien immediately loses all rights and privileges that accompany LPR status—*e.g.*, permission to reside and work in the United States. In most cases USCIS will issue a notice to appear (NTA), which initiates removal proceedings, at the same time it issues the termination notice.[31] No special procedure exists for administratively appealing a decision to terminate conditional resident status, but the alien may ask an immigration judge to review the decision in a removal hearing.[32] Even if conditional residency is terminated, the alien is entitled to work authorization while his or her case is pending.

At the removal hearing, the agency has the burden of proving by a preponderance of the evidence that the alien is not entitled to conditional resident status.[33] This is a lower burden of proof than in other removal proceedings, in which the trial attorney must prove that a deportable alien is subject to removal by clear and convincing evidence. This creates the anomaly that conditional residents can be ordered removed on weaker evidence than deportable aliens who may never have established lawful entry or status in the United States.

Upon receiving the notice of termination, the conditional resident may file a waiver application (Form I-751, Petition to Remove Conditions on Residence).[34] These waiver applications can be filed at any time, either before or after the two-year conditional residence period has expired. If USCIS grants the waiver, the condition

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[28] INA §216(b).

[29] INA §216(b)(1).

[30] 8 CFR §216.4(d).

[31] 8 CFR §216.5(f).

[32] INA §216(c)(3)(D).

[33] INA §216(b)(2).

[34] 8 CFR §216.5(a).

on the alien's permanent resident status will be removed effective the second anniversary of the alien's admission for permanent residence.

Most terminations will occur after the two-year conditional period has ended because, as a practical matter, USCIS rarely will initiate an investigation before then or discover through other means that the marriage has ended or that it was entered into fraudulently.

If a conditional resident fails to comply with the requirements for removing the condition at the end of the two-year period, USCIS can terminate the status at that time.[35] In the ensuing removal proceedings, the burden of proof will be on the alien to establish that he or she has complied with the removal-of-condition requirements.

Even if the alien has satisfied the requirements for removing the condition and it has been removed, the agency can still bring proceedings to rescind the alien's adjustment to permanent residence and any subsequent naturalization. However, the only valid basis for such an action would be that the agency determined that the alien obtained LPR status through a marriage he or she entered into to evade the immigration laws.[36]

Removing Conditional Status

Unless conditional resident aliens take certain steps to remove the condition, they lose their lawful status. Within 90 days before the second anniversary of the date on which the alien obtained permanent residence, the alien must file a Form I-751, Petition to Remove the Conditions on Residence.[37] The two-year period is not tolled by any time spent by the alien outside the United States. In other words, the amount of time the conditional resident has spent outside the United States during the two years since acquiring conditional residence does not affect the requirement that he or she file the petition within the specified time period.

Failure to file the petition or failure to comply with the interview requirements will lead to automatic termination of conditional resident status and the initiation of removal proceedings.[38] As noted above, in removal proceedings the alien will bear the burden of proof to establish that he or she has complied with the prerequisites for having the condition removed.

Filing the Joint Petition

If the conditional resident is still lawfully married to the spouse through whom he or she obtained immigrant status, and if that spouse agrees to cooperate in completing the petition, then the couple will be filing a joint petition.[39] This means that the

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[35] INA §216(c)(2).

[36] 8 CFR §216.3(b).

[37] 8 CFR §216.4.

[38] INA §216(c)(2).

[39] 8 CFR §216.4(a)(1).

conditional resident will check box “a” in part 2 of Form I-751, and both spouses will sign in part 7 of the form. On the form, both spouses must declare under penalty of perjury that they were married in accordance with the laws in the jurisdiction where the marriage took place, and they did not enter into the marriage to procure an immigration benefit. If the marriage has ended due to either the death of the citizen spouse, divorce, or annulment, then the conditional resident alien must seek a waiver of the joint petition requirement.

If the conditional resident has filed a joint petition but at the time is legally separated or is in divorce or annulment proceedings, the USCIS will want the petitioner to submit the final decree and request that the joint petition be treated as a waiver petition. The Service Center adjudicating the petition has been instructed to issue a Request for Evidence (RFE) granting the petitioner 87 days to submit the final decree of divorce or annulment. If the divorce or annulment is finalized within that period of time and the conditional permanent resident submits the decree, the I-751 will be amended from a joint petition to a waiver application without requiring the petitioner to re-file.[40]

Filing for a Waiver of the Joint Petition Requirement

In lieu of the couple’s completing the joint petition, the conditional resident can request that this joint filing requirement be waived, based on any of four grounds:

(1) The marriage was entered into in good faith, but the spouse has died;[41]

(2) The marriage was entered into in good faith, but the marriage has been terminated by divorce or annulment;[42]

(3) The marriage was entered into in good faith, but the conditional resident has been battered or subjected to extreme cruelty by the citizen spouse;[43] or

(4) Termination of permanent residency and deportation would result in extreme hardship.[44]

Although Form I-751 indicates that the conditional resident must elect one of the possible grounds for a waiver, they should not be mutually exclusive. In other words, the conditional resident should be able to claim, for example, both the battered spouse and the extreme hardship grounds.

Three of the possible waiver grounds include the requirement that the applicant prove that the marriage was entered into in good faith. The regulations state that USCIS will consider evidence concerning the amount of commitment each party has

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[40] Memo, Neufeld, Acting Associate Director, USCIS, “I-751 Filed Prior to Termination of Marriage” (April 2009).

[41] Form I-751, pt. 2(c).

[42] INA §216(c)(4)(B).

[43] INA §216(c)(4)(C).

[44] INA §216(c)(4)(A).

shown to the marital relationship.[45] To prove good faith, USCIS suggests submitting evidence showing the following: (1) a sharing of financial assets and liabilities; (2) the length of time the parties cohabited; (3) birth certificates of children born of the marriage; and (4) any other pertinent evidence.[46] This is essentially the same type of proof an alien spouse seeking conditional residency needs to provide to establish that his or her marriage is legitimate.

DEATH OF THE SPOUSE

If the conditional resident is submitting a waiver based on the death of his or her spouse, he or she should submit documentation proving that the spouse has died. In this situation, too, the conditional resident must submit documentary evidence establishing that the marriage was bona fide. In these cases, USCIS will nearly always grant the waiver without requiring an interview. USCIS would be likely to investigate the matter further only in a rare case in which it suspected that the conditional resident had married someone with the intention of gaining immigration benefits and anticipating that the person would die soon after the marriage.

DIVORCE/ANNULMENT WAIVER

The joint petition requirement can be waived if the conditional resident demonstrates that the marriage has ended in either divorce or annulment and that it was entered into in good faith. The divorce/annulment waiver is available to all conditional residents whose marriage has failed, regardless of who was at fault for the breakup and who initiated the divorce or annulment proceedings.[47]

The USCIS allows conditional residents to apply for this waiver if the parties have separated and one has filed for dissolution or annulment but the decree has not yet been finalized. The Service Center has been instructed to issue an RFE granting the petitioner 87 days to produce the final decree. If the divorce or annulment is finalized within that period of time, the waiver will be adjudicated based on the merits. If the divorce or annulment is not finalized within that period of time, the USCIS will deny the waiver, terminate the conditional residency, and refer the case through the proper chain of command for issuance of removal proceedings.[48] Aliens who have filed for divorce or annulment and who are nearing the end of their two-year conditional residency must therefore make a decision. If they suspect that the divorce or annulment will not be finalized within 87 days of receiving the RFE, they will need to file under one of the other two waivers – battered spouse or extreme hardship – and then amend the application or file under this waiver once the divorce is final.

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[45] 8 CFR §216.5(e)(2).

[46] 8 CFR §§216.5(e)(2)(i)–(iv).

[47] 8 CFR §216.5(e)(2).

[48] Memo, Neufeld, Acting Associate Director, USCIS, "I-751 Filed Prior to Termination of Marriage" (April 2009).

