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## **“Marital Problems”**

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## REMOVING CONDITIONS FROM RESIDENCY: JOINT FILING AND WAIVERS

*updated by by Avram E. Morell, Lucy Fong Lee, and Milissa R. Tipton-Dunkins\**

This advisory provides guidance to practitioners assisting clients who obtained conditional residence through marriage-based immigration and need to file the I-751 application, Petition to Remove Conditions on Residence. It addresses the joint petition to remove conditional residence and circumstances when a waiver of the joint filing requirement is required.

### JOINT FILING

The Immigration and Nationality Act (INA) imposes an initial two-year period of conditional residency on certain persons who acquire resident status through marriage to a U.S. citizen.<sup>1</sup> If a couple has been married for less than two years at the time residency is granted, the noncitizen will acquire conditional residence and be required to later remove this condition.<sup>2</sup> To remove the condition, an applicant must either file a joint I-751 petition with the U.S. citizen spouse or file for a waiver of this requirement.

A conditional resident (CR) may remove the condition on permanent residence by jointly filing a petition (Form I-751) with the U.S. citizen spouse within a 90-day period prior to the expiration of the second-year anniversary of the grant of conditional residence.<sup>3</sup> The joint applicants must further establish, *inter alia*, that the qualifying marriage was entered into legally; has not been judicially annulled or terminated, other than through death of a spouse; was not entered into for the purpose of procuring the noncitizen's entry as an immigrant; and that no fee was paid (other than to an attorney).<sup>4</sup> The petition must be accompanied by evidence of a valid marriage.<sup>5</sup>

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<sup>1</sup> INA §216.

<sup>2</sup> This requirement applies both to applicants who were granted permanent residence in the United States, through an application for adjustment of status, and those who were granted an immigrant visa at a US consulate abroad and were subsequently admitted to the United States as permanent residents.

<sup>3</sup> INA §216(c).

<sup>4</sup> USCIS Memorandum, D. Neufeld, "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" (Oct. 9, 2009), *published on AILA InfoNet at Doc. No. 09110667 (posted Nov. 6, 2009)*.

<sup>5</sup> 8 CFR §216.4(a)(5).

The petition is filed by mail at the U.S. Citizenship and Immigration Services (USCIS) service center with jurisdiction over the applicants' place of residence. After receipt of the petition, USCIS will issue a receipt notice and schedule the noncitizen spouse for biometrics collection at an Application Support Center near the applicants' residence. In some cases, particularly where the application was filed on time and the bona fides of the marriage are clear from the evidence submitted, the entire adjudication is conducted "on the papers" by the Service Center. However, in many cases—either due to an issue arising out of the paper submission or as a result of a random selection—the joint applicants are summoned to an interview at the USCIS District Office, and the adjudication is completed by an officer at the District Office.

### **WAIVERS OF JOINT FILING REQUIREMENT**

In the event that the noncitizen spouse is unable to jointly file Form I-751, he or she may file for a waiver of the joint-filing requirement on Form I-751.<sup>6</sup> Three such waivers exist, and may be granted if the noncitizen spouse can demonstrate any one of the following:<sup>7</sup>

1. extreme hardship would result if the noncitizen spouse were to be removed;
2. the qualifying marriage was entered into in good faith by the noncitizen spouse, but the qualifying marriage has been terminated (other than through the death of the citizen spouse); or
3. the marriage was entered into in good faith by the noncitizen spouse, but the noncitizen spouse was abused or subjected to extreme cruelty during the marriage.

### **SEPARATED BUT NOT YET DIVORCED**

If a joint I-751 petition is filed by parties who are legally separated and/or in pending divorce proceedings, USCIS will issue a Request for Additional Evidence (RFE) to the noncitizen to provide a divorce decree. If the decree is presented to USCIS within the 87-day response period, the officer will amend the petition to adjudicate it as a waiver petition, thus avoiding the need to refile the case as a waiver. If the divorce decree is not produced because the parties are not divorced when the RFE is due, USCIS will evaluate the bona fides of the marriage and adjudicate the case as a joint petition.<sup>8</sup>

USCIS guidance specifically states that "USCIS may not deny a petition solely because the spouses are separated and/or have initiated divorce or annulment proceedings."<sup>9</sup> When filing cases under these circumstances, it is important to reference this language and include a copy of the memo, as well as ensure that the petition is accompanied by strong evidence of the bona fides of the marriage.

In cases where the parties are separated and divorce is pending, but the U.S. citizen spouse will not agree to sign a joint petition, the noncitizen must file for a waiver of the joint filing requirement and hope that the pending divorce is finalized within the 87-day deadline for the RFE. If the noncitizen establishes the eligibility for the waiver, USCIS will adjudicate the petition on the merits in accordance with the established procedure. However, if the noncitizen does not respond to the RFE, or if the submitted response does not establish eligibility for the waiver, USCIS will deny the I-751 and issue a Notice of Termination of Conditional Resident Status. The USCIS adjudicator will then refer the case for issuance of a Notice to Appear (NTA).<sup>10</sup>

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<sup>6</sup> 8 CFR §§216.5, 1216.5.

<sup>7</sup> INA §216(c)(4).

<sup>8</sup> See USCIS Memorandum, D. Neufeld, "I-751 Filed Prior to Termination of Marriage" (Apr. 3, 2009), published on AILA InfoNet at Doc. No. 09072166 (posted July 21, 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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