

Caught in Between: I-751 Petition Questions

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This practice advisory provides guidance to practitioners assisting clients who obtained conditional residence through marriage-based immigration and need to file the Form I-751, Petition to Remove Conditions on Residence. It addresses the following:

- Preempting RFEs and Interviews: packaging a solid I-751 packet;
- Negative Factors: brief cohabitation and lack of joint documents;
- Marital Limbo: separated clients with no divorce in sight; and
- Benefits of Filing the N-400 during I-751 pendency.

* This practice advisory supplements and updates an earlier advisory, "Removing Conditions From Residency: Joint Filing and Waivers," *Navigating the Fundamentals of Immigration Law* (AILA 2014–15 Ed.).

The Immigration and Nationality Act (INA)¹ imposes an initial two-year period of conditional residency on certain persons who acquire resident status through marriage to a U.S. citizen.² If a couple has been married for less than two years at the time residency is granted, the noncitizen will acquire conditional residence and be required to later remove this condition.³ To remove the condition, an applicant must either file a joint I-751 petition with the U.S. citizen spouse or file for a waiver of the joint filing requirement within a 90-day period prior to the expiration of the second-year anniversary of the grant of conditional residence.⁴ Failure to file the I-751 during this period will result in the automatic termination of lawful status and initiation of removal proceedings.⁵ Late filings may be accepted if the applicant demonstrates good cause for failure to timely file.⁶

JOINT FILING

Preempting RFE's and Interviews: Packing A Solid I-751 Packet

In general, a conditional resident (CR) must apply to remove the condition on permanent residence by **jointly** filing a Form I-751 petition with the U.S. citizen spouse.⁷ The joint applicants must further 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 a good faith marriage (not entered into for the purpose of procuring the noncitizen's permanent resident status); and that no fee was paid (other than to an attorney).⁸ Evidence of a good faith marriage may include documentation showing jointly-owned property, joint leases; comingled financial resources (joint accounts, taxes, health or auto insurance, utilities, etc.), birth certificates of children born to the marriage, affidavits of third parties having knowledge of the bona fides of the marital relationship, or other supporting documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.⁹

Practice Pointer: Supporting documents should extend from at least the time the conditional permanent residence was issued to the date of filing the I-751 petition, or even back to the date of marriage depending on the variety and availability of evidence. Documents may also include any correspondence or official documents sent to the CR and U.S. citizen

¹ Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

² INA §216.

³ This requirement applies both to applicants who were granted conditional residence in the United States, through an application for adjustment of status, and those who were granted an immigrant visa at a U.S. consulate abroad and were subsequently admitted to the United States as conditional residents.

⁴ INA §§216(c)(1)(A) and 216(d)(2).

⁵ 8 CFR 216.4(a)(6).

⁶ *Id.*

⁷ INA §216(c)(1)(A).

⁸ INA §216(d)(1). *See also* USCIS Memorandum, D. Neufeld, "I-751 Filed Prior to Termination of Marriage" (Apr. 3, 2009), AILA Doc. No. 09072166.

⁹ 8 CFR §216.4(a)(5).

spouse at the same address, and photographs of applicants taken with family and friends over the past couple of years.

Practice Pointer: The petition is filed by mail at the U.S. Citizenship and Immigration Services (USCIS) Service Center with jurisdiction over the applicants' place of residence.¹⁰ After receipt of the petition, USCIS will issue a receipt notice and schedule the CR for biometrics collection at an Application Support Center near the applicants' residence.

Where the petition was filed on time and the bona fides of the marriage are clear from the evidence submitted, the entire adjudication is often conducted "on the papers" by the Service Center. However, in some cases—either due to an issue arising out of the paper submission or as a result of a random selection—the joint applicants are summoned to an interview at the USCIS district office, and the adjudication is completed by an officer at the district office.¹¹

Practice Pointer: It is advisable for the CR and U.S. citizen spouse to continue to collect updated and recent evidence of a good faith marriage, to submit at the interview to the officer at the District Office.

If the adjudicating officer approves the joint petition, the condition on the alien's permanent resident status is removed,¹² with the issuance of a lawful permanent resident card valid for 10-years.

WAIVERS OF THE JOINT-FILING REQUIREMENT

In the event that the noncitizen spouse is unable to jointly file Form I-751, he or she may be able to file for a waiver of the joint-filing requirement on Form I-751 under certain circumstances.¹³ The removal of conditions may be granted if the noncitizen spouse can demonstrate any one of the following three waiver grounds:¹⁴

1. Extreme hardship would result if the noncitizen spouse were to be removed;¹⁵
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 spouse);¹⁶ or
3. The marriage was entered into in good faith by the noncitizen spouse, but the noncitizen spouse was abused or subjected to extreme cruelty during the marriage.