BATTERED SPOUSE WAIVER

The 1990 Immigration Act[49] added an important option for spouses who have been the victims of battery or other forms of spousal abuse. These persons now can request a waiver of the joint petition requirement based solely on this ground. Abused spouses have the option of either pursuing divorce or remaining married and removing their conditional status through the battered spouse waiver.[50]

The statute allows for this waiver if "during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetuated by his or her spouse or citizen or permanent resident parent . . . ."[51] In other words, the conditional resident spouse may request this waiver if either the conditional resident or the conditional resident's child has been abused by the other spouse.

Regulations implementing the battered spouse waiver further define the statutory terms and set forth the requirements for being granted the waiver. The regulations clarify that the waiver is available to conditional residents, regardless of their current marital status.[52] In other words, they may be married and living with the abusing spouse, may be separated, may be divorced, or may be in the process of seeking a divorce. As a practical matter, the battered spouse waiver probably will be sought only by aliens who are not seeking divorce. Spouses who are divorced normally would request the "divorce/annulment" waiver, due to its more relaxed proof requirements.

The waiver is available to all spouses affected by the conditional residency requirements, regardless of whether their conditional residency ended before or after Congress created this waiver. This means that both current and former conditional resident aliens can take advantage of the 1990 statutory changes. To be eligible for the waiver, the alien must not have departed the United States after his or her conditional resident status ended.

Acts that constitute battery or extreme cruelty include, but are not limited to, "any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury."[53] Acts of violence include "psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution."[54]

If the alien is alleging physical abuse, the alien can submit any credible evidence. This "may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service

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[49] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

[50] 8 CFR §216.5(e)(3).

[51] INA §216(c)(4)(B).

[52] 8 CFR §216.5(e)(3)(ii).

[53] 8 CFR §216.5(e)(3)(i).

[54] *Id.*

agency personnel."[55] It is not clear whether the applicant's affidavit, standing alone, would satisfy this requirement, but presumably it would as long as it was credible.

In the regulations, USCIS limits "extreme cruelty" to that which qualifies as "extreme mental cruelty." The agency also requires waiver applicants alleging extreme cruelty to furnish independent evidence from "a professional recognized by [USCIS] as an expert in the field."[56] Only licensed clinical social workers, psychologists, and psychiatrists fit that definition. The evaluation, as well as the waiver petition itself, must contain the professional's name, address, identification number, and the date his or her professional license expires.[57] However, other guidance provides that the original VAWA statute[58] prohibits this extra requirement.[59] Instead, "credible evidence" is the standard for both physical abuse and mental cruelty.

The statute requires that USCIS keep information contained in the waiver petition or supporting documents in strict confidence.[60] It may not release the information to any party without a court order or the written consent of the alien. Information may be released only to the applicant, his or her authorized representative, an officer of USCIS, or any state or federal law enforcement agency.[61]

Finally, the statute requires that the battered spouse not have been "at fault in failing to meet the [joint filing] requirement."[62] This clause seemed at first to impose a "no fault" requirement—*i.e.*, the battered spouse could take advantage of this waiver only if he or she were not at fault for causing the abusive action by the other spouse. But the regulations do not impose such a requirement, and to date USCIS has not interpreted this provision as requiring any further proof of eligibility. Therefore, it is unclear what, if any, meaning is to be placed on this statutory language.

EXTREME HARDSHIP WAIVER

The conditional resident spouse may request a waiver of the joint petition requirement based on "extreme hardship." Although the statute is silent about whom the extreme hardship must affect, USCIS has stated that the conditional resident may file for this waiver based on hardship either to himself or herself, to children of the marriage, or to a new spouse. The statute and regulations state that USCIS will take

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[55] 8 CFR §216.5(e)(3)(iii).

[56] 8 CFR §216.5(e)(3)(iv).

[57] 8 CFR §216.5(e)(3)(v).

[58] Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55.

[59] Immigration and Naturalization Service Memorandum, T. Aleinikoff, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses and Children of U.S. Citizens or Lawful Permanent Residents" (Apr. 16, 1996).

[60] INA §216(c)(4)(C).

[61] 8 CFR §216.5(e)(3)(viii).

[62] INA §216(c)(4)(B).

into account only factors that arose after the alien's entry as a conditional resident.[63] For example, USCIS presumably will not consider a preexisting medical problem that requires care and treatment in the United States. But medical problems that developed after the conditional resident entered the United States would be relevant, as would adverse political, social, or economic conditions that have developed recently in his or her home country.

USCIS recognizes that any removal is likely to result in a certain degree of hardship; but only when the hardship is "extreme" will it grant the waiver. Case law developed in the context of applications for the former relief of suspension of deportation will be relevant in defining what "extreme" means in the context of joint petition waivers. According to those cases, extreme hardship consists of something more than the hardship that persons ordinarily would experience upon being deported—*e.g.*, the emotional strain that accompanies relocating, separation from family and friends, and economic loss.

The Board of Immigration Appeals (BIA) has listed 10 criteria that it considers relevant in determining whether the hardship an alien would suffer is extreme enough to meet the standard for granting suspension of deportation. These include the following: (1) the alien's age; (2) the alien's ties to family in the United States and abroad; (3) how long the alien has resided in the United States; (4) the alien's health; (5) economic and political conditions in the alien's home country; (6) the alien's occupation and work skills; (7) his or her immigration history; (8) his or her position in the community; (9) whether the alien is of special assistance to the United States or to the community; and (10) whether the alien could adjust status by alternate means.[64]

Aliens with health problems that would not receive adequate treatment in the alien's home country have been particularly successful in establishing that extreme hardship makes them eligible for suspension of deportation or cancellation of removal. By itself, the probability that an alien will suffer economic detriment is usually not enough to meet the standard for establishing extreme hardship, unless the alien can show that it will be impossible for him or her to find work in the home country. But when economic hardship is combined with advanced age, illness, or family ties in the United States, USCIS is more likely to find that the alien faces extreme hardship. The practitioner thus should consider carefully all possible equities in a case, especially those that demonstrate a special hardship. An unusually strong factor, together with more typical hardships such as psychological suffering, loss of ties in the community, and separation from family, will be very helpful in meeting the test for extreme hardship.

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[63] INA §216(c)(4)(C); 8 CFR §216.5(e)(1).

[64] *Matter of Anderson*, 16 I&N Dec. 596 (1978).

Procedures for Filing the Petition

The Form I-751 must be filed by mail with either the California Service Center or Vermont Service Center, depending on the alien's U.S. residence. Petitioners who live in Alaska, American Samoa, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, or Wyoming must file their Form I-751 with the California Service Center at:

USCIS California Service Center
P.O. Box 10751
Laguna Niguel, CA 92607-1075

Petitioners who live in Alabama, Arkansas, Connecticut, Delaware, Washington, D.C., Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, or West Virginia must file their Form I-751 with the Vermont Service Center at:

USCIS Vermont Service Center
75 Lower Welden St.
P.O. Box 200
St. Albans, VT 05479-0001

If the conditional resident is in removal proceedings at the end of the two-year period, the petition nevertheless should be filed with USCIS rather than with the immigration judge. In the removal proceedings, however, the immigration judge has authority to review USCIS's decision regarding the joint petition or the waiver application.[65]

The filing fee is currently $505, plus the $85 cost of biometrics.

Documentary Evidence

The regulations require the petitioner to submit certain documentary evidence to show that the marriage was entered into in good faith. USCIS has suggested that the following types of documents be submitted: (1) mortgage contract or lease showing joint ownership or joint occupancy of a common residence; (2) financial records showing joint ownership of assets and/or responsibility for liabilities; (3) birth certificates of children born of the marriage; (4) affidavits from third parties having knowledge of the marriage; or (5) "other documentation" establishing that the marriage is legitimate.[66]

The best type of evidence shows that the parties have made a true commitment to live together. In addition to the documents suggested by USCIS, the petitioners

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[65] INA §216(c)(3)(D).

