Green Card thru marriage — consequences of separation or divorce

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Spouses of US citizens (USCs) and legal permanent residents (LPRs) (commonly referred to as “green card holders”) are entitled to seek permanent residence in most cases.

Spouse of USC

A spouse of a USC is categorized as an immediate relative. If the spouse of a USC is already in the United States in legal status, then an immigrant visa petition and application for adjustment of status may be filed for the spouse with the US Citizenship and Immigration Services (USCIS). In some cases, even if the spouse has no legal status in the United States, he/she may still be able to apply for adjustment of status based on the marriage to a USC under Section 245(a) or Section 245(i) of the Immigration & Nationality Act.

Spouse of LPR

Visa numbers for spouses of LPRs are not immediately available due to backlogs. Therefore, an immigrant visa petition must be filed with USCIS initially. If the spouse is in the United States and eligible for adjustment of status, an application for adjustment of status can be filed with the USCIS when the spouse’s priority date becomes current or the LPR sponsor becomes a naturalized United States citizen.

Eligibility requirements for adjustment of status

To be eligible for adjustment of status, the spouse and the USC or LPR must be married at the time of filing and adjudication of the I-485 application by USCIS. The marriage must be bona fide and the burden of proof rests with the applicant to prove the validity of the marriage. The key issue is whether the marriage was valid at its inception. To determine marriage validity at inception, USCIS looks at whether the spouses intended to establish a life together at the time of their marriage. USCIS can examine the behavior of the spouses both before and after the wedding to ascertain the intent to establish a life together. Such intent can be established through evidence of joint financial accounts, jointly titled property, creating beneficiary rights, sharing health and auto insurance, and creating children together.

Consequences of separation on an adjustment application

A problem arises if the spouses start living separately between the date of marriage and the date of the adjustment interview. Though separation can be a highly relevant factor in determining whether the marriage was bona fide or not, separation itself is not a bar to the approval of the adjustment application, if the spouses are able to justify that their marriage was valid at its inception.

The USCIS New York district office has a unique procedure for adjudicating spousal petitions where there are issues about the marriage being genuine. In such cases, a written notice describing the rights involved must be given to the petitioner, a separate attachment of the list of rights must be sent out with the interview appointment letter and a list of documents to be submitted at the time of the interview should be mailed to the petitioner. The interview may be conducted with both spouses present, or they may be separated and questioned in the presence of a video camera. The interview will feature questions concerning the personal living arrangements and marital situation of the spouses. Questions can range from the layout of furniture in

the marital residence to the names of family members, friends, and pets, to product brand names used by the other spouse.

Although the Stokes procedure is only required in New York, USCIS has applied the basic concept to all marriage cases throughout the United States. A notice is sent to spouses in marriage cases advising them to bring certain documents to the interview, and it is now a routine to require spouse to provide at least some minimum proof about the bona fide nature of the marriage. Spouses usually are not separated and videotaped during the interviews unless USCIS has evidence indicating a sham marriage. When spouses are living separate and apart at the time of the interview, they may be more likely to find themselves in such a situation.

If the Stokes interview results in a denial of the petition for permanent residence, a person has the option to appeal to the Board of Immigration Appeals, which has jurisdiction over the visa petition. A new petition could also be filed, but the spouses may have to overcome the same issues that led to the denial of the first petition, including allegations of marital fraud.

Immigration proceedings

Adjustment applicants, who fail to appear for an adjustment interview, could be placed in proceedings. The beneficiary spouse would not be able to seek relief for adjustment, in cases where spouses have been living separately during the USCIS adjustment process and end up getting divorced by the time the immigration court is ready to hear the case.

In some situations, if the first marriage does not work out and a divorce occurs after USCIS denies adjustment; a new marriage to a more suitable candidate may be available. The spouse can file a new petition for permanent residence and application for adjustment of status based on the second marriage. How-ever, if the subsequent marriage occurs, while removal proceedings are pending, adjustment of status based on the marriage is not permitted, unless the spouses can prove the bona fide nature of the marriage by heightened clear and convincing evidence standard.

Conditional residence

Persons, who obtain permanent resident status based on their marriage to USC or LPR, are granted conditional resident status if the marriage is less than two years old at the time residence is granted. During the 90 days preceding the second anniversary of the grant of conditional residence, the conditional resident and the spouse are required to take steps to make the conditional status permanent. For this purpose, Form I-751 Petition to Remove Conditions on Residence has to be filed jointly by both spouses. Conditional residence is terminated if the conditional resident spouse fails to file the petition within the 90-day window or fails to appear for an interview.

However, if a conditional resident spouse's marriage ends within the two year period, it is necessary to file for a waiver of the requirement that both spouses sign the petition. There are four types of waivers available and more than one waiver can be sought by the conditional resident spouse by providing supporting evidence.

- Death and extreme hardship waivers — A conditional resident spouse may individually qualify for a joint petition waiver if the other spouse has died, or it can be shown that he or she would suffer extreme hardship if removed from the United States, only if such hardship occurred during the two-year conditional residence period.

- lDivorce or annulment waiver — A conditional resident spouse can individually qualify for a waiver if it can be shown that the marriage was entered into in good faith, but the marriage was terminated by divorce or annulment prior to the filing of the joint petition. If the spouses are separated but not divorced prior to and during the three-month period designated for filing the joint petition, the conditional resident spouse cannot file the joint petition until a divorce is obtained. If the conditional resident spouse is in immigration court proceedings, a continuance may be sought to allow the divorce to become final.

- Extremely cruelty waiver — A conditional resident spouse can individually qualify for a waiver if it can be shown that the marriage was entered into in good faith, but the applicant was battered or subjected to extreme cruelty by the US citizen or LPR spouse during the marriage. Evidence showing battery or extreme cruelty could include police reports documenting physical abuse, restraining orders, medical records, and other forms of psychological or emotional abuse.

However, if the USCIS denies the I-751 petition to remove conditions, the conditional resident spouse would receive a notice to appear in an immigration court for removal proceedings. The conditional resident spouse can request the Immigration Judge to adjudicate the petition. If the conditional residence has been terminated by USCIS and a waiver request was filed with USCIS but not adjudicated, the conditional resident spouse placed in removal proceedings can ask the Immigration Judge for a continuation until the waiver is adjudicated. A continuation can be obtained if the conditional resident spouse never filed a petition with USCIS and now seeks to do so.

VAWA: VAWA stands for “The Violence Against Women Act” and provides relief to certain spouses, who have experienced battery or abuse from USC or LPR spouses, including cancellation of removal or suspension of deportation. VAWA permits battered immigrant spouses to seek permanent residence without the assistance of the abusive spouses. In order to file a self-petition, a battered immigrant must have had a valid marriage to a USC or LPR; joint residence in the United States in most cases; spousal battery or extreme mental cruelty; and good moral character. A VAWA self-petition is filed on USCIS Form I-360. The most compelling part of the application is the battered immigrant’s own personal statement, typically submitted as an affidavit.