LO QUIERO HASTA LA MUERTE – LOVE IN THE EYES OF THE USCIS

WHAT IS MARRIAGE FRAUD?

- First off, it is rare.
- But for the government, it's when a foreign national and a U.S. citizen get married, not principally to establish a life together but rather as a means for the foreign national to remain in the U.S. indefinitely. In some cases, a foreign national may dupe a U.S. citizen into marriage by professing true love. In other cases, the U.S. citizen may participate in the fraud, accepting payment as part of the deception.
- Foreign nationals who marry U.S. citizens do not have to wait for a visa, and after a 2-year conditional period there are no restrictions on status. Additionally, marriage fraud, if successful, can create a short pathway to U.S. citizenship, which can be granted after three years of lawful permanent resident status.

MARRIAGE FRAUD INVESTIGATIONS BEFORE USCIS

SOME TYPES OF MARRIAGE FRAUD

- A U.S. citizen is paid, or asked to perform a favor, to marry a foreign national;
- "Mail-order" marriage where either the U.S. citizen or alien knows it is a fraud;
- Visa lottery fraudulent marriage; and,
- A foreign national defrauds a U.S. citizen who believes the marriage is legitimate.

POSSIBLE CRIMINAL CHARGES IN MARRIAGE FRAUD CASES

- 8 U.S.C. § 1325(c): "Any person who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than five years, fined in accordance with title 18, United States Code, or both."
- 18 U.S.C. § 1546 prohibits **visa fraud** including making any false statements under oath with respect to any material facts in any application, affidavit or other document required by immigration law or the knowing presentation of any such document;
- 18 U.S.C. § 1001 prohibits the making of false statements and the use of documents containing false statements.
- 8 U.S.C. § 1324(a)(1)(A)(iii) prohibits, inter alia, harboring.

POSSIBLE CIVIL CONSEQUENCES OF MARRIAGE FRAUD/MULTIPLE MARRIAGES ETC

- INA 204(c): There is an absolute prohibition from future approval of petitions on behalf of aliens who ever attempted or conspired to commit marriage fraud.
- INA § 212 (a)(6)(C)(i): Any alien who has ever sought admission into the U.S. or sought any "other benefit" under the INA by fraud or by willfully misrepresenting a material fact are inadmissible.
- INA § 204(a)(2)(A): LPRs who file a second preference visa petition within 5 years of obtaining LPR status must satisfy additional requirements if they obtained that status based on a previous marriage.
- INA §204(g)/INA 245(c)(3): Aliens who marry while they are in exclusion, deportation, or removal proceedings must show "clear and convincing evidence" of marriage legitimacy to adjust status.

BURDEN OF PROOF

- Burden is on applicant or petitioner to prove eligibility for a requested immigration benefit. 8 CFR § 103.2(b), Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966)
- Did the married couple intend to establish a life together at the time of the marriage? The married couple must demonstrate this by a preponderance of evidence, INA § 204(g), but living together is not an absolute evidentiary requirement, see Matter of Peterson, 12 I&N Dec. 663 (BIA 1968), although that would need to be explained. As long as the aforementioned "establish a life" test is met, securing an immigration benefit may be one of the factors that led to marriage. See Matter of Boromand, 17 I. & N. Dec. 450, 454 (BIA 1980).
- If marriage entered into while the beneficiary is in removal proceedings, then the couple must request a bona fide marriage exception and produce clear and convincing evidence that the marriage is legitimate. INA §204(g)/INA 245(c)(3):

USCIS' "FRAUD INDICATORS"

- USCIS Fraud Referral Sheet (available at AILA Infonet at Doc. No. 10012861)
  - Answers prompted by attorney
  - Attorney attempted to distract/mislead
  - Answers interrupted by attorney or other
  - Over-Submissions
  - Photographic evidence suggests imposter
  - Proactive/explicit/staged photographs
  - Over interaction
  - Lack of interest/interaction
  - Documents issued immediately before or immediately after interview
  - Suspicious filing history of beneficiary or applicant

ADJUDICATORS' FIELD MANUAL FRAUD INDICATORS

- Large disparity of age;
- Inability of petitioner and beneficiary to speak each other's language;
- Vast difference in cultural and ethnic background;
- Family and/or friends unaware of the marriage;
- Marriage arranged by a third party; Marriage contracted immediately following the beneficiary's apprehension or receipt of notification to depart the United States;
- Discrepancies in statements on questions for which a husband and wife should have common knowledge;
- No cohabitation since marriage;
- Beneficiary is a friend of the family;
- Petitioner has filed previous petitions in behalf of aliens, especially prior alien spouses.

FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE (FDNS) SITE VISITS

- FDNS regularly subjects alien petitioners to background checks and other administrative inquiries, which include unannounced visits to the homes of couples applying for marriage-based immigration benefits. Agents will show up in the early morning in an attempt to catch applicants unaware in the hopes of exposing fraudulent couples.
- FDNS agents will often:
  - pressure petitioners to sign a withdrawal form usually written by an officer;
  - threaten petitioners with possible criminal prosecution;
  - speak directly with the petitioner even when they know the person is represented by counsel (in violation of ethical rules).
- Send a cease and desist letter!
- Counsel should consider whether to participate or not
  - Failure to allow them in an answer questions risks a denial for lack of evidence
  - Participating in an unfair, pre-determined "interview" is unlikely to produce results

STOKES INTERVIEWS

- Generally, if the USCIS officer conducting the first I-130 interview still has questions about the marriage, he/she will schedule a secondary interview known as the "Stokes Interview," during which the husband and wife are separated from each other and must answer a series of questions that are rather personal and invasive. The interview will be taped and their statements will be compared against each other in a search for discrepancies.
- A Stokes interview can last hours and be a long, exhausting and definitely unpleasant experience. Be prepared to shut it down and leave with your client(s) if necessary.
- At the conclusion of the Stokes interview if the officer is still not convinced, and still has reasons to believe the marriage was created for the purpose of obtaining immigration benefit, he or she will deny the adjustment of status petition.

STOKES TIPS

- Make sure your documentation is organized. This documentation could be, e.g., updated tax returns, job letters, bills, bank statements, and the like. A full set of these copied documents should be organized and readily available to hand over to the officer with ease.
- Instruct your client to:
  - respond only when specifically and individually addressed ;
  - respond truthfully. Sometimes, clients, rather than responding with what they know to be correct, choose to say things that they believe their spouses will say even though it is in accurate. This obviously creates a greater chance for discrepancies and makes any discrepancies more difficult to explain away.
  - review the "lesser" details in their marital life - the layout of their residence, what's in their bedrooms and bathrooms, the number and nature of tattoos and scars your spouse may have, etc.; and
  - to review their social media.

INA § 204(C)

- Pursuant to INA §204(c)(1), no visa petition may be approved under INA §204 if the "alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws…"
- The strict language here may lead you to believe that there is no relief from such a summary denial. However, case law and regulations provide some protection for those facing a prior finding of marriage fraud. The BIA has held that the prior finding must be examined and not merely accepted as the final word. Where the USCIS fails to follow to the Board's guidance on this issue, it is possible to challenge what may appear to be a decision set in stone.

INA § 204(C) cont.

- In notifying applicants of a denial based on INA §204, the USCIS often simply refers to the prior finding of marriage fraud as the basis for the denial without explanation. But the BIA has held that the USCIS must engage in a real analysis of the prior finding of marriage fraud and that the evidence of a fraudulent marriage "must be documented in the alien's file and must be substantial and probative." Matter of Tawfik, 20 I&N Dec. 166, 167 (BIA 1990); see also Matter of Samsen, 15 I. & N. Dec. 28 (BIA 1974).
- With regard to denials based on a prior finding of marriage fraud, the BIA stated: "the district director should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the evidence before him." Tawfik, at 168. This means that a simple restatement of the prior determination, absent any independent conclusion based on the evidence in the record, is not sufficient under Tawfik.

INA § 204(C) cont.

- Before invoking the § 204(c) bar to approval of a subsequent visa petition, the USCIS must have "substantial and probative" evidence that the noncitizen committed, attempted to commit, or conspired to commit marriage fraud. Tawfik, at 168. A prior failure to prove up eligibility for a "good faith" marriage waiver to the I-751 requirement is not a sufficient basis to invoke the § 204(c) bar. See e.g., Matter of P-, A29 906 195-Dallas (BIA 1997) (unpublished decision), reported in 17 Imm. Case Rptr. B1-407 (Sept. 1, 1997);
- Your client has a right to be informed of the basis for a denial. The evidence the USCIS rrelied upon should be referenced in and included with the decision. Furthermore,if a decision adverse to an applicant, "is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and officer an opportunity to rebut the information…" 8 C.F.R. § 103.2(b)(16)(i).
- Without a detailed description of the basis for the USCIS's intent to revoke the petition, it is often difficult to determine whether a decision complies with the "substantial and probative evidence" requirement of Tawfik, supra. It is similarly difficult to determine whether the decision was an "abuse of discretion." See 5 U.S.C. §706(2)(A)(setting forth the standards for review of an agency decision by a reviewing court).