[66] 8 CFR §216.4(a)(5).

should include evidence such as joint tax returns, insurance policies, health care plans, and evidence that they have jointly purchased land or personal property (such as a car or appliances) and of other joint holdings. Other persuasive evidence could include photographs of the wedding ceremony or of the couple together in different situations. If the parties have taken vacations or traveled together, they should submit copies of airline tickets or hotel bills. Other possible documents include credit cards on which either spouse has authority to make charges, joint check-cashing cards, or even joint video club membership cards.

Travel Abroad

The regulations do not require that either spouse be physically present in the United States when the joint petition is filed,[67] although the conditional resident must be willing to return to the United States with his or her spouse and any dependent children to appear for a scheduled interview.

Conditional residents outside the United States can file the petition by sending it by certified mail to the appropriate service center. The conditional resident must include a statement asking USCIS to postpone the adjudication process and giving reasons for requesting the postponement. The conditional resident should provide an address where he or she can be reached abroad and an expected date of return to the United States.

After it receives the joint petition or waiver application, USCIS will send the conditional resident a fee receipt. While USCIS is adjudicating the petition, the conditional resident can travel abroad even if his or her permanent resident visa has expired. The alien may re-enter the United States within six months after the two-year conditional residence period has ended by presenting the expired Form I-551 in lieu of a visa, plus the joint petition or waiver application filing receipt.[68] The conditional resident must be returning to an “unrelinquished lawful permanent residence” in the United States from a temporary absence abroad that did not exceed one year. Alternatively, if the conditional resident is a crewperson regularly serving aboard a U.S. aircraft or vessel and is returning after a temporary absence in connection with his or her duties, he or she can exceed the one-year limit. The expired I-551, together with the fee receipt, also can be used to satisfy I-9 employment eligibility verification requirements.

If USCIS has not adjudicated the I-751 petition by the end of the six-month period following the expiration of the I-551 card, the alien may apply for a renewal of the I-551 at the USCIS office that has jurisdiction over his or her residence.

Should USCIS terminate the alien’s conditional residence, he or she may travel outside the United States and re-enter only if the local USCIS district director grants the alien advance parole (*i.e.*, advance permission to re-enter the United States). If

[67] 8 CFR §216.4(a)(4).

[68] 8 CFR §211.1(a)(5).

USCIS already has begun removal proceedings against the alien, it cannot grant advance parole.

Late Petitions

If petitioners can show they have good cause for filing a late petition to remove conditional status, USCIS will allow it.[69] The conditional resident must state in writing the specific reasons why the petition was not filed before the end of the two-year period. The form itself states that to be allowed to file a late petition, the conditional resident must not have been at fault, that the delay must have been "due to extraordinary circumstances" beyond the alien's control, and that the length of the delay must have been reasonable.[70] Some examples of what constitutes good cause have been provided by USCIS and include: hospitalization, long term illness, death of a family member, the recent birth of a child and a family member on active duty with the U.S. military.[71] If a petitioner fails to provide a written explanation of good cause for not filing on time, the petition will be automatically denied.[72] USCIS will not issue a request of evidence but will send a denial notice based on the untimely filing.

USCIS customarily accepts late petitions with good cause explanations that are submitted within a few days or weeks after the deadline. When a joint petition or waiver is filed several months late, however, USCIS will scrutinize the reasons for the delay more carefully.

The USCIS district director's office can adjudicate petitions filed after the two-year deadline but before USCIS has started deportation proceedings. In such a situation, USCIS can excuse the late filing, grant the petition to remove the condition, and cancel any NTAs that have been issued but not yet filed with the immigration judge.

Because the petitioner files for a waiver as an alternative to filing the petition jointly, normally the I-751 requesting a waiver should be filed within the 90 days preceding the end of the two-year conditional residence period. Sometimes, however, it may be appropriate to file for the waiver before or after the 90-day period. For example, if the parties' divorce becomes final or the citizen spouse dies before the 90-day period, USCIS will adjudicate a waiver request filed early and, if it approves the waiver, remove the conditional status at that time. On the other hand, the petitioner may file for a waiver after the 90-day period if the parties initially filed a timely joint petition, but the citizen spouse subsequently refuses to cooperate or the parties divorce. Moreover, if USCIS denies the joint petition, the conditional resident then can resubmit an I-751 with a waiver request.

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[69] 8 CFR §216.4(a)(6).

[70] Form I-751 Instructions, p. 1.

[71] Memo, Neufeld, Acting Associate Director, USCIS, "Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions" (October 2009).

[72] *Id.*

Failing Marriages

USCIS cannot deny or refuse to accept an I-751 joint petition based solely on the current viability of the parties' marriage. In other words, if the marriage is failing at the end of the two-year period—even if the parties have separated or filed for divorce—USCIS still must accept a timely filed joint petition or waiver application. As long as the petition or waiver application establishes that the marriage was legitimate at the time it was entered into, USCIS cannot deny either on the grounds that the marriage is no longer viable. The parties' conduct after they enter the marriage should affect USCIS's decision only if it bears on the parties' state of mind at the time they were married.

Petitions and Waivers Filed For Children

Dependent children of a conditional resident who acquire their legal status concurrently with their parent may be included in the parent's Form I-751, whether filed as a joint petition or with a request for waiver of the joint petition requirement.[73] It does not matter how old the "child" is at the time the petition is filed. USCIS regulations use the term "children" when referring to the procedures for removing the condition, but the statute refers to "sons and daughters," a term without a statutory age limitation.[74]

However, to be included on the petition, the child must have been granted conditional resident status within 90 days of the parent's being granted the status, because otherwise the child's eligibility to file for removal of the condition would not begin until after the parent's eligibility period had expired. A child who entered the United States more than 90 days after the conditional resident parent entered, and who thus cannot be included in the petition filed by the parent, must file an independent petition. The child would have to establish only that the parent's marriage is legitimate and has not been terminated; he or she does not have to establish any hardship. The child's representative can do this by checking box (b) in answer to part 2 on Form I-751 and stating in the cover letter why the child could not be included on the parent's petition. Submit a copy of the parent's approved I-751 petition. The outcome of the child's I-751 petition normally will follow that of the parent's.

If the child is not included in the parent's I-751 application, or if the parent does not file a joint petition because of death, disability, or health reasons, the child must file his or her own I-751 petition.[75] In those situations the child should submit the parent's death certificate or evidence showing why the parent cannot file the petition, together with some evidence that the marriage was bona fide.[76] The child need not submit evidence of extreme hardship unless USCIS requests it. In other situations in

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[73] 8 CFR §216.4(a)(2).

[74] INA §216(h)(2).

[75] 8 CFR §216.4(a)(2).

[76] *See* 8 CFR §216.5(a)(1) (requirements when conditional resident alien is unable to meet the requirements for a joint petition).

which the parent did not file an I-751 petition, the child would need to submit a waiver request based on any of the permissible grounds. When a conditional permanent resident child applies separately on the basis of abuse by the U.S. citizen stepparent or extreme hardship upon removal, USCIS will adjudicate the child's I-751 independently of the parent's case.

USCIS Interview

After the conditional resident has submitted the I-751 petition, either as a joint petition to remove the condition or with an application to waive the joint petition requirement, he or she will receive a filing receipt. When the conditional permanent residence visa expires at the end of two years, this receipt serves as evidence of the alien's continued lawful status.[77]

USCIS must schedule or waive an interview and adjudicate the joint petition within 90 days of receiving it.[78] The statute does not state what will happen when USCIS fails to schedule an interview or adjudicate the joint petition by this deadline. While it could be argued that in such a situation the petition should be treated as automatically approved, USCIS has rejected that argument and taken the position that it is not bound to issue a decision within the 90-day period. The USCIS general counsel has concluded that the statute does not preclude the agency from denying a petition after the 90-day period has expired; according to him, the statutory language imposing the time limitation is discretionary (*i.e.*, it allows room for the USCIS to use its discretion), not mandatory.[79] The statute does not impose a corresponding limitation on the time USCIS has to schedule an interview if the conditional resident files a waiver request.[80]

The service center director has full discretion to schedule or waive interviews for aliens who file an I-751. In most cases the decision will depend on the sufficiency of the evidence the petitioner submits. Each service center director will follow guidelines established by the USCIS district director's office that has jurisdiction over the alien's place of residence.