¹⁰ Be sure to check the USCIS website for current filing locations at the time of filing Form I-751.

¹¹ INA §216(c)(1)(B).

¹² *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999); INA §216(c)(3)(B); 8 CFR §216(d)(1).

¹³ INA §216(c)(4), 8 CFR §216.5.

¹⁴ *Id.*

¹⁵ *Matter of Munroe*, 26 I&N Dec. 428 (BIA 2014) held that only circumstances existing during the initial two-year conditional resident period may be considered when evaluating extreme hardship.

¹⁶ In the unfortunate circumstance of the death of the petitioning spouse, the CR does not need a waiver from the joint-filing requirement. The language of the statute and the form itself excuse the need for a waiver in the event of the passing of the U.S. citizen spouse. *Matter of Rose*, 25 I&N Dec. 181 (BIA 2010).

ADDRESSING NEGATIVE FACTORS: BRIEF COHABITATION AND LACK OF JOINT DOCUMENTS

A conditional resident who is now divorced and seeking a waiver to remove conditional residency has the burden of proof to show that she married the US citizen petitioner in good faith.¹⁷

Practice Pointer: When the couple had brief cohabitation and lack of joint documents, counsel must take great care in evaluating how best to show that even though the marriage ended, the parties intended to “have a life together” and document extensively the post-marriage conduct of the parties.¹⁸ Evidence can include communications during courtship, detailed affidavit of friends, family, co-workers, employers, landlords, neighbors regarding the relationship before and after the marriage. A detailed affidavit of the conditional resident with consistent facts explaining the reasons for the short marriage, the brief cohabitation and lack of joint documents. Below is a list of documents that may be useful in preparing for a waiver application if the couple did not have joint accounts:

- Request the copy of the file through the Freedom of Information Action (FOIA)¹⁹ asking for all documents filed with the adjustment of status application and I-130 from the client.
- Any wedding related documents, including pre-marital counseling and preparations;
- Marriage License application and Certificate. Some states require the address of each applicant.
- Review the Divorce Decree and all family court pleadings. Some courts require that parties reveal the address and how long the couple cohabited under oath. Some pleadings may reveal where the spouse was served and affidavits from resident witnesses that may have known the parties.
- Check the Facebook, Twitter and other social media accounts from the client and former spouse. You may be surprised what you’ll find.
- Dated texts, cards, email messages exchanged with former spouse;
- Dated photo album documenting history of relationship;
- An obituary in the newspaper for a friend or relative that refers them as a couple or an invitation to a wedding or party inviting the couple;
- Proof that the couple participated or were members of in any clubs or organizations.

Counsel may need to do an extensive interview with the client to understand his or her day-to-day life and the nature of her/his finances before and during the marriage. If the

¹⁷ *Ibrahimi v. Holder*, 566 F.3d 758, 763 (8th Cir. 2009); Legal Opinion, Rees, Gen Counsel, CO 216-C (Dec. 3, 1991).

¹⁸ *Iliev v. Holder*, 613 F.3d 1019, 1025-26 (10th Cir. 2010).

¹⁹ 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.

couple did not have joint documents or accounts, then it is important to show proof of cohabitation. This can include:

- Bills and bank statements she/he received at the joint address.
- Joint airplane tickets such as electronic tickets, boarding passes hotel and car rental reservations, if the couple traveled together;
- Online purchases and delivery bearing the joint address,
- Copies of employment applications showing the same address,
- Emergency contact forms naming former spouse,
- Change of beneficiary forms,
- Income tax returns and W-2 forms,
- Pay stubs showing joint address,
- Post office change of address form or any other correspondence from school, church and even junk mail bearing the same joint address, and /or
- U.S. credit history showing previous and current addresses.

During this uncertain and stressful time in your client's life, it is important that counsel remain alert to the client's behavior and demeanor because she/he may have suffered abuse from the former spouse and he/she is embarrassed or otherwise too fearful to disclose it. Abuse may have been the reason why cohabitation was short or for the lack of joint accounts during the marriage.

