# Immigration Essentials for the FAMILY LAW PRACTITIONER



Delay. Delay. Delay. Such is the hallmark of California immigration visa processing. An adjustment of status application, through which a person in the United States (with some exceptions) applies for U.S. permanent residency by marriage to a U.S. citizen, can take up to three years. Immigrants, in various stages of visa processing, are appearing in lawyers' offices for advice regarding divorce. However, in many cases, foremost on their minds is not, "what is my due?" but rather "can he (usually a "he") force me to leave the United States?"

The immigrant may be in an abusive relationship that she (or he) is afraid to leave for fear that leaving will result in deportation. Sometimes the fear is legitimate. Often it is not. Even when the immigrant is "safe," counsel for the immigrant must still be prepared for demands for production of immigrant documents, usually irrelevant in the dissolution proceeding and raised solely to harass the immigrant. No matter what the processing status, scare tactics like these usually frighten the immigrant. Counsel for the immigrant must understand what is and is not a legitimate concern.

At a minimum, counsel must understand the basic issues raised by the Immigration Marriage Fraud Amendment of 1986 ("IMFA") and immigration benefits available to victims of domestic violence. This article attempts to provide the Bar with an overview of this complex and highly technical area of law.

## A family lawyer's guide to sanity in spite of IMFA

Marriage to a U.S. citizen was, and in many ways still is, the easiest route to legal immigration to the United States. In immigration law, marriage to a U.S. citizen can absolve an alien of many immigration-related sins. In this environment where "I do" also means "I avoid mountains of red tape and an uncertain future," a compelling incentive is created for many aliens to enter into sham marriages. Congress' response to such fraud was the Immigration Marriage Fraud Amendments of 1986 ("IMFA").[1]

For a marriage to form the basis of an application for permanent residency, the marriage must be both valid and subsisting (not legally terminated).[2] Assuming that the marriage is a legal marriage in the jurisdiction where the marriage took place, the main line of inquiry is whether the marriage was fraudulent, that is, whether the parties entered the marriage for the purpose of evading U.S. immigration laws.[3]

Under the IMFA, if the marriage to a U.S. citizen is less than two years old at the time of the granting of permanent residence status, the Immigration and Naturalization Service ("INS") will only grant a two-year conditional permanent residence status.[4] If the spouse was married to the citizen for more than two years, the alien spouse would be admitted as a permanent resident without the condition.

Within 90 days of the second anniversary of the granting of conditional permanent residence status, the spouses must file a joint petition to remove the condition.[5] The permanent status can also be terminated prematurely by the Attorney General ("AG") and the alien placed in deportation proceedings,[6] if the AG determines that:

1. The marriage was entered into for the purpose of procuring an alien's admission as an immigrant;

2. The marriage was annulled or otherwise judicially terminated other than by the death of a spouse; or

3. A fee or other consideration was paid by or on behalf of the alien spouse for the filing of the immigrant petition (other than attorney's fees for preparation of a lawful petition).[7]

## Delays again – sanity breaks down

The average processing time for an adjustment of status application filed in San Francisco is 450 days, in Los Angeles it is 730 to 820 days, and in San Jose it is 730 to 975 days.[8] If it takes more than two years from the date of marriage for the INS to process an adjustment of status application, the alien avoids the burden of receiving conditional status, because conditional status is only triggered when a marriage is less than two years old.

An alternative to adjustment of status in the United States is to have the visa issued at the foreign consulate.[9] This should (but does not always) provide the alien with permanent resident status more quickly than the adjustment of status process in the United States.

## Dissolution imminent

A common problem brings the immigrant to the divorce lawyer's office. The alien is on a conditional visa, and the American spouse has filed for dissolution. Quite possibly, the citizen spouse has been pressuring the alien spouse for some time, trying to gain an advantage in the dissolution proceedings. Your client, assuming you represent the alien, is probably confused, stressed and frightened. What can you do?

*Look for a waiver of the condition*

IMFA allows the alien to apply for a *discretionary hardship waiver* under any of

the following circumstances:

1. Extreme hardship if the alien is deported (discussed further below);

2. The marriage was entered into in good faith by the alien spouse but was judicially terminated; or

3. The marriage was entered into in good faith by the alien spouse and the alien spouse or child was battered by or subjected to extreme cruelty perpetrated by the U.S. citizen or permanent resident spouse.[10]

These waivers can be asserted as alternative bases for removal of the condition. The INS must consider any credible evidence.

The real problem cases are those in which dissolution procedures begin and the adjustment of status application has been filed in the United States, but has not yet adjudicated. For these aliens, it is too early in the process to apply for a waiver.

As discussed above, for an adjustment of status application to be approved, the alien spouse must establish that the marriage was valid and that it was subsisting. If the marriage has ended in divorce before INS adjudication, it is too early in the process to take advantage of one of the waivers (which were established as bases to remove the condition). One possible solution may be to delay the entry of judgment of dissolution until after the petition for permanent residency is granted. Alternatively, victims of domestic violence may be able to "self-petition."