Apparently, the service center directors divide cases into categories according to their level of suspicion—high, medium, or low—that a case involves marriage fraud. They require an interview in almost all cases in which they suspect fraud. When they have little or no suspicion of fraud, they schedule interviews using a random selection process. If the evidence submitted contains inconsistencies, or if USCIS has received information from other sources that could damage the petitioner's case, USCIS can—and usually will—conduct further investigation.

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[77] 8 CFR §216.4(a)(1).

[78] 8 CFR §216.4(b).

[79] INS Legal Opinion, Cook (June 21, 1990), *reprinted in* 67 *Interpreter Releases* 979, 991–97 (Aug. 31, 1990).

[80] INA §216(c)(3).

Experience has shown that in the majority of cases in which the spouses filed a joint petition, USCIS has waived the interview. On the other hand, when the conditional resident filed with a waiver request, USCIS has been more likely to require a personal interview. If USCIS decides to require an interview before adjudicating the petition, the service center will forward the file to the USCIS district office that has jurisdiction over the couple's residence.

A conditional resident who receives an interview notice should take additional affidavits or documents to the interview attesting to the validity of the marriage or, if he or she requested a waiver, showing that the waiver grounds have been met.

Before USCIS can deny an I-751 application, it must give the applicant an opportunity to rebut any adverse evidence.[81]

Waiver of the Interview Requirement

If one of the petitioning parties cannot attend the interview, the agency may, in some cases, waive the attendance requirement. For example, if the citizen spouse is overseas in the military, USCIS could interview the conditional resident without requiring that the citizen spouse be present. But USCIS still would have to be satisfied, based on all the evidence, that the marriage was legitimate and that the reasons given for the spouse not appearing for the interview were valid.

Consequences of Failure to Appear

Normally, if the conditional resident—or in the case of a joint petition, either spouse—fails to appear for the interview, USCIS will deny the petition or waiver application, terminate conditional resident status, and start removal proceedings.[82] USCIS must provide the conditional resident with written notification of and specific reasons for the termination. In most cases, an NTA will accompany the termination notice. The conditional resident can ask USCIS to reconsider the decision to terminate, but he or she bears the burden of showing valid reasons for having failed to comply with the interview requirements.[83] The conditional resident can submit a written request that the interview be rescheduled or waived.[84] The USCIS district director may grant the request if he or she believes there is good cause to do so.[85] In such cases, the notice to terminate and the NTA will be rescinded.

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[81] Michael Aytes, USCIS, "Delegation of Authority for I-751" (2006).

[82] 8 CFR §216.4(b)(3).

[83] *Id*.

[84] *See id*.

[85] *Id*.

Approval of the I-751 Petition

If USCIS approves the I-751 petition, the conditional status will be removed.[86] USCIS will send a written notice of the decision to the conditional resident requiring him or her to report to the appropriate USCIS office for processing to receive a new permanent resident card.[87] At that time the alien will surrender the I-551 that indicates his or her previous status as a conditional resident.[88] In the same way as any other permanent resident, the conditional resident alien will be eligible to file for naturalization three years after his or her date of adjustment of status or entry as a conditional resident if the alien is still married to the U.S. citizen. USCIS will not approve the naturalization application, however, until it has approved the I-751.

Denial and Review in Removal Proceedings

If USCIS denies the I-751 petition, it must provide written notice of the decision stating the reasons for the denial. USCIS will instruct the conditional resident to surrender any I-551 card in his or her possession. The alien's lawful immigration status will terminate, and he or she will be served with an NTA starting removal proceedings.[89]

There is no appeal available from the district director's denial of an I-751 petition, but once the alien is in removal proceedings, he or she can ask the immigration judge to review the denial. In these proceedings, the agency bears the burden of proving by a preponderance of the evidence that the information contained in the petition is false and that its denial of the petition was proper.[90] Denial of the I-751 can only be reviewed by an immigration judge if the alien previously filed it with USCIS; the I-751 petition cannot be filed for the first time with the immigration judge.

Assuming the immigration judge has jurisdiction to review USCIS's denial of the I-751 petition, the standard of review is de novo. In other words, the judge should accept all relevant evidence and make an independent determination about whether the joint petition or waiver request should be approved. If the immigration judge is reviewing the agency's denial of a waiver petition, the alien bears the burden of proving that the waiver should be approved. Although the agency bears the initial burden of proving that the alien is subject to removal, the alien bears the burden of proving eligibility for any form of discretionary relief from removal for which he or she applies, and that he or she merits a favorable exercise of discretion.

If the conditional resident has failed to file a timely joint petition or waiver application, he or she still may attempt to file it late with the USCIS service center, even if an NTA has been issued. USCIS can accept a late filing if it finds that there is good

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[86] 8 CFR §216.4(d)(1).

[87] *Id.*

[88] *Id.*

[89] 8 CFR §216.4(d)(2).

[90] INA §216(c)(3)(D).

cause to do so. If jurisdiction already has vested with the immigration judge (which occurs when the NTA is filed with the Office of the Chief Immigration Judge), the alien can ask the judge to continue the proceedings until USCIS makes a decision.[91] If USCIS approves the joint petition or waiver application, the immigration judge can terminate the proceedings upon a joint motion filed by the alien and the Immigration and Customs Enforcement (ICE).

Final Removal Orders

USCIS will automatically deny an I-751 joint petition or waiver filed by a conditional permanent resident subject to a final order of removal. The denial will indicate that it is based on a final removal order and the case may be sent to the ICE Office of Detention and Removal.[92]

Multiple I-751 Filings

Since there are no limitations on how many times a conditional permanent resident may file an I-751, a second joint petition or waiver may be filed subsequent to the denial of a previous joint petition or waiver. This may happen when a joint petition is filed but then the conditional resident and his or her spouse divorce or domestic violence occurs. The subsequent joint petition or waiver will also be denied if there is no different or additional evidence submitted with the new petition. The new denial will incorporate by reference the basis for denial of the earlier petition and unless the petitioner is already in proceedings, the adjudicator will send the file to the appropriate unit for issuance of a Notice to Appear.[93]

Reapplication for an Immigrant Visa After Conditional Residence Terminates

As we have seen, the conditional resident's status may terminate at the end of the two-year period because he or she failed to file a petition, filed late, or had the petition denied by USCIS. In all these situations, there is limited opportunity for appeal or review. Nevertheless, couples in this situation may have another alternative. After the conditional residence has terminated, the couple can file a second I-130 petition and have the alien spouse receive the immigrant visa abroad through consular processing. Since this time the marriage will have taken place more than two years before the alien enters the United States on the second immigrant visa, the alien spouse will enter as a permanent resident without conditions.

Alternatively, the alien spouse may qualify for adjustment of status. For example, if the marriage creating the conditional residency ends through divorce or annulment within two years, the conditional resident could file a timely application for a waiver of the joint petition requirement. If USCIS denies the waiver application and termi-

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[91] *See Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994).

[92] Memo, Neufeld, Acting Associate Director, USCIS, "Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions" (October 2009).

[93] *Id.*

nates the conditional residency, the alien can request the waiver before an immigration judge. Alternatively, if the alien remarries another U.S. citizen, he or she could apply for adjustment of status.[94] The couple first would have to file an I-130 petition with USCIS. But after that is approved, the alien spouse could request adjustment either with USCIS or before the immigration judge.