INA § 204(C) cont.

- The § 204(c) bar does not apply if the subsequent visa petition involves the same petitioner and the same beneficiary. *Matter of Isber*, 20 I&N Dec. 676 (BIA 1993).

- Although the bar is most commonly applied to persons who seek to obtain resident status through a subsequent marriage, the USCIS will also deny an employment-based visa petition if it determines that the beneficiary falls under § 204(c)'s purview.

PRACTICE POINTERS

- Try to obtain an affidavit from the previous spouse.
- Hire a private investigator to take the prior spouse's statement.
- Provide your witnesses' contact information in their affidavits.
- Never treat 204(c) as final.
- USCIS's factual findings are frequently wrong so build a record to prepare for filing an appeal to the BIA or to support federal court action.

PRIOR WITHDRAWAL OF VISA PETITION?

- If your clients have been on-again off-again and the petitioner withdrew a petition only to later refile it, expect to have to explain the prior withdrawal and to have to produce substantial evidence that the marriage was entered into in good faith. Matter of Laureano, 19 I&N Dec. 1 (BIA 1983).

VISA PETITION DENIED?

- Should you appeal to the BIA or file suit in the district court?
- The BIA has jurisdiction to hear appeals of family based immigrant petitions filed in accordance with INA §204, with the exception of petitions on behalf of certain orphans. 8 CFR §1003.1(b)(5). The petitioner must appeal the denial of a visa petition, not the beneficiary (unless the petitioner is a self-petitioner). Matter of Sano, 19 I&N Dec. 299 (BIA 1985).
- Determinations pertaining to I–130 petitions are not precluded from review by courts pursuant to § 1252(a)(2)(B)(ii). See, e.g., Ginters v. Frazier, 614 F.3d 822 (8th Cir. 2010); Ruiz v. Mukasey, 552 F.3d 269 (2d Cir. 2009); Ayanbadejo v. DHS, 517 F.3d 273 (5th Cir. 2008). However, case law varies on whether and under what circumstances exhaustion (to the BIA) is first required.

VISA PETITION DENIED? CONT.

- District Court has jurisdiction over I-130 denials. *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. 273).
- The determination of whether the marriage was bona fide is a question of fact, not law, and is subject to the substantial evidence test.
- Your client will have to be thoroughly prepared prior to a deposition but you can get discovery, including the chance to depose USCIS officers.
- If the denial is based on a w/drawal by a petitioning spouse that was improperly coerced by USCIS, consider federal court review. Several courts have found jurisdiction to order USCIS to rescind the withdrawal of documents similarly obtained. See Navia-Duran v.. INS, 568 F.2d 803, 808 (1st Cir. 1977) (reversing a deportation order and sending the matter back to the INS for a new hearing without the use of the appellant's coerced statement); Boukhris v. Perryman, 2002 WL 193354, at *2 n. 1 (N.D.Ill. Feb. 7, 2002) (affirming the court's power to "declare [wife's] withdrawal of her visa petition for [her husband] a nullity" if it was coerced in violation of her constitutional rights); Osunsanya v. U.S. Citizenship & Immigration Servs., No. CIV A 06-10625-RWZ, 2007 WL 484864, at *3 (D. Mass. Feb. 12, 2007) (finding that violations of agency regulations may form the basis for mandamus jurisdiction and Due Process violations where USCIS used threats and coercion to induce withdrawal of an I-130).

MARRIAGE FRAUD IN IMMIGRATION COURTS

Overview

- INA § 237(a)(1)(G) – marriage fraud ground.
  - Burden of proof is on DHS to show fraud by clear and convincing evidence
  - Object to hearsay documents and reports. Request an opportunity to cross examine the officers.
  - Not commonly charged.
- INA § 216 (b) – Termination of conditional permanent residence
  - Easier to prove since DHS must only submit the 751 denial
  - Marriage fraud issue comes up during relief stage.

