Advanced I-751 Removal of Conditions Issues

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Introduction

The conditional permanent residence scheme, codified in the Immigration and Nationality Act (INA) § 216(a), was established in 1986 to combat what was perceived as widespread marriage fraud. The law applies to cases where a person becomes a permanent resident based the petition of a U.S. citizen or permanent resident spouse or step-parent. In marriages where permanent residence is granted before the couple celebrates their second wedding anniversary, or, in the case of a stepchild, the marriage of the stepchild's parents, the foreign spouse or stepchild is granted conditional permanent residence good for two years. In a window of between 90 days before the second anniversary of the alien's permanent residence and the actual second anniversary of the alien's permanent residence, the couple and/or stepchild must file a joint petition on Form I-751 to removal the conditions on residence.[1]

In the normal case, the couple files the joint petition along with proof of the continued existence of the marriage in this 90 day window, USCIS sends a receipt extending residence for one year and within the next year USCIS adjudicates and approves the petition and issues the permanent resident spouse and/or stepchild a 10-year permanent resident card. Of course, the normal case is not the only scenario. In this practice advisory, we will address other-than normal situations.

Waivers of the Joint Petition Requirement

Realizing that providing no exceptions to the joint filing requirement would create

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[1]INA §§ 216(c)(1)(A), (d)(2)(A).

undue coercive power to the United States citizen spouse, the fact that not all marriages are idyllic, and to accommodate those who were inattentive to or unable to meet the filing deadline, the INA allows for exceptions to the joint filing and 90-day filing-window requirements allowing the foreign spouse to self-petition. Unlike a joint petition, a self-petition for waiver of the joint filing requirement may be filed at any time and is not subject to the 90-day filing window.[2] A self-petitioner may file an I-751 petition before the 90-day period or after USCIS terminated his or her status.[3]

The Immigration and Nationality Act provides for three different types of waivers of the joint filing requirement.[4] The conditional resident may petition for the removal of conditions on residence based on more than one exception to joint filing if he or she is independently eligible for each exception.[5] If the conditional resident later becomes eligible for a waiver not included in the original petition, he or she must generally file a new Form I-751 and pay a new filing fee. In these situations the foreign spouse can self-petition for the removal of the condition on residence:

1. Good Faith but Terminated: In this situation, the marriage was entered into in good faith but has been terminated by a final divorce or annulment. A conditional resident spouse and/or child may file this type of waiver only after the marriage has been judicially terminated or annulled. USCIS will generally require a certified copy of the

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[2]*Matter of Stowers*, 22 I&N Dec. 605 (BIA1999); 8 CFR § 216.5.

[3]INA § 216(d)(2)(C).

[4]INA § 216(c)(4).

[5]*Matter of Balsillie*, 20 I&N Dec. 486 (BIA 1992); *Matter of Anderson*, 20 I&N Dec. 486 (BIA 1992).

judicial decree that terminates the marriage;

2. Good Faith but Battered or Subjected to Extreme Mental Cruelty: In this situation, the qualifying marriage was entered into in good faith but during the marriage the foreign spouse or child was abused or subjected to extreme mental cruelty. As with the "good faith but terminated" waivers, waivers of the joint filing requirement in this category require a showing that the qualifying marriage was entered into in good faith. "Good faith but battered" waivers, however, do not require the marriage to have been terminated, but they do require a showing that the conditional resident or his or her child was battered or subjected to extreme cruelty at some point during the course of the marriage. A conditional resident may apply for the waiver based on abuse to himself or herself, or to his or her child, regardless of the child's citizenship or immigration status. A child who is a conditional resident may also apply for the waiver based on abuse to himself or herself.

3. Extreme Hardship Waivers In this situation, the foreign spouse must show that he or she would suffer extreme hardship if compelled to return to his or her country of origin. The only statutory requirement of the "extreme hardship" waiver is that extreme hardship would result if the conditional resident were removed. A conditional resident could base an "extreme hardship" waiver on hardship not only to the resident's immediate family, but presumably to any individual or entity. However, the statute allows for consideration of hardships that arose "only during the period that the alien was admitted for permanent residence on a conditional basis."

