New York is still one of the major destination states in this country for newly arriving immigrants. Many of them come as newlyweds to the state, or are married after they’ve lived here, either legally or illegally, for some time. Of course, newly married immigrant spouses of American citizens or permanent citizens can apply for residency, but in the first years of marriage, that status, when granted, is not permanent but conditional. Family lawyers dealing with divorcing aliens or their spouses must therefore be prepared to advise their clients of the problems that can arise when immigration status is at stake along with the usual questions of who gets the dining set and the better car.

The Conditional Resident

In the normal course of events, when an American citizen or permanent resident marries a foreign national, that alien spouse can lawfully be admitted for permanent residence here. If the marriage at the time of application is less than 2 years in duration, however, the residency will be granted on a conditional basis only. 8 U.S.C.S. §1186a[a] [2003]. The condition is generally removed after 2 years from the date of the grant of conditional residence when the spouses file a joint petition to the Attorney General to have the condition removed, then appear for an interview with the immigration authorities. Their petition must be filed within 90 days previous to the 2-year anniversary of the grant of conditional resident status. It is the couple’s responsibility to remember to file the petition in a timely manner because although Sec. 216[a][2][B] of the Immigration and Nationality Act, 8 U.S.C.S. §1186a[2][B], requires the Attorney General to attempt to notify the alien spouse of the filing requirements at the beginning of the 90-day filing period, the Attorney General’s failure to provide such notice will not affect the enforcement of the statute. 8 U.S.C.S. §1186a[2][C]. Failure to timely file the petition or to appear at the immigration interview will authorize the Attorney General to terminate the alien spouse’s permanent resident status.

Why the Waiting Period?

Congress enacted the requirement of a 2-year waiting period in order to make it more difficult for parties to enter into sham marriages for the purpose of obtaining permanent resident status for
the alien spouse. If the marriage is entered into in good faith and the couple meets the deadlines for filing, all should go smoothly. They will file their petition within 90 days of the 2-year anniversary of the grant of conditional status, be interviewed by representatives of the U.S. Citizenship and Immigration Services [USCIS] [formerly the Immigration and Naturalization Service, or INS], an office within the Department of Homeland Security [DHS], and the condition will be removed. In fact, they need not even be living together at the time of filing: The only filing requirement the statute places on a couple is that the alien be able to locate his or her spouse and persuade that spouse to join the alien in filing the form within the three-month period allowed for such filing. 8 U.S.C.S. §1186a[c]. Or, if the sponsoring spouse dies during the 2-year conditional period, the requirement of a joint filing is dispensed with and the conditionally admitted alien can file alone.

Complications

Where complications set in is when the parties commence an action for divorce within the first 2 years of the marriage, or even if divorce has not been commenced or finalized, the parties are not getting along and the legal-resident spouse refuses to sign the joint petition. Now, your client may ask, what can be done?

Overcoming the Requirement of a Joint Filing

When there are problems in the marriage but neither party has yet filed for divorce, the joint-filing requirement can be overcome if the resident alien can obtain a waiver of the requirement. A request for waiver can be filed separately, without giving notice to the citizen or permanent resident spouse. Such waiver is possible in three situations: 1) When extreme hardship would result if the alien is deported; 2) When the marriage was entered into in good faith and ended [other than through the death of the spouse] through no fault of the conditionally admitted spouse; or 3) When the marriage was entered into in good faith and the conditionally admitted spouse was battered by his or her spouse. 8 U.S.C.S. §1186a[c][4]. Under each of these three exceptions, the hardship claimed must have occurred during the period that the alien was conditionally admitted for permanent residence, not before.

The first exception to the joint filing requirement, which allows for a waiver if deportation would result in extreme hardship, allows the Attorney General to make determinations on a case-by-case basis. The definition of “extreme hardship” can encompass many fact situations, but it must be a greater hardship than would normally be created when other aliens are removed from the United States.