USCIS has defined acts of violence to include, but not limited to, “being a victim of any act or threatened act of violence, including any forceful detention which results or threatens to result in physical or mental injury.”²⁰ The standard for abuse in I-751 situations is the same as the one involved in VAWA²¹ self-petitioning cases.²² Therefore, VAWA-based cases are helpful in determining what constitutes “extreme cruelty” or “battery.” The *Hernandez v. Ashcroft*²³ 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,”²⁴ but the immigration judge (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.²⁵ On the other hand, the IJ in *Bedoya-Melendez*²⁶ held that a wife’s actions of slapping her husband, filing numerous frivolous lawsuits against him, and leading him to falsely

²⁰ 8 CFR §§216.5(e)(3)(i), 1216.5(e)(3)(i).

²¹ Violence Against Women Act of 1994 ([VAWA 1994](#)), Pub. L. No. 103-322, §§40701–03, 108 Stat. 1796, 1953–55.

²² 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.).

²³ 345 F.3d 824, 841 (9th Cir. 2003).

²⁴ 429 F.3d 977, 984 (10th Cir. 2005).

²⁵ *Id.*

²⁶ See *Bedoya v. U.S. Attorney Gen.*, 680 F.3d 1321, 1323 (11th Cir. 2012); see also *Johnson v. Attorney Gen. of the United States*, 602 F.3d 508 (3d Cir. 2010); *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006).

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 Board of Immigration Appeals (BIA) lacks jurisdiction to review an IJ's discretionary determination that a certain act does, or does not, constitute extreme cruelty or battery.²⁷

In cases where the client suffered psychological abuse, detailed affidavits from the client and individuals who witnessed the client's suffering during, and after the marriage is very important. It is also recommended that the client seek the counseling of a licensed psychologist or social worker in order to evaluate the client's psychological well-being and perform an evaluation in order to supplement the I-751 application, document the abuse which may explain the lack of joint accounts.

MARITAL LIMBO: SEPARATED CLIENTS WITH NO DIVORCE IN SIGHT

Spouses who are separated at the time when an I-751 petition may be filed may file a joint petition. USCIS guidance explicitly states that "USCIS may not deny a petition solely because the spouses are separated and/or have initiated divorce or annulment proceedings."²⁸ Separated spouses who believe the marriage is irreconcilable and that divorce is imminent may seek to file for a waiver of the joint filing requirement. As explained above, INA §216(c)(4) and 8 CFR §216.5(a) allow a CPR to submit a waiver of the joint filing requirement in certain limited circumstances. Unfortunately, temporary separation and separation pending a final divorce are not specifically referenced within the regulations, as a result, "there is no waiver of the joint filing requirement based solely on the fact that a CPR may have entered the marriage in good faith, but he or she legally separated from the petitioning spouse or is currently in divorce or annulment proceedings."²⁹ In light of the regulations failure to reference or include spouses that are legally separated or spouses currently engaged in divorce or annulment proceedings, USCIS issued guidance on April 3, 2009 on "how to adjudicate an I-751 petition if the CPR and petitioning spouse are legally separated or have initiated divorce or annulment proceedings, but the marriage has not been terminated."³⁰

The guidance mandates the issuance of a Request for Evidence (RFE) with a response period of 87-days in situations where a waiver of the joint filing requirement based on termination of marriage, 8 CFR §216.5(a)(ii), is requested but the CPR is either legally separated or in pending divorce or annulment proceedings.³¹ The RFE provides the CPR additional time to obtain and submit a final divorce decree or annulment. Assuming a divorce decree or annulment is issued and submitted within the RFE response period, the

²⁷ See, e.g., *Bedoya v. U.S. Attorney Gen.*, 680 F.3d 1321, 1328 (11th Cir. 2012); *Johnson v. Attorney Gen. of United States*, 602 F.3d 508 (3d Cir. 2010); *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006).

²⁸ USCIS Memorandum, D. Neufeld, "I-751 Filed Prior to Termination of Marriage" (Apr. 3, 2009), AILA Doc. No. 09072166 .

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Immigration Service Officer (ISO) must proceed to examine the merits of the case and the evidence submitted demonstrating a bona fide marriage.³²

In the event the CPR fails to respond to the RFE or fails to submit a final divorce decree or annulment, the ISO must deny the I-751 petition and issue a Notice of Termination of Conditional Residence Status.³³ The ISO will then proceed in accordance with USCIS procedure and a Notice to Appear (NTA) will be issued and the CPR will be notified that denial was based on failing to meet the joint filing waiver eligibility requirements and that “he or she may be able to establish eligibility for the waiver before an immigration judge in the event the marriage is terminated during the pendency of removal proceedings.”³⁴

Practice Pointer: The regulations require a jointly-filed I-751 petition be filed within 90 days of the second anniversary of conditional residency status.³⁵ By comparison, a petition requesting waiver of the joint filing requirement may be filed prior to, during or after the 90-day period, therefore, due consideration should be given as to whether a petition should be filed during divorce or annulment proceedings or after a divorce decree or annulment is issued.³⁶