MARRIAGE FRAUD IN IMMIGRATION COURTS

INA Sect. 237(a)(1)(G)

- Two grounds of deportability provide the government with tools to investigate and deal with marriage fraud - INA §§ 237(a)(1)(G)(i) and (ii).
- Subsection (i) provides that if a foreign national obtained LPR status through a marriage that took place within two years prior to the foreign national's gaining status, and the marriage was judicially annulled or terminated within two years after the foreign national gained LPR status, the marriage is presumed to have been fraudulent. The foreign national, whose burden it is to rebut this presumption by the preponderance of the evidence , may overcome it by proving that he or she did not marry to evade the immigration laws.
- This presumption is separate from the procedural requirement that after two years of conditional status a resident alien must file a petition to remove the condition in order to maintain permanent residency. The introduction of conditional permanent residency in 1986 reduced the importance of the presumption in fraud ground of deportability. For the most part, this ground of deportability will only arise in connection with persons who immigrated to the U.S. on the basis of a marriage to a USC or LPR before 1986, when conditional residency status was established.

MARRIAGE FRAUD IN IMMIGRATION COURTS - CONT

- INA § 237(a)(1)(G)(i) example:
  - Miguel, from El Salvador, married USC Marybell in 1984, and immigrated to the U.S. in 1985. They divorced six months later. In 2013, Mika applies to become a USC and lists on the naturalization application the dates of his marriage and divorce. Miguel is at risk of being placed in removal proceedings and charged with deportability on this ground, based on a presumption of marriage fraud in his case.

MARRIAGE FRAUD IN IMMIGRATION COURTS - CONT

- INA §237(a)(1)(G)(ii) which makes a foreign national deportable if he or she failed or refused to fulfill the foreign national's marital agreement which, in the opinion of the Attorney General, was made for the purpose of procuring the foreign national's admission as an immigrant.
- This rule is supposedly designed to protect unwary USCs from foreign nationals who, with no other reason than obtaining immigration benefits, deceived citizens by agreeing to marry them.
- Note, however, this section does not make a foreign national deportable if that individual could not consummate the marriage because the USC spouse refused to fulfill his or her marital responsibility. This is because a foreign national cannot be deported under this ground unless the foreign national procured his or her immigrant visa by fraud.

MARRIAGE FRAUD IN IMMIGRATION COURTS - CONT

- **INA § 216**

- Most alien spouses who immigrate through marriage must first obtain "conditional" permanent resident status before they achieve the "unconditional" rights of other LPRs. This conditional status is imposed on aliens who obtain LPR status based on a marriage that occurred within two years of their (1) entering the United States as a permanent resident, or (2) adjusting to permanent resident status within the United States.
- At the end of the two-year period, the couple must file an I-751 "joint petition" to have the condition removed. If the i-751 isn't properly filed, termination of conditional residency is automatic and the government may commence removal proceedings, in which the burden of proof will be on the alien to establish that he or she has complied with the removal-of-condition requirements. INA §216(c)(2).
- But even if the alien has satisfied the requirements for removing the condition and it has been removed, the agency can still bring proceedings to rescind the alien's adjustment to permanent residence and any subsequent naturalization. However, the only valid basis for such an action would be that the agency determined that the alien obtained LPR status through a marriage he or she entered into to evade the immigration laws.

MARRIAGE FRAUD IN IMMIGRATION COURTS - CONT

Note, however, that if USCIS is terminating the conditional status based on damaging information that the alien cannot reasonably be expected to know, USCIS must provide the alien an opportunity to review and rebut the evidence on which it is relying. 8 CFR §216.4(d).

At the removal hearing, the agency has the burden of proving by a preponderance of the evidence that the alien is not entitled to conditional resident status. INA §216(b)(2). This is a lower burden of proof than in other removal proceedings, in which the trial attorney must prove that a deportable alien is subject to removal by clear and convincing evidence. This means that conditional residents can be ordered removed on weaker evidence than deportable aliens who may never have established lawful entry or status in the United States.

MARRIAGE FRAUD IN IMMIGRATION COURTS – CONT.

Relief

- I-751:
  - Renew the I-751 arguing good faith marriage ending in divorce. INA § 216(c)(4)(B). If your client isn't divorced yet, get the divorce finalized and then refile the I-751 w/ USCIS, seeking a continuance if necessary from the immigration judge. The client must be divorced to seek this waiver. See Matter of Anderson, 20 I & N Dec. 888 (BIA 1994).
  - File an extreme hardship waiver or show your client was battered or subject to extreme cruelty. A good faith marriage is not necessary to qualify for an extreme hardship waiver.
  - These waiver applications can be filed at any time, either before or after the two-year conditional residence period has expired.
  - USCIS's denial of an I-751 can only be reviewed by an immigration judge if the alien previously filed it with USCIS; the I-751 petition cannot be filed for the first time with the immigration judge.
- INA Sect. 237(a)(1)(H) waiver. Even persons otherwise subject to INA § 204(c) can get this waiver (assuming other eligibility requirements are met).