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HAPPILY NEVER AFTER: EFFECTS OF DIVORCE ON SPOUSAL-BASED IMMIGRATION CASES

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By Nicolas Chavez, Lakshmi Nayar and Maria McIntyre

Immigration through marriage is one of the most common methods for a foreign national to obtain lawful permanent residence. For the lucky ones, the process only takes a few months. For others, the journey can last several months or years. During this time, marriages fail, which can jeopardize the foreign national's immigration status.

This article addresses the effects of divorce on your client's immigration status based on his or her qualifying marriage to a U.S. citizen or lawful permanent resident. We discuss the consequences of divorce or separation during the initial adjudicative stages of the I-130 process, as well as after your client obtains conditional permanent residence. We present practice pointers on how you can deal with these issues, and identify options which your client may pursue despite the dissolution of the underlying marriage.

DISSOLUTION OF MARRIAGE PRIOR TO ADJUDICATION OF THE I-130 PETITON

Under the Immigration and Nationality Act (INA), a foreign national may immigrate as the spouse of a U.S. citizen or lawful permanent resident. In this section we discuss the impact of divorce on a marriage-based immigration application during the adjudication process and identify situations in which a foreign national may remain eligible to immigrate notwithstanding the dissolution of the underlying marriage.

Initiating the I-130 Process Based on Qualifying Marriage

Immigration through marriage is initiated by filing an alien relative petition (Form I-130) with the U.S. Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security. The purpose of this process is to establish the appropriate relative classification that will serve the basis for applying for lawful permanent residence. There are several familial categories under the immigration scheme, but this paper will focus solely on spousal petitions filed by U.S. citizens and lawful permanent residents.[1]

The U.S. citizen or lawful permanent resident wishing to immigrate his or her spouse is known as the "petitioner." The foreign national spouse is known as the "beneficiary." The term "spouse" is not affirmatively defined in the INA. Generally, an individual qualifies as a spouse for the purposes of family sponsored immigration if the marriage is valid under the laws of the state or country where the marriage is celebrated, and not contrary to public policy.[2] A sham marriage, or a marriage entered into solely to receive immigration benefits, is not permitted under the INA.[3] The

[1] INA §§ 201(b)(2)(A)(i)("immediate relatives" include spouses of U.S. citizens), 203(a)(2) (spouses of lawful permanent residents); *see generally* INA § 203 (for a list of other immigration classifications).

[2] *See Loughran v. Loughran*, 292 U.S. 216 (1934); *Matter of Lovo*, 23 I&N Dec. 746, 748 (BIA 2005); *Matter of Zeleniak,* 26 I&N Dec. 158 (BIA 2013); *Matter of Arenas,* 15 I&N Dec. 174 (BIA 1975); *Matter of Levine*, 13 I&N Dec. 244 (BIA 1969); *Matter of Dagamac*, 11 I&N Dec. 109 (BIA 1965); *Matter of Moncayo, 14 I&N Dec. 472 (BIA 1973).*

[3] *Matter of McKee* 17 I&N Dec. 332 (BIA 1980); *Bark v. INS*, 511 F.2d 1200 (9 Cir. 1975).

petitioner must establish that the marriage to the beneficiary is valid at the time of filing the I-130 petition.[4] If the couple divorces prior to filing the visa petition, clearly the beneficiary will no longer qualify for immigrant classification through the terminated marriage. If a couple legally separates after the I-130 petition is filed, this act may disqualify the beneficiary from seeking permanent residence.[5] However, a marriage that becomes nonviable after the I-130 petition is filed—even where the couple is no longer cohabitating—may still be valid for immigration purposes, so long as the marriage has not legally terminated and was not a sham or fraudulent.[6] The question is whether or not the couple intended to establish a life together at the time of marriage.[7]

> **Practice Pointer:** Although a nonviable marriage is valid for immigration purposes, a couple's informal separation can raise suspicion as to the validity of the marriage. As a result, it is critical to have documentation supporting a good faith marriage. Such evidence may include, but is not limited to, leases, bank statements, joint accounts, insurance policies, tax returns, birth/baptismal certificates of common children, third party affidavits, and any other evidence issued under both names or addressed to each other. Photos of the couple may also be helpful, but it is important that the photos capture what a couple would normally do within the course of a relationship. Examples of this include birthday celebrations, holidays, family gatherings, etc. The photos should identify the persons, date, and place each were taken.

> **Practice Pointer**: Counsel should be aware of the varying standards of evidence that may be applicable in proving the validity of the marriage. Unless a standard is specified, the petitioner must normally prove by a preponderance of evidence that the beneficiary is eligible for the benefit sought.[8] However, the standard is different and heightened in other situations. For example, a lawful permanent resident petitioner who marries the beneficiary within five years of having obtained residence through another marriage, must prove by "clear and convincing" evidence that the previous marriage was not a sham.[9] Another example involves marriage while the beneficiary is in removal proceedings. The couple

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[4] *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966)(the petitioner has the burden to establish eligibility for the benefit sought on behalf of the beneficiary).

[5] *Matter of Lenning*, 17 I&N Dec. 476 (BIA 1980)("A visa petition filed on behalf of an alien spouse is properly denied where the parties legally separated pursuant to the terms of a formal, written separation agreement notwithstanding fact that their marriage was entered into in good faith and had not been finally dissolved by an absolute divorce decree.").

[6] *Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980)(absent fraud or divorce, an application for adjustment of status should not be denied solely because the marriage is nonviable); *Matter of McKee*, 17 I&N Dec. 332 , 334-35 (BIA 1980)(a visa petition should not be denied solely because the parties no longer live together, so long as the parties entered into a good faith marriage and the marriage has not been legally dissolved).

[7] *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994)**;** *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[8] *See Matter of Chawathe*, 25 I&N Dec. 369, 374-76 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997).

[9] INA § 204(a)(2)(A); 8 C.F.R. § 204.2(a)(1)(i).

Title search: Happily Never After: Effects of Divorce on Spousal-Based Immigration Cases

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