Unastonishingly, the death of the citizen spouse is also is a basis to self-petition.

Excusing Late Filing

The INA permits USCIS to accept late filings of joint I-751's if the alien establishes good cause and extenuating circumstances for failure to file the petition within the 90-day period.[6] The instructions for Form I-751 state that a Conditional Permanent Resident may file a petition untimely only if he or she can demonstrate good cause and extenuating circumstances by submitting a written explanation for his or her failure to timely file and a request that USCIS excuse the late filing.

When adjudicating a late jointly filed I-751 petition, the USCIS officer will check for a written explanation of the late filing. He or she will also review any corroborating evidence that was submitted to determine if the conditional resident established a good cause for the late filing. Although corroborating evidence is not mandatory, a prudent practitioner will include it in the filing. If an explanation is not included, USCIS will deny the petition.[7] If an explanation is supplied, a USCIS adjudicator will evaluate the explanation along with any evidence submitted to determine if the conditional resident established good cause for the late filing. USCIS may schedule an interview to explore the issue.

USCIS has enumerated what it believes constitutes good cause in policy memorandum. The list includes hospitalization, long term illness, death of a family member, the recent birth of a child, particularly if there were complications, or a family member on active duty with the U.S. military.[8] If good cause is believed to be shown,

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[6]INA § 216(d)(2)(B).

[7]Memo, Neufeld, Acting Assoc. Director, Domestic Operations. USCIS HQ70/6.1.1. AD 09-48 (Oct. 9, 2009) , posted on AILA InfoNet Doc. No. 09110667.

[8]*Id.*

officers may proceed with adjudication of the I-751. If good cause is not believed to be shown, the officer will deny the petition.

The 90-day period is tolled in the case of couples where one of the couple is serving abroad in active-duty status in the Armed Forces.[9]

Treatment of children

Dependent children who acquired conditional residence concurrently with a parent, or within 90 days after the parent, may be included in the joint petition. All dependents included in the joint petition must pay a separate biometrics fee. Dependent children who are ineligible to be included in the joint petition because they did not obtain residence concurrently with a parent or within 90 days after the parent, or because the parent has died, may file a separate petition. Children sometimes immigrate as stepchildren of the U.S. citizen or permanent resident petitioner without the parent immigrating. These children, too, must file a petition to remove the condition on residence with the step-parent.

When a child is included in the parent's petition, the child will not receive a separate I-751 receipt with his or her own name on it. The receipt is important because the conditional permanent residence card, good for only two years, will expire while the I-751 is being adjudicated. The expired card plus the receipt serve as the immigrant's and the child's proof of permanent resident status. Lacking his or her own I-751 receipt means the child lacks the proof of permanent residence necessary for travel abroad, employment authorization, and other purposes. For that reason, some families prefer to have the child

[9]INA § 216(g)(1).

file a separate Form I-751 even if he or she is eligible to be included on the parent's I-751. An alternative to such an expense is to seek a passport stamp from USCIS through INFOPASS evidencing the child's extension of conditional permanent residence after the timely filing of a petition by the parent.

Understanding the status of the Petitioner during the process.

When a conditional permanent resident files his or her joint I-751 petition within the 90 day period before the second anniversary of becoming a conditional permanent resident, he or she will be issued a receipt which will extend his or her authorization to work and travel lawfully for one year while the I-751 petition is pending. If there is no determination on the petition within the twelve month period, the conditional resident may make an INFOPASS appointment to request that an I-551 stamp be placed in his or her passport to reflect continued conditional residence status.[10] Thus, the often lengthy processing times should not pose any real inconvenience to the conditional resident who files the I-751 in a timely manner. He or she retains all of the rights of a permanent resident. In fact, the period of conditional permanent residence, including while the I-751 petition is pending adjudication, count towards the required residence for naturalization eligibility.[11]

Practice Pointer: When travelling abroad, the foreign national should carry his expired permanent resident card along with the original I-751 filing receipt. Airlines and may not accept copies of the I-751 as acceptable proof of status and Customs and Border

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[10]See, USCIS memo on documentation of extension of conditional resident status posted on AILA InfoNet at Doc. No. 03120940 (Dec. 9, 2003).

