**Removing Conditions from Residency: Joint Filing and Waivers**

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**CONDITIONAL RESIDENCE**

The INA imposes an initial two-year period of conditional residency on certain persons who acquire resident status through marriage to a U.S. citizen or permanent resident.[[1]](#footnote-1)  If a couple has been married for less than two years at the time residency is granted, the noncitizen/nonresident will acquire conditional residence and be required to later remove this condition. Eligible step-children also acquire conditional residence if their parent has been married less than two years to the U.S. Citizen/Permanent Resident when they acquire their residence.

To remove the condition on their status, an applicant must either file a joint I-751 petition with the U.S. citizen spouse or file for a waiver of this requirement. Children are either included on their parent’s petition or must file a separate petition if they gained their residence prior to their parent, more than 90 days after their parent or their parent is for some reason not submitting a petition to remove the conditions on their status. It is very important to keep track of children’s CR expiration dates to make sure they should be included with a parent’s petition or should be filed early. Occasionally a child will be granted status prior to the noncitizen parent; e.g. when the parent is in removal proceedings and the child is not, the child attends a consular appointment while parent is waiting for I-601A processing, a parent is not eligible for a waiver and foregoes obtaining residence, etc. The regulations relating to the removal of conditional resident status based on marriage are found at 8 CFR 216.4 and 216.5.

**JOINT FILING**

A conditional resident (CR) removes 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.[[2]](#footnote-2) It is important to note that the petition must be filed no later than the day before the CR status expires.[[3]](#footnote-3) The joint applicants must 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). The petition must be accompanied by evidence of a valid marriage. If a child is filing their own petition the same requirements must be met. The U.S. citizen/resident relative (step-parent) must sign the petition.

The petition is filed by mail at the USCIS Service Center with jurisdiction over the applicants’ place of residence. After receipt USCIS will issue a receipt and schedule the noncitizen spouse (and children) for biometrics collection at an Application Support Center near the applicants’ residence. It is important to include additional G-28 forms for each child included in the application. USCIS will then correspond with the attorney with the child’s filing receipt and biometrics interview. If not included all correspondence about the child will only go to the petitioning parent(s). A timely filed joint petition automatically extends the noncitizen’s status until the I-751 is adjudicated. The receipt notice for the I-751 includes language extending the permanent resident status for an additional year and may be used as evidence of status.

If the petition is not filed in the 90-day window, the petitioners must establish “good cause and extenuating circumstances” for the late filing.[[4]](#footnote-4) The late-filed I-751 petition must be accompanied by a written explanation for the delay, and the application may be denied for failure to include such an explanation. Examples of good cause and extenuating circumstances include, but are not limited to, hospitalization, long-term illness, death of a family member, recent birth of a child, or a family member on active duty with the U.S. military. Issuance of a receipt for the filing is proof of the acceptance of the reason for the late-filing and will not be examined further. Failure to file a petition within the 90-day period results in automatic termination of conditional resident status though. Unlike the jointly filed petition, a waiver petition can be filed before, during, or after the 90-day period.

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 adjudication will take place without an interview. 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 required to attend an interview at the District Office, and the adjudication completed after the interview.

**WAIVERS OF JOINT FILING REQUIREMENT**

If the spouse is unable to jointly file Form I-751, he/she may file for a waiver of the joint-filing requirement on Form I-751. A child may also file a waiver or be included on their conditional resident parent’s petition, if they meet the requirements listed above. Three such waivers exist, and may be granted if the CR spouse (or child) can demonstrate any one of the following:[[5]](#footnote-5)

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/resident spouse); or
3. the marriage was entered into in good faith by the noncitizen spouse, but the noncitizen spouse or their child (either a step-child or natural child of the U.S. citizen) was abused or subjected to extreme cruelty during the marriage.