Given USCIS’s approach to adjudicating I-751 petitions where the CPR and spouse are legally separated, thorough consideration must be given to filing jointly or filing and requesting a waiver of the joint filing requirement. This is a fact sensitive evaluation of whether the CPR and spouse are temporarily separated with the intent to continue the marriage. In such circumstances a jointly filed petition must be filed; however, to avoid misrepresentation the jointly filed petition should clearly indicate the CPR and spouse are residing separately and are undergoing a temporary separation in hopes of preserving the marriage. Supporting evidence demonstrating efforts to repair the marriage should be submitted, including any evidence of joint counseling or therapy. Established case law affirms the notion that a jointly filed I-751 petition should not be denied because the CPR and spouse are separated.³⁷

Practice Pointer: Alternatively, assuming the CPR and spouse have no intent to preserve the marriage, a determination must be made with regard to when the CPR should file the I-751 petition and request a waiver of the joint filing requirement. The foregoing assessment must consider state law as it pertains to divorce or annulment proceedings and the length of time it takes for the adjudication of the same based on the local court system in

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 8 CFR §216.4(a)(1).

³⁶ *In re Stowers*, 22 I&N Dec. 605 (BIA 1999); 8 CFR §216.5 has no 90-day requirement.

³⁷ *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980) held that the marriage was not a sham solely because the parties to the marriage were no longer living together; see also, *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975.) so long as the parties had a bona fide intent to enter into marriage, subsequent conduct after the marriage, no matter how unconventional, does not prove lack of marital intent.

the county or municipality where the CPR resides. In some jurisdictions, there may be little concern given USCIS processing times and the additional 87-day RFE response period; but in others careful consideration must be given as to whether an untimely petition should be filed as filing too soon may lead to the issuance of an NTA and subject the conditional permanent resident (CPR) to removal proceedings prior to the issuance of a final divorce decree or annulment.

BENEFITS OF FILING THE N-400 DURING I-751 PENDENCY

As was previously discussed, the CPR is required to file an I-751 to release the conditions on his or her residency as early as 90 days prior to the expiration of the conditional card. Following the filing of the I-751 form, absent defects in the filing, the CPR will have his or her conditional status automatically extended for one more year, pending the adjudication of the petition. Depending on the service center, the average processing time of I-751 is six months. Therefore, if an application is filed jointly and the supporting documents, in the officer's opinion, satisfy the standard of "Bona Fide" marriage, the officer will approve the application and the conditions on the applicant's residence will be released.

However, in some cases, when the record requires additional corroborating evidence of the good faith marriage, the adjudicator often sends a Request for Evidence (RFE). RFE's usually are very detailed and require extensive time to be complied with. And after complying with the RFE, the case usually is put on hold for months before a decision is made. In many cases involving RFEs the processing time can be extended beyond the one year I-751 extension.

Another delay in the I-751 adjudication process may be triggered by the presence of criminal records in the CPR's file. When the alien's record contains evidence of past criminal charges, the adjudicator often sends the file to headquarters for further investigation. The review of such cases can delay the adjudication process for several months.

Finally, security concerns and suspected terrorist activities have been a major source of substantial delays of I-751 adjudication in the recent years. This type of case can be pending for several years and status requests in these cases have little to no effect.

So what happens when the I-751 application is pending beyond the one year extension? Pursuant to CFR 206.1, a CPR is allowed to file for naturalization within the 90 days preceding the third anniversary of their Conditional Permanent Residence. The regulations do not require the applicant who filed a joint application to have the conditions on the residency removed prior to the filing of the Naturalization application. However, the adjudicator cannot approve the N-400 application unless the I-751 is first approved. Therefore, when the CPR files N-400, the adjudicator will have to request the Conditional Residence file, review it, and concurrently adjudicate the I-751 and the N-400 applications.

Because of differences in the adjudication processing times for Form I-751 and Form N-400, and because the CPR is eligible to apply for naturalization while the I-751 application is pending, by filing the N-400 while the I-751 is pending, the CPR may avoid extensive delays in processing their I-751. This becomes especially important, in cases where the I-751 application is pending due to the lack of sufficient evidence, or due to separation from the U.S. spouse during the pendency of the application. In this case, the applicant will be offered the opportunity to discuss the lack of sufficient evidence of good faith marriage or the brief separation between the applicant and the U.S. spouse. The concurrent adjudication of the I-751 and N-400 forms may also accelerate the administrative review process caused by criminal charges and/or security issues.