USCIS had originally interpreted INA §245(d) as forever barring adjustment of status to aliens who were granted conditional residency. But the agency's own regulation implies that this statutory bar only applies to conditional residents while they are in conditional resident status. The BIA confirmed that once the conditional residency status has been terminated, the alien is not ineligible for adjustment of status pursuant to INA §245(a).[95]

USCIS Notice Requirements

USCIS is required to provide notice to affected aliens concerning the conditional status–related requirements.[96] Although the statute contains two separate notice provisions,[97] USCIS nevertheless can terminate a conditional resident's status and start removal proceedings against him or her even if the alien never receives the required USCIS notices.

First, at the time the alien obtains conditional resident status, USCIS must provide notice "respecting the provisions of this section," including what the alien must do to have the conditional status removed.[98] Then, USCIS is required to provide similar notice approximately 90 days before the end of the two-year conditional residence period.[99] However, failure by USCIS to provide notice will not affect its power to enforce the statute.[100] Nor does such failure relieve the alien of the requirement to file the I-751 petition.[101]

Two-Year Foreign Residence Requirement

IMFA's original two-year foreign residence requirement was certainly its most controversial provision. It prohibited granting marriage-based petitions for aliens who married while in deportation or exclusion proceedings until the alien had resided outside the United States for two years after the date of the marriage.[102]

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[94] *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991).

[95] *Id.*

[96] INA §216(a)(2).

[97] INA §§216(a)(2)(A), (B).

[98] INA §216(a)(2)(A).

[99] INA §216(a)(2)(B).

[100] INA §216(a)(2)(C).

[101] 8 CFR §216.2(c).

[102] INA §204(g).

The Immigration Act of 1990[103] all but eliminated this two-year foreign residence requirement. The law now provides that aliens in deportation proceedings may be granted marriage-based petitions if they establish "by clear and convincing evidence" that they entered the marriage in good faith, for legitimate reasons, and in accordance with the laws of the jurisdiction where they were married.[104] Since this standard of proof is very similar to that required for approval of the marriage-based immigrant petition, the couple probably would not need to file any additional documentary evidence.

The statutory amendment is retroactive to all marriages entered into before, on, or after its effective date. Therefore, both current and former conditional resident aliens can take advantage of these changes, and aliens who previously had been required to live abroad can now request to have their visa petitions adjudicated.

If an alien who has not formally entered a marriage is placed in removal proceedings and is considering formally marrying his or her U.S. citizen or LPR partner, the alien instead might avoid application of the two-year foreign residence requirement by establishing that he or she was in a common-law marriage before the NTA was filed. A couple may be able to establish that it has entered a common-law marriage if the man and woman have not formally solemnized their relationship by obtaining a marriage license. A few states and foreign countries still recognize common-law marriages, or it may be possible for a couple to establish that it entered a valid common-law marriage created under a jurisdiction's former law. USCIS will recognize a common-law marriage that is permitted under a state law and that satisfies the specific requirements of the state law.[105]

Under common-law marriage statutes, the parties must establish some or all of the following factors: a capacity to marry, an agreement to marry, cohabitation, and that they hold themselves out as married to other persons. A couple can do this by seeking a declaratory judgment in state court and proving to the court's satisfaction that it has a common-law relationship. USCIS should be bound by any judicial decision on this issue. A couple seeking such a declaratory judgment is not required to provide prior notice to USCIS. If a state court declares that the parties were married as of a date before the start of deportation proceedings, the alien is not subject to the two-year foreign residence requirement.

Second-Preference Petitions

Aliens who obtain LPR status through marriage to a U.S. citizen or LPR cannot remarry and then file a second-preference visa petition on behalf of their new spouse unless five years have elapsed since the date the alien acquired LPR status.[106] In the

[103] Pub. L. No. 101-649, 104 Stat. 4978.

[104] INA §245(e).

[105] *Matter of Hosseinian*, 19 I&N Dec. 453 (BIA 1987).

[106] INA §204(a)(2)(A)(i).

alternative, the alien must establish that he or she did not enter the previous marriage to gain immigration benefits.[107]

This prohibition on the granting of "second generation" petitions does not apply if the first marriage ended in the death of the previous spouse.[108] It also does not apply if the alien has become a naturalized citizen and files an immediate-relative petition based on a subsequent marriage that occurred within five years of the alien's immigrating to the United States. Moreover, the prohibition does not apply if the alien originally obtained immigrant status through a means other than marriage to a U.S. citizen or LPR. For example, the alien could have gained derivative status through marriage to a person immigrating through an employment-based visa category. Finally, the provision only applies to spouses, so a petition for a child would not be subject to the five-year bar.

The burden is on the alien to prove through clear and convincing evidence that the previous marriage was legitimate.[109] In these situations, the alien should submit the same type of evidence used to support I-751 petitions to remove conditional status. In fact, if USCIS has previously removed the conditions on the alien's residency, that determination should be given substantial weight. USCIS will take into consideration such factors as the length of time the alien and the previous spouse lived together, whether any children were born of that marriage, joint ownership of assets and assumption of liabilities, and the reasons why the marriage was terminated.[110]

If the alien fails to meet this burden and USCIS denies the second-preference visa petition, the alien can reapply after acquiring five years of permanent residence.[111] The denial does not prejudice any subsequent petition, although the alien will not be able to use the previous filing as a priority date for the later petition.

If USCIS gains information indicating that the alien entered the previous marriage fraudulently, it can elect to initiate removal proceedings.[112] However, if USCIS chooses not to initiate proceedings, that decision will not establish that the previous marriage was legitimate. This presents a strategic problem for persons who may have difficulty proving the legitimate nature of the earlier marriage. Based on an alien's petition, supporting documentation, and other evidence, the USCIS might conclude that the previous marriage was fraudulent and initiate removal proceedings, which could result in the petitioner's losing his or her LPR status. However, if the alien waits until the five-year period has ended, he or she is not required to submit these documents or meet this additional burden.

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[107] INA §204(a)(2)(A)(ii).

[108] INA §204(a)(2)(B).

[109] 8 CFR §204.2(a)(1)(i)(A)(1).

[110] 8 CFR §204.2(a)(1)(i)(B).

[111] 8 CFR §204.2(a)(1)(i)(C).

[112] *Id*.

The BIA has addressed the case of a "second generation" second-preference visa petition that was pending adjudication when IMFA took effect. In a case in which the petitioning spouse had received immigrant status within the past five years based on a previous marriage, the BIA held that the new evidentiary burdens were procedural and thus could be applied retroactively to petitions filed before IMFA took effect but not adjudicated until afterward.[113] It found that the USCIS district director was correct in requiring the petitioner to establish through "clear and convincing" evidence that the previous marriage was legitimate. But the BIA rejected the USCIS position that the evidence should have been submitted with the petition, since the new requirements did not exist when the petition was filed. Despite the "rapid sequence of events" between the first two marriages in this case, the BIA also found generally that there could be important factors that would justify the termination of a previous marriage. In this case, it found that the evidence submitted adequately explained the reasons for the dissolution and rebutted the statutory presumption that the first marriage was not legitimate.

In the second-preference visa petition case discussed above, the BIA put great weight on an affidavit filed by the first spouse that explained in detail the cause for the marriage's termination. Whenever possible, the practitioner should try to obtain the cooperation of the previous spouse and submit such statements, together with all other relevant evidence indicating the validity of the first marriage. Given the requirements of the statute, practitioners must analyze each second-preference spousal petition to determine how the petitioner obtained LPR status. If the petitioner acquired status based on a marriage entered within the previous five years, thorough documentation of the previous marriage's history is essential. Ideally, to expedite approval of the petition, supporting documents evidencing a legitimate marriage should be filed with every I-130 petition. However, the documentary requirements may be difficult to meet, because they effectively force aliens to gather evidence of the *bona fides* of a first marriage at a time when they have no reason to think they will later need such evidence.

The Fiancé(e) Visa—K-1 And K-2 for Intending Spouses of U.S. Citizens and Their Children

Initiating the Process

The process of obtaining a nonimmigrant fiancé(e) visa begins when the citizen fiancé(e) files a petition with USCIS.[114] Form I-129F requests basic information regarding both parties, such as their addresses, whether either has been married previously, and the names of any children of the alien fiancé(e). The petitioner must submit proof that he or she is a U.S. citizen and that each party is free to contract a valid

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[113] *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988).

