

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.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

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 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 visas based on the parent’s marriage to a U.S. citizen.

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

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).

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 petitions that are based on marriage to a U.S. citizen. 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.

Children Affected

The law also affects alien children who immigrate legally to the United States within two years of their parent’s marriage.²² Like their immigrating parent, these

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).

²² INA §216(g)(2).

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, the alien's children can immigrate in one of three possible ways. First, the citizen 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 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.

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

²³ INA §101(b)(1)(E).

²⁴ INA §101(b)(1)(B).

²⁵ INA §203(a)(2).

²⁶ INA §216(g)(1).

²⁷ INA §216(a)(1).

²⁸ INA §216(b).

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 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

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).

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 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 (1) they were married in accordance with the laws in the jurisdiction where the marriage took place; (2) they did not enter into the marriage to procure an immigration benefit; and (3) no fee was paid to anyone other than an attorney in return for filing the petition. 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.

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).