[11]INA § 216(g)(1).

Protection (CBP) may object to providing only a photocopy of the fee receipt extending conditional permanent residence. This could complicate admission to the United States.

As discussed above, the INA and regulations provide for the filing of late I-751's for individuals who can establish that there was good cause for the late filing. However, while such late filers will be issued the same receipt notice as those who file in a timely manner, the receipt specifically states that "This extension and authorization for employment and travel does not apply to you if your conditional resident status has been terminated." Pursuant to INA § 216, if the petition is not filed as required, the "Secretary of Homeland Security *shall* (*emphasis added*) terminate the permanent resident status of the alien as of the second anniversary of the alien's lawful admission for permanent residence." Further, the regulations at 8 CFR § 216.4 (a)(6) state that the failure to properly file the I-751 within the 90 day period "shall result in automatic termination of the alien's permanent residence status and the initial of proceedings to remove the alien from the United States." Should USCIS ultimately accept the late filing, then his or her status will be restored and he or she will be considered to have been in lawful status as a permanent resident from the time the conditional permanent residence was granted up and through the time the I-751 is approved.[12]

It is possible that USCIS will issue a receipt for a late-filed petition before USCIS generates a termination of status decision based on the failure to file the I-751 on time. The question then is whether issuance of the receipt restores the foreign spouse's status.

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[12]See INS Advises on Unlawful Presence posted on AILA InfoNet Doc. No. 97092240 (Sept. 22, 1997).

The California Service Center asserts that the issuance of a filing receipt does not restore the foreign spouse's status. Rather, status is only restored upon a determination by USCIS that good cause for the late filing has been demonstrated. Unfortunately, petitioners do not receive separate notice of the decision to accept the late filing and will only know the filing has been accepted once the petition is approved.[13]

Practice Pointer: Late filers should be cautioned about the risks of travel abroad while the petition is pending despite the fact that they have been issued the standard I-751 receipt notice.

Red flags in the I-751 process

As in all instances where an attorney represents more than one client, conflicts may arise. The I-751 context is no exception. Conflicts generally arise when an attorney is retained by two spouses to file a joint I-751, and, before the petition is adjudicated, the parties separate or divorce. To avoid conflict situations, the attorney's retainer agreement should address the possibility that a conflict of interest may arise and describe the agreement of the parties should this occur. For example, the parties can agree that the attorney may not represent either party unless the U.S. citizen spouse signs a waiver permitting the attorney to continue to represent the conditional resident. In a case in which the divorce is acrimonious, the attorney should seriously consider withdrawing from the representation of either party particularly when the attorney was privy or potentially will be privy to privileged information from either party.

Another red flag situation arises when an attorney is contacted by a potential client

[13]California Service Center at the CSC Quarterly Stakeholder Engagement Meeting on Nov. 8, 2011, Posted on AILA InfoNet Doc. No. 12021547 (2/15/2012); AFM 25.1(f).

who jointly filed an I-751 petition when he or she was already divorced or a divorce became final and the joint-filed I-751 was subsequently approved. When an attorney learns that the I-751 petition was incorrectly jointly filed, the client should be advised to amend the petition if it is still pending or to re-file if it has been adjudicated. However, the client must be advised of the risks of re-filing an I-751 including the fact that he or she may be placed in removal proceedings. Under no circumstances should a client file an application for naturalization if his jointly I-751 petition was approved after a judgment of divorce was entered if he has not taken steps to correct the situation. In such cases, the N-400 will be denied and the client could be placed in removal proceedings.

Removal proceedings if the petition is denied.

There are several reasons why an I-751 can be denied. USCIS could conclude that a jointly filed petition where the couple assert that they live together is not actually a *bona fide* marriage. USCIS could conclude that a jointly-filed petition where the couple has separated but not divorced was not a *bona fide* marriage at its inception. USCIS could deny the I-751 because the couple divorced after filing jointly. USCIS could also deny the petition finding a lack of proof of battery or extreme cruelty or a lack of extreme hardship if the foreign spouse applied under those categories. In any and all of these situations, after USCIS denies the I-751, the case is sent by USCIS to the immigration court for a removal proceeding.