[114] INA §214(d)(1).

marriage with the other. The petitioner must swear that each party intends to marry the other within 90 days of the alien fiancé(e)'s entry into the United States.

If, based on the evidence submitted, USCIS is satisfied that the parties have the legal capacity and the intention to marry, it will approve the petition and forward the file to the appropriate consular office.[115] Upon receiving the approved K-1 visa petition, a consular officer will notify the alien fiancé(e) of the documents he or she needs to submit. The consulate will interview the alien after he or she has obtained security clearances and collected necessary documents. If it finds the alien to be admissible and eligible as a fiancé(e), the consulate will issue a K-1 visa.

Previous Meeting Requirement

As a result of Congress's attempt to deter cases involving "mail-order brides," a couple now must have "met in person" within two years preceding the filing of the fiancé(e) petition.[116] However, Congress also was aware that in some countries it is still common practice for persons to enter prearranged marriages that are not based on love. In those countries, strict and long-established customs may prevent couples from meeting between the time the marriage is arranged and the wedding day. To accommodate these situations, the law allows the attorney general to waive the "previous meeting" requirement "in his discretion." USCIS regulations permit this exemption (1) for persons who can show that they are following strict cultural or social practices; and (2) for those who would experience extreme hardship if forced to comply with this requirement.[117]

Established Custom Exemption

To satisfy requirements for the first exemption, the petition must show both that the personal meeting would violate established customs and that all other aspects of the traditional marriage arrangements will be followed. If the couple is following cultural or social practices, they should submit affidavits from religious or other appropriate officials attesting to the details of those traditional arrangements. Letters from family members also might help prove that the parties are complying with requirements that they not meet before the marriage.

Extreme Hardship Exception

If the petitioner is claiming extreme hardship, he or she should submit all possible supporting evidence. This might include evidence of the couple's having met before the two-year period; of political conditions preventing travel to the fiancé(e)'s country; of problems preventing the fiancé(e) from leaving the home country and traveling to the United States; of financial barriers; or of medical problems that have affected

[115] 9 FAM 41.83 N3.

[116] 8 CFR §214.2(k)(2).

[117] *Id.*

the mobility of either party. The regulation offers no guidance for defining the term "extreme hardship" under the second waiver option.

In fact, the statute, regulations, and legislative history provide little guidance as to what factors USCIS should consider in granting exemptions under either of the two grounds. As a result, petitioners should provide as much documentation as possible to show a bona fide intent to marry and eligibility for the requested exemption. Many situations that could give rise to a legitimate claim by the parties that hardship prevented their being able to see each other during the preceding two years are conceivable. Cases are common in which couples have met and carried on a long-distance relationship, but due to financial, political, or medical reasons have been unable to meet during the preceding two years.

Documenting the Petition

The fiancé(e) petition and all supporting documents should be filed by the citizen fiancé(e) with the USCIS director having jurisdiction over the petitioner's residence.[118] Fiancé(e) petitioners must document instances in which the couple has met over the course of the preceding two years.[119] Such evidence could include copies of airline tickets, passport stamps, photos of the couple together, and affidavits from third parties who have knowledge of the meeting(s). Evidence of a couple's bona fide intention to marry could include copies of correspondence or long-distance telephone charges. The practitioner should err on the side of over-documenting these cases, because some USCIS and consular officials are demanding significant evidence for K visa applicants.

Adjustment of Status For Fiancé(e)s

An alien fiancé(e) is required to marry the citizen petitioner within 90 days of entry or lose his or her lawful status and be subject to deportation.[120] If the parties marry within 90 days, the alien who receives his or her fiancé(e) visa must follow the INA §245 adjustment procedures. If they adjust within two years of marriage, they will be subject to the two-year conditional residence requirement.[121] If they adjust more than two years after the marriage, they will not be subject to those requirements.[122]

A K-1 visa holder must marry the fiancé(e) petitioner to be able to file for adjustment.[123] In other words, if the parties did not marry but instead broke their relationship, and the alien fiancé(e) subsequently married another U.S. citizen, the alien could not

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[118] 8 CFR §214.2(k)(1).

[119] INA §214(d)(1).

[120] 8 CFR §212.2(k)(5).

[121] 8 CFR §214.2(k)(6).

[122] Matter of Sesay, 25 I&N Dec. 431 (BIA 2011).

[123] INA §245(d).

adjust status in the United States. Rather, he or she would have to go through consular processing abroad and re-enter the United States as a conditional resident. The same is true if the parties married beyond the 90-day period. However, the BIA has ruled that a fiancé(e) may still adjust status even if the underlying marriage has been terminated, provided the parties did enter into a bona fide marriage within the 90-day period.[124] In that case, the adjustment application was adjudicated more than two years after the marriage and the conditional residency requirements did not apply.

Unmarried children of an alien granted a K-1 visa may obtain a K-2 visa to accompany or follow-to-join the fiancé(e).[125] After the parent has married the U.S. citizen, the children may adjust status in the same way as the alien parent, even though they may be over 18 at the time the marriage took place and otherwise would not satisfy the definition of stepchildren. In addition, a K-2 who entered the U.S. before age 21, may adjust status even if he turned 21 before adjustment application was adjudicated.[126]

The K-3 And K-4 For Spouses of U.S. Citizens and Their Children

The Legal Immigration & Family Equity (LIFE) Act[127] and LIFE Act Amendments of 2000[128] expanded eligibility for a K visa to spouses of U.S. citizens and their dependents who are residing outside the United States.[129] These categories of nonimmigrant fiancé(e) visas are called K-3 (spouses) and K-4 (dependents). The requirements include the following:[130]

- The alien entered into a valid marriage with the U.S. citizen petitioner, is the beneficiary of an alien relative visa petition filed by the petitioner, and seeks to enter the United States to await approval of the I-130 petition and availability of immigrant visa, or
- The alien is a child of a parent described above and is accompanying or following to join the principal beneficiary.
- If married to a U.S. citizen, the consular officer must have received an I-129F petition filed in the United States by the U.S. citizen spouse and approved by the USCIS service center.

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[124] *Matter of Sesay,* 25 I&N Dec. 431 (BIA 2011).

[125] *8 CFR §214.2*(k)(3).

[126] *Matter of LE*, 25 I&N Dec. 541 (BIA 2011).

[127] Pub. L. No. 106-553, §1(a)(2) (appx. B, H.R. 5548, §§1101–04), 114 Stat. 2762, 2762A-142 to 2762A-149 (2000).

[128] Pub. L. No. 106-554, appx. D, div. B, §§1501–06, 114 Stat. 2763, 2763A-324 to 2763A-328.

[129] INA §101(a)(15)(K)(ii).

[130] 8 CFR §214.2(k)(7).

- If the marriage took place outside the United States, the alien spouse must receive the K-3 visa from the consulate in the country where the marriage took place.

Applicants must submit the I-129F and proof of filing the I-130.[131] While the I-130 is filed with the appropriate service center, the I-129F petition is filed with the USCIS Dallas Lockbox. Send the petition to:

U.S. Citizenship and Immigration Services
P.O. Box 66051
Dallas, TX 75266

Applicants submitting the application by Express mail or by courier should send it to the following address:

U.S. Citizenship and Immigration Services
Attn: I-129F
2501 South State Highway 121 Business
Suite 450
Lewisville, TX 75067

Aliens who enter with K-3 and K-4 visas are eligible for employment authorization.[132] Their period of authorized admission terminates 30 days after denial of the underlying I-130 petition, application for immigrant visa, or application for adjustment of status.