## Self-petitioning to safety

*Citizens and lawful permanent residents may choose whether and when to petition for a relative... Some abusive citizens or lawful permanent residents misuse their control over the petitioning process. Instead of helping close family members to legally immigrate, they use this discretionary power to perpetuate domestic abuse of their spouses and minor children who have been living with them in the United States. Abusers generally refuse to file relative petitions for their closest family members because they find it easier to control relatives who do not have lawful immigration status. These*

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*family members are less likely to report the abuse or leave the abusive environment because they fear deportation or believe that only citizens and authorized immigrants can obtain legal and social services. An abuser may also coerce family members' compliance in other areas by threatening deportation or by promising to file a relative petition in the future.*[11]

Congress' answer to this problem was to pass the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLE"). This law enabled victims of domestic violence, both spouses and children, to self-petition, regardless of the alien's immigration status. A self-petitioning spouse must establish that he or she meets all of the following conditions:

1. Is the spouse of a U.S. Citizen or lawful permanent resident;

2. Is eligible for classification as an immediate relative to a U.S. citizen or lawful permanent resident;

3. Is residing in the United States at the time the petition is filed;

4. Has resided in the United States with the citizen or lawful permanent resident spouse (although not necessarily at the time the petition is filed);

5. Has been battered, or has been subjected to extreme cruelty perpetrated, by the citizen or lawful permanent resident during marriage; or is the parent of a child who has been subjected to such treatment;

6. Is a person of good moral character;

7. The deportation would result in extreme hardship to the alien or the alien's child; and

8. The alien entered into the qualifying marriage in good faith.[12]

In addition, the self-petitioning spouse must be legally married to the abuser when the petition is filed with the INS. The self-petition *"must be denied if the marriage to the abuser legally ended through annulment, death, or divorce..."* before filing.[13] Divorce after the filing of the petition will not be fatal to the petition, however, remarriage prior to filing the petition will be a basis for denying the petition.[14]

Battery or extreme cruelty is defined by the regulations as including (but not limited to) "being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury." The regulations also state that "abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence."[15]

Extreme hardship, while burdensome, is hardly as insurmountable as it may seem. The Board of Immigration Appeals ("BIA") takes the position that extreme does not equate to "unique," but should rather be given a flexible reading.[16] In determining whether extreme hardship exists, the INS should consider all of the relevant factors in the aggregate.[17]

## Additional penalties for non-citizen perpetrators of domestic violence

As part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress created a new ground for the removal for aliens convicted of a crime of "domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."[18] The act also provides the family law practitioner with a special Restraining Order enforcement mechanism that makes an alien deportable for conduct that "violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued."[19] For the purposes of IIRIRA, the term protection order "means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provision) whether obtained by filing an independent action or as a pendente lite order in another proceeding."[20]

## Conclusion

The immigrant spouse, no matter the stage of his or her immigration processing, is particularly vulnerable to psychological pressure from the non-immigrant spouse. This vulnerability is usually based on the alien's lack of familiarity with the culture and legal system of the United States. The immigrant spouse is likely exposed to blackmail based on her immigration status – becoming hostage to an abusive situation. When insecurities about immigration status are combined with marital difficulties, the stage is set for alienation from the legal system. After living in the United States, many immigrants are unwilling to seek a dissolution or a restraining order for fear that to do so will result in their removal

from the United States. This fear perpetuates violence and subjugates the alien spouse. As lawyers, we can free these aliens from their fears and assure they receive their entitlement to equal protection under the law. Being an immigrant does not mean the client should be alienated from the legal system nor deprived of his or her rights under the Family Code and the United States Constitution. ♦

*—David M. Lederman is a solo practitioner in Walnut Creek practicing Family and Immigration Law. Having lived in the Republic of China for four years he speaks fluent Chinese and is a contributing author to Commercial Laws in East Asia (Sweet and Maxwell, 1997).* *David thanks Amy T. Lee, James R. Morgan, and Ann VanDePol for their valuable comments on prior drafts of this article.*

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[1]See *Immigration Law and Procedure*, Vol. 4, Chapter 41, §42.01, Matthew-Bender (Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr).

[2]See Matter of Boromand, 17 I&N Dec. 450 (BIA 1980).

[3]See 8 USCA §1154 (c).

[4]See 8 USCA 1186a (a)(1).

[5]8 USCA §1186a (c)(1).

[6]The INS is an agency of the Department of Justice.

[7]8 USCA §1186a (b)(1).

[8]February 2000 Immigration Law Today, American Immigration Lawyers Association, pg. 87 "Report Card on INS Adjudications."

[9]Not all aliens have a choice. An immigration professional should be consulted before making any strategic visa processing decisions.

[10]8 USCA §1186a (c)(4).

[11]61 FR 13061 (March 26, 1996).

[12]8 CFR 204.2 (c)(1)(*i*)(A-H).

[13]8 CFR 204.2 (c)(1)(ii).

[14]*Ibid.*

[15]8 CFR §204.2 (c)(1)(vi)

[16]See Matter of L-O-G, J-O, 16 Immig. Rptr. B1-177 (1996); L-O-G, Int. Dec. 3281 (BIA 1996).

[17]See Matter of O-J-O, 16 Immig. Rptr. B1-101 (1996); 21 I&N Dec. 381 (BIA 1996). The Board of Immigration Appeals found that "[t]he respondent has lived in the United States during his critical formative years. He has significant church and community ties in the United States. He is fully assimilated into American culture and society. This assimilation makes the prospect of readjustment to life in Nicaragua much harder than would ordinarily be the case. He would also face difficult economic and political circumstances in his native country, including the possible loss of an ongoing business concern. This combination of hardships amounts to extreme hardship."

[18]8 USC §1227 (a)(2)(E)(*i*).

[19]8 USC §1227 (a)(2)(E)(ii).

[20]*Ibid.*