**DEATH OF THE U.S. SPOUSE/RESIDENT**

If the U.S. citizen/Legal Permanent Resident spouse dies during the two year period, a joint petition is not required and the waiver provisions under INA 216(c)(4) do not apply. The conditional resident must still file a petition and provide proof of the death and establish that the marriage was legal where it took place and was not entered into for the purposes of procuring the noncitizen’s admission. In *Matter of Rose*,[[6]](#footnote-6) the BIA determined that the death of the noncitizen’s spouse excuses the joint filing requirement. The CR must still meet the general requirements of demonstrating a good-faith marriage, filing a timely petition, and attending the required interview; however, no separate hardship waiver is necessary.[[7]](#footnote-7)

**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 and this comes to the attention of USCIS it 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 re-file 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.[[8]](#footnote-8)

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.” 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. It is an ethical conundrum for counsel when made aware of a separation and the petition is pending at the Service Center. If a divorce should occur it is necessary to advise USCIS of the divorce if the petition has not been approved already. USCIS will not take a new application while another is pending: however, an updated petition with supporting documents can be submitted with a request for substitution. If rejected, it would be necessary to withdraw the original petition, wait for confirmation of the withdrawal and submit the new one.

Where the parties are separated and/or 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, file for divorce and hope that the pending divorce is finalized within the 87day deadline for any RFE issued. 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 and issue a Notice to Appear (NTA).

**EXTREME HARDHSIP**

Where the conditional resident must establish that extreme hardship would result from their removal from the U.S. only those factors that arose subsequent to the noncitizen’s entry as a conditional permanent resident are considered.[[9]](#footnote-9) USCIS notes that some hardship will always be present when an applicant has to depart the country so it must be shown that the hardship resulting from their departure would be extreme. The burden in establishing that extreme hardship exists is on the applicant. Country conditions that have arisen since the date of conditional residence are considered; however, the fact that the conditional resident may have given up a good life to move to the U.S. or will be looked down upon by society if returned to their native country are not normally valid considerations. Hardship to others will be considered and is not necessarily limited to the alien and/or their immediate family. A review of the standards for demonstrating extreme hardship needs to be made before submitting this type of request.[[10]](#footnote-10) It is important to note that it may not be necessary to demonstrate that the marriage was in good faith in the first place in order to be eligible for this provision.[[11]](#footnote-11) Although it is not a provision designed to waive a[[12]](#footnote-12) sham marriage finding.

**WHAT EXACTLY IS GOOD FAITH?**

Where a CR must establish that the marriage was entered into in good faith in order to be eligible for a waiver, USCIS in order to deny the petition does not need to prove that it was a sham marriage, but rather only that the CR failed to prove the validity of the marriage. Occasionally, USCIS will allege that the marriage was a sham and issue a notice to revoke the original I-130 visa petition; however usually does not go to this length unless there was substantial evidence of a sham marriage. A response to the notice of intent to revoke may be attempted by the noncitizen; however, the petitioner is the only person who can appeal a revocation.

A good-faith marriage is generally considered one that the parties entered into with the intent of building a life together and not solely to confer an immigration benefit.[[13]](#footnote-13) USCIS will consider evidence relating to the amount of commitment by both parties to the marital relationship. The regulations specify the evidence that should be considered as including proof of commingling of assets, cohabitation of the parties, and children born to the couple.[[14]](#footnote-14) The regulations also provide a “catch-all” provision that instructs USCIS to consider “other evidence deemed pertinent.”[[15]](#footnote-15) It is important to note that conduct post conditional resident grant is also considered in evaluating a good-faith marriage, although it is not absolutely conclusive as to the underlying validity of the marriage, it will provide strong support either for or against approval.

Where the evidence of commingling and cohabitation might be lacking, the practitioner should utilize the catch-all provision to fill the gaps and to tell the client’s story. A detailed affidavit from the client explaining the history of the relationship and the reasons it failed is very important. Evidence of any attempts to salvage the marriage, such as counseling or therapy, is also very persuasive. Moreover, detailed affidavits from individuals who are familiar with the bona fide nature of the relationship from before, during, and after the marriage and procurement of the conditional residency are strongly suggested. The burden for demonstrating a good faith marriage rests with the applicant.

**ABUSE DURING MARRIAGE**

To be eligible under this provision it must be demonstrated that the marriage was entered in good faith but during the marriage the spouse (or child) beneficiary was battered by or was the subject of extreme cruelty perpetrated by his or her spouse (step-parent) and the beneficiary is not at fault in failing to meet the petitioning requirements. Divorce is not necessary. Also, this provision may be asserted if a conditional resident child or any other child was the victim of such abuse, even though the parent spouse may not have been.