K-3 spouses and K-4 derivatives may only adjust status based on the I-130 filed by the visa petitioner.[133] The USC spouse must file a separate I-130 for the K-4 derivative to immigrate; where the derivative is over 18 at the time the marriage to the K-3 spouse takes place, the derivative does not qualify as a stepchild and will not be eligible to adjust status. [134]

This expansion of the K visa took place on December 21, 2000. The law applies to any alien who is beneficiary of I-130 petition filed under INA §204 before, on, or after that date. The premise of the K-3 visa is that consular processing as K-3 is faster than entering as an immigrant. But with the acceleration of the processing of I-130 petitions by the service centers and the comparable amount of time for processing the I-129F petition – currently about five months for both – the K-3 option has lost most of its rationale. In addition, the State Department provided guidance on cases where both the I-130 and the I-129F have been approved and forwarded to the NVC.[135] Beginning on February 1, 2010, in those situations the NVC and consulate will stop all

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[131] *Id*.

[132] 8 CFR §214.2(k)(9).

[133] INA § 245(d); *Matter of Valenzuela*, 25 I&N Dec. 867 (BIA 2012)

[134] *Matter of Akram*, 25 I&N Dec. 874 (BIA 2012)

[135] Department of State, "How will the Department of State process my K-3 visa?" (February 1, 2010), *published on* AILA InfoNet at Doc. No. 10021965 (*posted* Feb. 19, 2010).

processing of the K-3 visa and it will administratively close the case. The State Department will proceed only with the immigrant visa application. If the NVC has received only an approved I-129F and the I-130 is still pending, the agency will proceed with nonimmigrant visa processing and will forward the petition to the appropriate U.S. consulate.

The V Visa for Spouses and Children of LPRs

On September 7, 2001, USCIS published interim regulations implementing the "V" visa and V status program, which grants nonimmigrant status and employment authorization to certain spouses and minor children of LPRs.[136] This status allows them to reside and work in the United States while waiting to obtain immigrant status. It attempts to remedy the extensive waiting periods created by the backlog in the second-preference F-2A category.[137]

This V program is one of several immigration benefits provided by the Legal Immigration & Family Equity Act (LIFE Act),[138] enacted on December 21, 2000. It provides that the spouse or unmarried child (under 21 years of age) of an LPR is eligible for the V nonimmigrant classification, if he or she:

- had a Form I-130 (Petition for Alien Relative) filed with USCIS on his or her behalf by the LPR spouse or parent on or before December 21, 2000, and
- has been waiting for at least three years after the Form I-130 was filed for immigrant status, either because a visa number has not yet become available, or because USCIS has not yet adjudicated the Form I-130 or the Form I-485.[139]

The unmarried child of a person who meets the above requirements is also eligible for V status.[140] V-1 status is given to spouses of LPRs. V-2 status is given to unmarried children of LPRs who have filed an I-130 on their behalf. V-3 status is given to derivatives (unmarried children) of those in V-1 or V-2 status who are accompanying or following to join the principal alien.

V status terminates 30 days after denial of the underlying I-130 petition, I-485 petition, or application for immigrant visa. Similarly, it terminates if the LPR spouse naturalizes or the parties divorce.[141] The benefits of this program include:

- employment authorization[142]

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[136] 8 CFR §214.15(a).

[137] INA §101(a)(15)(V).

[138] Pub. L. No. 106-553, §1(a)(2) (appx. B, H.R. 5548, §§1101–04), 114 Stat. 2762, 2762A-142 to 2762A-149 (2000).

[139] 8 CFR §214.15(c).

[140] 8 CFR §214.15(a).

[141] 8 CFR §214.15(j).

[142] 8 CFR §214.15(h).

- travel into and out of the United States without having to apply for advance parole[143]
- Certain grounds of inadmissibility do not apply, including INA §§212(a)(9)(B) [three- and ten-year bars for unauthorized presence], 212(a)(6)(A) [present without permission or parole], and 212(a)(7) [documentation requirements].[144]
- Aliens physically present in the United States can apply to USCIS for V status classification, while those outside the United States will receive V visas from the consulate.[145]
- V status holders may be able to adjust status later under INA §§245(a) or (i). They will be considered in lawful status while here with V status.

The State Department issues V visas to eligible persons living abroad.[146] Those persons apply for employment authorization once they arrive in the United States.

USCIS regulations provide important information regarding eligibility for the visa and work permit, as well as the application procedures. They provide that the period of authorized stay and work permit will be for two years, with the opportunity to file for renewal.[147]

Persons in immigration proceedings must move the immigration court to close their case so that they may apply for the V status with USCIS. Those who have received a final administrative order of deportation, exclusion, or removal but have not "effected" the order by leaving the United States must move the immigration court to reopen their case. There are strict limits on the number (only one) and timing (within 90 days of the order) of motions to reopen, but the person may request that the trial attorney join in the motion, thus avoiding those limitations.[148] Persons who have effected their deportation or removal order by leaving the United States are ineligible to receive V status if they re-entered illegally after April 30, 1997.

The V status allows persons to travel and return to the United States without having to apply for advance parole. If they have been granted V status by USCIS, they also must obtain a V visa from the U.S. consulate abroad before re-entering. Also, if they have been "unlawfully present" in the United States for more than 180 days before getting the V visa, travel may trigger the three– or ten-year bar when they apply for immigrant status. At that time, they would need to seek a waiver of this ground of inadmissibility. Also, it is important to note that while the three– and ten-year bars

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[143] 8 CFR §214.15(i).

[144] *Id*.

[145] 8 CFR §§214.15(e), (f).

[146] 8 CFR §214.15(e).

[147] 8 CFR §§214.15(h), 274a.12(a)(15).

[148] 8 CFR §214.15(*l*).

are waived for persons applying for V status, the “permanent” bar for illegal entry (or attempted entry) after one year of unlawful presence is not waived.[149]

Eligible persons living in the United States must apply for V nonimmigrant status with USCIS by submitting the following:

- an application for V status on Form I-539. The fee is currently $290.
- an application for employment authorization on Form I-765. The fee is currently $380.
- results of a medical examination (Form I-693) by a designated civil surgeon (without vaccination supplement)
- a fee of $85 for fingerprints, if the applicant is between the ages of 14 and 79
- proof that an I-130 petition was filed at least three years ago. This could be an I-130 or I-485 filing receipt, notice of action (Form I-797), notice of approval, letters from USCIS, or other evidence.

While V status applicants do not have to submit an I-864 affidavit of support, they will have to prove that they are not likely to become a public charge. If requested, they may have to submit a nonbinding I-134 affidavit.

The supplement to Form I-539 provides further information in completing the form. V visa applicants should check box “b” in part 2 of Form I-539 and indicate “V” in the space provided. In part 3, question 4, the applicant should put the name of the LPR spouse or parent who filed the I-130, where the I-130 was filed, and the date of filing. When completing the I-765 employment authorization application, put “(a)(15)” in answer to question 16 where it requests the provision of law under which the applicant is applying.

The V status and employment authorization applications should be sent to the following address:

U.S. Citizenship and Immigration Services
P.O. Box 7216
Chicago, IL 60680-7216

For those filing by Express mail or via courier, send the application to the following address:

U.S. Citizenship and Immigration Services
Attn: VKL
131 South Dearborn, 3rd Floor
Chicago, IL 60603-5517

At the end of 2004, the U.S. Court of Appeals for the Ninth Circuit issued a decision holding that children who entered the United States on V-2 visas should be allowed to

[149] 8 CFR §214.15(i)(3)(ii).

remain in the country and extend their status beyond their 21st birthday.[150] Under current regulations, children who entered on V-2 visas are ineligible for an extension and continued employment authorization beyond the date they turn 21.[151] The appellate court found that it was not Congress' intent to separate these children from their petitioning parents upon their turning 21. While children who have already turned 21 lose their eligibility for a V visa, under the ruling they still would qualify to extend their V status and employment authorization while they remain in the United States pending eligibility to adjust.