The second exception allows waiver of the joint-filing requirement if the marriage was entered into in good faith and ended through no fault of the petitioning alien. Waiver under this provision will be granted only if the marriage has in fact ended. Therefore, an alien whose conditional resident status is approaching the 2-year anniversary of the grant of such status but who is unable to file a joint petition to remove the conditions because divorce or annulment proceedings have commenced, will be subject to removal proceedings. All is not lost, however, as the Bureau of Citizenship and Immigration Services advised in a memorandum to its regional directors on April 10, 2003: If an alien conditional resident’s right to remain in the United States is revoked
because the permanent resident spouse wouldn’t join in filing a petition to remove the condition and a divorce was commenced but not finalized by the 2-year point, the alien may request a continuance from the immigration judge to allow for the finalization of the divorce or annulment proceedings. Once the divorce is finalized, a waiver from the requirement of a joint filing may be sought. See “Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of the Marriage,” Memorandum for Regional Directors, et al., U.S. Dept. of Justice, Immigration and Naturalization Service, April 10, 2003.

The burden of proof that the marriage was entered into in good faith in the case of a short-lived marriage lies with the alien. To determine whether a marriage was entered into in good faith, the INS considers documentary evidence of combined financial assets and liabilities, length of time the parties lived together after marriage, birth certificates of their children and such factors as whether the wedding was attended by friends and relatives. These things would indicate an intent to enter into a legitimate marriage arrangement. Acquaintances can also provide evidence through affidavits or testimony concerning their perceptions of the genuineness of the marriage. A decision that the marriage was not entered into in good faith will be reviewed by the courts only for abuse of discretion. And, while it’s difficult for the alien to prove such abuse of discretion, it is not impossible. For example, an immigration judge was found to have abused her discretion in Damon v. Ashcroft, No. 02-71677, 360 F.3d 1084; 2004 U.S. App. LEXIS 4635 [9th Cir. 3/11/04], when she ordered a petitioning ex-wife and her children deported on the basis that the woman had not entered into her marriage in good faith. The woman in question, a Korean national, met her husband-to-be in Korea, then came with her children to the United States, where, 6 days after her arrival, the couple married. They lived together for more than a year, during which time they combined their finances. The immigration judge found the marriage was not bona fide because she thought it implausible that two people from different cultures could court for such a short time and legitimately decide to marry, especially when the woman already had two children from a previous relationship. In addition, the couple’s wedding did not involve a religious ceremony, and the woman did not change her last name to her husband’s last name. The U.S. Court of Appeals for the Ninth Circuit found these bases for a finding of bad faith impermissible because the immigration judge had not been objective, instead using her own personal values to judge the wife’s intent in marrying her husband.

The third exception to the requirement of a joint filing comes into play if the alien spouse entered into the marriage in good faith and was then battered by his or her spouse. The purpose of this exception is to shield the alien spouse who has been victimized by an abuser from the further injustice of being deported. However, as can be imagined, this provision can tempt the foreign-born spouse to unjustly accuse the citizen spouse of abuse in order to obtain a waiver of the requirement of a joint filing and remain in the United States.

Spousal abuse for the purposes of obtaining waiver under this provision can be physical, sexual or psychological, and encompasses false imprisonment of the victimized spouse. A foreign spouse of an abusive U.S. citizen or permanent resident may also seek relief from the joint filing requirement if the abuse was directed not toward him or her but toward a child of the family. Evidence of abuse must be submitted with the request for waiver and can include copies of police and medical records, evaluations of clinical social workers or psychologists showing
evidence of mental cruelty or a copy of a divorce decree if the divorce was obtained on the basis of physical abuse or mental cruelty.

As a precaution, American courts will often issue restraining orders against an accused abuser, even when there is very little evidence of abuse. The protective order can then be used by the conditionally admitted spouse to remove the conditional status. It is therefore important that the attorney handling the divorce for the citizen or permanent resident spouse caution the client that being falsely accused of abuse is a real possibility. In many situations, the client would be well advised to keep to a minimum any “unchaperoned” contact with the other party or their children because any confrontation between them has the potential of being blown up into an accusation of spousal or child abuse.

In next month’s newsletter, we look at other means for divorcing aliens to obtain permanent resident status.

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