USCIS has defined this exception 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. Psychological or sexual abuse or exploitation … shall be considered acts of violence.[[16]](#footnote-16) The standard for abuse in I-751 situations is the same as the one involved in VAWA self-petitioning cases.[[17]](#footnote-17) Therefore, VAWA-based cases are helpful in determining what constitutes “extreme cruelty” or “battery.” The *Hernandez v. Ashcroft*[[18]](#footnote-18) court held that a noncitizen was subjected to extreme cruelty in the United States when her abusive husband continuously called her, promised to not hurt her again, and lured her back to his home in Mexico after she had fled to her sister’s home in the United States. The *Perales-Cumpean v. Gonzales* court stated that “marital rape clearly falls within any reasonable definition of battery,”[[19]](#footnote-19) but the IJ in that case also had determined that verbal abuse in the form of derogatory remarks, anger, and jealousy rose to the level of extreme cruelty.[[20]](#footnote-20) On the other hand, the IJ in *Bedoya-Melendez*[[21]](#footnote-21) held that a wife’s actions of slapping her husband, filing numerous frivolous lawsuits against him, and leading him to falsely believe he had HIV did not rise to the level of extreme cruelty or battery. It is important to note that a number of courts have held that the extreme cruelty and battery requirements do not provide any objective legal standard on which a court can base its review, and therefore the BIA lacks jurisdiction to review an IJ’s discretionary determination that a certain act does, or does not, constitute extreme cruelty or battery.[[22]](#footnote-22)

1. INA Sec. 216. [↑](#footnote-ref-1)
2. INA Sec. 216(c). [↑](#footnote-ref-2)
3. 8 CFR 216.4(a)(1). [↑](#footnote-ref-3)
4. See USCIS Memorandum, D. Neufeld, “Adjudication of Form I-751, *Petition to Remove Conditions on Residence* (Oct. 9, 2009), published on AILA InfoNet at Doc. No. 09110667. [↑](#footnote-ref-4)
5. INA Sec. 216(c)(4). [↑](#footnote-ref-5)
6. 25 I&NDec. 181, 182 (BIA 2010). [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *See* USCIS Memorandum, D. Neufeld, “*I-751 Filed Prior to Termination of Marriage*” (Apr. 3, 2009), *published on* AILA InfoNet at Doc. No. 09072166. [↑](#footnote-ref-8)
9. *Matter of Singh*, 24 I&N Dec. 331 (BIA 2007). [↑](#footnote-ref-9)
10. The regulations contain a list of 14 factors to be considered when evaluating extreme hardship for NACARA applications.8 CFR 1240.58(b). This is a good place to start in preparing any application requiring a showing of hardship. [↑](#footnote-ref-10)
11. *Waggoner v. Gonzalez*, 488 F.3d 632, 634-38, (5th Cir. 2007). [↑](#footnote-ref-11)
12. *Velazquez v. INS*, 876 F. Supp. 1071, 1075-78 (D.Minn. 1995). [↑](#footnote-ref-12)
13. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). [↑](#footnote-ref-13)
14. 8 CFR sec. 216.5(e)(2)(i)-(iii). [↑](#footnote-ref-14)
15. 8 CFR sec. 216.5(e)(iv). [↑](#footnote-ref-15)
16. 8 CFR Sec. 216.5(e)(3)(i). [↑](#footnote-ref-16)
17. *Compare* INA §216.5(e)(3) *with* INA §204.2(c)(1)(i)(E). *See also* S. Brown *et al*., “Conditional Residence Marriage Cases: Joint Petitions and Waivers,” *Immigration Practice Pointers* 690, 692 n.26 (AILA 2010 Ed.). [↑](#footnote-ref-17)
18. 345 F.3d 824, 841 (9th Cir. 2003). [↑](#footnote-ref-18)
19. 429 F.3d 977, 984 (10th Cir. 2005). [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *See Bedoya-Melendez v. Att’y Gen.*, 680 F.3d 1321, 1323 (11th Cir. 2012); *see also* *Johnson v. Att’y Gen.*, 602 F.3d 508 (3d Cir. 2010); *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006) [↑](#footnote-ref-21)
22. *Wilmore v. Gonzalez*, 455F.3d 524 (5th Cir. 2006). [↑](#footnote-ref-22)