In light of this case, the director of field operations for the Department of Homeland Security (DHS) issued guidance to the National Benefits Center regarding the adjudication of V-2 and V-3 extension applications from persons who have turned 21. According to a January 10, 2005, memorandum, the court's decision will be applied nationwide and will affect both V-2 and V-3 visa holders.[152] The memo also finds that the appellate court "invalidated the age-out provisions of 8 CFR 214.15(g)." That provision states that V-2 or V-3 visa holders will be admitted to the United States for two years or until the day before alien's 21st birthday. It states that V-2 or V-3 status applicants will be given the equivalent period of time when applying within the United States. V-2 and V-3 visa or status holders will be granted extensions of their status for the equivalent period of time.

Under the USCIS interpretation, V-2 and V-3 visa holders or status holders are entitled to an extension for two years, irrespective of when they turn 21. The memo states, "If the only reason for potentially denying an I-539 filed for V-2 or V-3 extension is that the alien has turned 21, the application shall be approved and the period of admission shall be in accordance with 8 CFR 214.15(g)(1) (granted a period of admission not to exceed two years)."[153]

Neither the court decision nor the USCIS memo provides a remedy for otherwise-eligible persons who failed to apply for a V visa or V status before turning 21. The USCIS memo reminds us that the law requires that they be under 21 to be eligible for "initial" V-2 or V-3 status. The same presumably would be true for persons who left the United States and are now over 21; they would have to file for a new V visa and would be ineligible due to their age. The USCIS memo does help persons, however, who made a timely application for an extension of status before turning 21, but who were denied solely due to age-out. Those persons "may file a new application for extension."

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[150] *Akhtar v. Burzynski*, 383 F.3d 1193 (9th Cir. 2004).

[151] 8 CFR §214.15(g)(3).

[152] USCIS Memorandum, T. O'Reilly, "Adjudication of Form I-539 for V-2 and V-3 Extension" (Jan. 10, 2005), *published on* AILA InfoNet at Doc. No. 05020460 (*posted* Feb. 4, 2005).

[153] *Id*.

Widow/Widower Petitions

Certain widow/widowers may be able to obtain permanent residence after their spouse has died. Immigration law provides that they may immigrate if they meet the following requirements: (1) they were married to a U.S. citizen; (2) the deceased spouse was a citizen at the time of his or her death (not necessarily during the whole period of the marriage); (3) they were not legally separated at the time of the death; (4) they file a "widow/widower" petition within two years of the death; and (5) they are not inadmissible.[154] In addition, they must not have remarried before acquiring the immigrant visa.[155] A 2009 law eliminated the prior requirement that the couple be married for at least two years. Widows/widowers whose citizen spouse died before the new law went into effect on October 28, 2009 had two years from that date to seek relief.

These widow/widowers are considered immediate relatives, and thus immigrate outside of the numerical quota restrictions and long waiting period that exists in many of the preference categories. They may either adjust status or consular process. But unlike other immediate relatives, their unmarried children under age 21 will be considered derivatives and may accompany or follow to join the parent.[156]

Widow/widowers file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The filing fee is currently $405. The information requested on the form is fairly self-explanatory. The applicant ignores part 1; checks box (b) in part 2; and fills in basic biographical information in part 3. If the widow/widower last entered the United States with a nonimmigrant visa, he or she is eligible to adjust status, even though the person may have overstayed the permitted time or worked illegally. Alternatively, if the I-360 was filed on or before April 30, 2001, the applicant may be able to adjust in the United States pursuant to INA §245(i). Nevertheless, complete part 4 by putting any foreign address and the location of the U.S. consulate where the applicant would consular process if required. Omit parts 5 and 6. Provide other biographical information in part 7. Be sure to list any and all unmarried children under 21 years of age in part 8 so they may immigrate with or follow to join the principal beneficiary.

If the citizen spouse had filed an I-130 on behalf of the alien spouse, that petition will automatically convert to an I-360 petition upon the petitioner's death.[157] This automatic conversion will occur to both I-130 petitions pending or approved at the time of the petitioner's death. It applies to I-130s pending on or approved before, on, or after October 28, 2009.

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[154] INA §201(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), Oct. 28, 2009.

[155] 8 CFR §204.2(b)(1).

[156] 8 CFR §204.2(b)(4).

[157] 8 CFR § 204.2(i)(1)(iv).

Documents that should accompany the I-360 application include:[158]

- proof of the deceased spouse's citizenship at the time of the death (through either birth in the United States or naturalization)
- proof of the deceased spouse's death
- proof of marriage to the deceased spouse
- proof of termination of any prior marriage of either party
- proof of the relationship of any unmarried children under 21 years of age

If the widow/widower is residing in the United States and otherwise eligible to adjust status (based on lawful entry or §245(i)), he or she may file the I-360 along with an I-485 at the National Benefits Center via the Chicago lockbox. If the person is ineligible for adjustment of status, he or she will file the I-360 petition at the Vermont Service Center.[159] If the widow/widower is residing outside the United States, he or she will file at the DHS office with jurisdiction over the place of residence.

Applicants for either adjustment of status or an immigrant visa are exempt from the affidavit of support (Form I-864) requirements, although they will have to file Form I-864W. The applicant may have to submit other proof that he or she is not likely to become a public charge.

If the widow/widower is ineligible for adjustment of status, determine whether he or she will trigger the ground of inadmissibility for unlawful presence upon leaving the country to consular process. If a widow(er) was physically present in the United States when the citizen spouse dies and he or she remains here until departing for the consular interview, the alien spouse will be able to file the waiver notwithstanding the death of the citizen spouse/qualifying relative. This applies to cases where the citizen spouse died while the I-130 petition was pending or after it was approved; it would not apply in cases where no petition was filed. Similarly, the agency will presume extreme hardship.[160]

Widows/widowers who had a pending I-130 on October 28, 2009, will not be deemed to have accrued any unlawful presence.[161] But those who have acquired more than 180 days of unlawful presence in the United States will trigger the three– or ten–year bar to lawful re-entry. Although there is a waiver under INA §212(a)(9)(B)(v), the applicant must demonstrate extreme hardship to a U.S. citizen or LPR spouse or parent. Most widows/widowers will lack that qualifying relative.

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[158] 8 CFR § 204.2(b)(2).

[159] 8 CFR § 204.2(b)(3); Instructions, Form I-360.

[160] USCIS Memo, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010).

[161] "Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)," D. Neufeld, Acting Associate Director, Domestic Operations, USCIS (Dec. 2, 2009)

The USA PATRIOT Act of 2001 provided additional relief to spouses and fiancé(e)s of U.S. citizens who died as a result of the September 11, 2001 terrorist attack.[162] One section allows the spouses and fiancé(e)s of U.S. citizens to self-petition if they were the principal beneficiary of an I-130, I-140, or I-129F filed on or before September 11, 2001.[163] The derivative children also may obtain special immigrant status, as long as the relationship existed on September 10, 2001.[164] Grandparents of children orphaned due to the terrorist attacks also may obtain benefits, provided one of the deceased parents was a citizen or LPR.[165]

Another section applies specifically to the widow/widowers of U.S. citizens, as well as their children, by eliminating the requirement that the couple must have been married for two years in order for the widow(er) to gain immigration benefits.[166] The public charge ground of inadmissibility is waived for these widow/widowers and their children.[167] Applicants for status as a widow(er) or derivative child still must file for relief within two years of the citizen spouse/parent's death.[168]

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[162] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§421–28, 115 Stat. 272, 356–63.

[163] *Id*. §421, 115 Stat. 356–57.

[164] *Id*.

[165] *Id*; USA PATRIOT Act Series: No. 6—Relief for Visa Applicants Directly and Adversely Affected by the Events of September 11, State 79359 (Apr. 2002), *published on* AILA InfoNet at Doc. No. 02042690 (*posted* Apr. 26, 2002).

[166] USA PATRIOT Act, *supra* note 162, §423(a)(1), 115 Stat. 360–61.

[167] *Id*. §423(d), 115 Stat. 362.

[168] *Id*. §423(a)(1), 115 Stat. 360–61.