Should the foreign spouse's I-751 filed under one category be denied but there are other categories not sought as a basis to remove the condition on residence, the immigration judge is supposed to afford the foreign spouse the opportunity to petition on

Form I-751 with USCIS in the other category or categories.[14] The immigration judge will either continue proceedings or administratively close them as USCIS has initial jurisdiction for the new I-751.[15] Should USCIS ultimately deny the new I-751, then the immigration court will adjudicate all the bases for I-751 petitioning.

Burdens of proof

When a couple jointly files an I-751, even if the couple is separated (but not divorced), the government has the burden to establish by a preponderance of the evidence that the facts and information in the I-751 – that the marriage was lawfully entered into, the marriage has not been terminated, and not entered into for immigration purposes – are not true.[16]

However, when there is self-petition, such as when the couple are divorced or the U.S. citizen or permanent resident spouse does not join in the petition, then the alien bears the burden of showing eligibility for the waiver.[17]

In cases where USCIS alleges that no I-751 was filed or the couple fails to appear at their interview, then the burden of proof is on the foreign spouse to show that a petition was filed or that the couple went to their interview.[18]

Alternate forms of relief

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[14]*Matter of Stowers*, *supra.*

[15]*Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991); 8 CFR §§ 216.5(f), 1216.5(f).

[16]INA § 216(c)(3)(D).

[17]INA § 216(c)(4); *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1148 (9th Cir. 2005).

[18]INA § 216(c)(2)(B).

In removal proceedings where the foreign spouse is charged with fraudulently procuring permanent residence, the foreign spouse may be able to seek a fraud waiver under INA § 237(a)(1)(H).[19] Adjustment of status through a new marriage is also possible in the rare event that conditional status is terminated but there is no allegation of fraudulently becoming a permanent resident such as when status was terminated for an unexcused late filing.[20]

Petitions for review

The BIA reviews decisions of the immigration courts. Should an immigration judge concur with USCIS and deny a petition to remove the condition on residence and order voluntary departure or removal, then appeal to the BIA is the next step. Should the BIA agree with USCIS and the immigration judge, then petitioning for review with a court of appeals is the next avenue for appeal. In cases where a joint petition was filed and the couple has not divorced, there should be no obstacle to petitioning for review as the courts of appeal consider legal issues, such as whether a marriage is a *bona fide* one.

Jurisdiction of the courts of appeal is more complicated in the cases of self-petitions. Courts of appeal do not have jurisdiction to review determinations specified in the INA to be at the discretion of the Attorney General or Secretary of Homeland Security other than asylum applications.[21] On the other hand, courts of appeal have jurisdiction to

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[19] *Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010).

[20] *Matter of Stockwell*, 20 I&N Dec. 309 (BIA 1991); INA § 204(c).

[21] INA § 242(a)(2)(B)(ii).

consider constitutional claims or questions of law.[22] The section of the INA that allows for self-petitioning states that the exceptions to join-filing are at the discretion of the Secretary of Homeland Security and that "[t]he determination of what evidence is credible and the weight given that evidence shall be within the sole discretion of the Secretary.[23] Some circuit courts[24] have found that they have jurisdiction to consider whether a marriage is a *bona fide* one and one circuit reviewed such a case without discussing jurisdiction.[25] Others have found that they lacked jurisdiction.[26]

Practice Pointer: Before filing a petition for review, research the law in the circuit where you intend to file to make sure the court has held that it has jurisdiction over INA § 216(c)(4) issues and exactly what aspects of an INA § 216(c)(4) decision it will review.

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[22]INA § 242(a)(2)(D).

[23]INA § 216(c)(4).

[24]*Oropeza-Wong v. Gonzales, supra*.; *Cho v. Gonzales*, 404 F.3d 96 (1st Cir. 2005); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (limited review).

[25]*Reynoso v. Holder*, 711 F.3d 199 (1st Cir. 2013).

[26]*Contreras-Salinas v. Holder*, 585 F.3d 710 (2d Cir. 2009); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 161 (3rd Cir. 2004); *Iliev v. Holder*, 613 F.3rd 1019 (10th Cir. 2010).