

Complex I-751 Petitions to Remove Conditions on Residency (Ethical Considerations)

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Removing the conditional basis of permanent residence can be complicated, depending on the conditions of the marital relationship. This practice advisory provides guidance to practitioners on common scenarios and ethical considerations that make an I-751 filing complex. It seeks to provide advice on best practices and strategies for ensuring success. This practice advisory addresses the following:

- Separated but Technically Married: How to Proceed
- Unusual and Unconventional Marital Circumstances
- Securing Waivers
- Ethical Considerations in Dual Representation

SEPARATED BUT TECHNICALLY MARRIED: HOW TO PROCEED

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

* This practice advisory supplements and updates an earlier advisory "Caught in Between: 751 Petition Questions," *Immigration Practice Pointers* (AILA 2018-19 Ed.).

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

² INA §216.

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 proceedings⁵. Late filings may be accepted if the applicant demonstrates good cause for failure to timely file.⁶

On April 3, 2009, U.S. Citizenship and Immigration Services (USCIS) released guidance relating to filing form I-751 in cases where the petitioner and the conditional resident (CR) are separated but still married.⁷ USCIS advised that the CR must still file the form I-751 even if not yet divorced from the petitioner. USCIS emphasized that in this instance, the CR may only file a waiver of the joint filing requirement if:

- Extreme hardship would result if the noncitizen spouse were to be removed;
- 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.⁸

The couple may file form I-751 jointly even though they are separated but still married. USCIS has reiterated that it “may not deny a petition solely because the spouses are separated and/or have initiated divorce or annulment proceedings”⁹ However, the regulations are clear that a waiver can only be granted upon the issuance of a divorce decree and showing that the marriage was entered in good faith.¹⁰ Therefore, the CR who is temporarily separated from the spouse or should the divorce is not final, the CR is not eligible for a waiver of the joint filing requirement.¹¹

In light of the USCIS guidance, it is advisable that the CR spouse file Form I-751 disclosing the separation and the pendency of the divorce proceedings by including, among other things, evidence that the couple married in good faith, a copy of the filed Divorce Complaint or any joint divorce filings, if applicable. USCIS mandates the issuance of the Request for Evidence (RFE) requesting a copy of a finalized Decree of Divorce or Annulment. The RFE requires a response period of 87-days¹² to which the CR would have time to finalize the divorce proceedings. Once the marriage is terminated and the Decree of Divorce is submitted in response to the RFE, USCIS will amend the petition and treat it as a waiver petition. If the divorce decree is not produced, then USCIS will proceed to adjudicate Form I-751 as a joint petition, will examine the merits of the case and will review all supporting documents evidencing that the marriage was entered in good faith.¹³

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 USCIS Memorandum, D. Neufeld, “I-751 Filed Prior to Termination of Marriage,” (April 3, 2009), AILA Doc. No. 09072166, (“Neufeld 2009 Memo”)

⁸ INA §216.

⁹ *Id.*

¹⁰ 8 CFR §216.5(a)(1).

¹¹ INA §216(c)(1)(A) and (d)(2).

¹² Neufeld 2009 Memo.

¹³ *Id.*

UNUSUAL AND UNCONVENTIONAL MARITAL CIRCUMSTANCES

USCIS sees a conventional marriage when the couple cohabitates and have evidence of shared expenses and joint assets.¹⁴ When representing your client, ask yourself how you can show that your client intended to have a life with the U.S. citizen spouse? Examples of unusual and unconventional marriages emerge when the couple:

- Lives in different states because of circumstances such as employment or caring for a relative who lives away from the household;
- Different cultural backgrounds, religions and large age-gaps between the couple;
- Very few joint assets and liabilities because of the couple's socio-economic backgrounds.

Regardless of your client's unusual or unconventional marital circumstances, remember that USCIS is not in the business of determining the "viability" of the marriage, or whether your clients look "good" together. Rather, USCIS need only determine whether the couple intended at the time of the marriage to establish a life together.¹⁵

PROVING THE GOOD FAITH MARRIAGE RELATIONSHIP IN AN UNCONVENTIONAL MARRIAGE

When choosing to represent an unconventional married couple, consider reviewing Form I-130, adjustment of status application and all evidence submitted in support of the clients' good faith relationship. It is likely that the couple had a lengthy or several interviews¹⁶ with USCIS. It will help determine what were the "red flags" USCIS was trying to discern. If you represented the couple during the adjustment interview you should re-submit all evidence filed in support of the adjustment of status interview because the government will examine the couple's state of mind and conduct after the marriage.¹⁷

PRACTICE POINTER: After form I-130 and adjustment of status have been approved but before closing the case internally, counsel should ask clients to continue collecting evidence showing a bone-fide relationship in preparation of their joint I-751 filing.

New clients who have a large age-gap, different religion and socio-economic background should not be an issue at the I-751 stage as long as you can provide evidence of continued cohabitation or any other documentation pertaining to the couple's intent to form a life together. If your clients do not have joint bills together because they each have their own bank account or because only one person works and pays the bills, for example, consider providing the following examples of good faith marriage:

- Check the Facebook, Twitter, and other social media accounts from the client and former spouse. You may be surprised at what you'll find.

¹⁴ 8 CFR §216.5(e)(2).

¹⁵ *Agyman v. INS*, 296 F.3d 871, 883 (9th Cir. 2002).

¹⁶ See *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975).

¹⁷ *Matter of Laureano*, 19 I&N Dc. 1, 3 (BIA 1983).

- Dated texts, cards, email messages exchanged with spouse;
- Dated photo album documenting history of relationship (before and after marriage);
- 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 are members of any clubs or organizations.
- 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 in retirement accounts,
- 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,
- Joint income tax returns or tax returns filing separately bearing the same address,
- Separate bank accounts, credit card statements showing the same address.

PRACTICE POINTER: Supporting documents should extend from the date of marriage through the date of filing of Form I-751.

ADDRESSING THE BRIEF COHABITATION AND LACK OF JOINT ASSETS AND LIABILITIES

The CR is now divorced and seeking your assistance in seeking a waiver to remove conditional residency. When the CR had brief cohabitation and lack of joint assets and liabilities, 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

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 couple did not have joint documents or accounts, then it is important to show proof of cohabitation as already provided in the above examples. Other evidence can also include communications during courtship, detailed affidavits of friends, family, co-workers, employers, landlords, neighbors regarding the relationship before and after the marriage. A detailed affidavit from the client with consistent facts explaining the reasons for the brief cohabitation and the circumstances that obligated the couple to have a brief cohabitation and lack of joint assets and liabilities.

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 they 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.

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

If time is not of the essence, consider requesting a copy of the file through the Freedom of Information Act (FOIA).¹⁹ The copy of the file may have some evidence of the couple's good faith intentions of forming a life together. Due to the current processing times of more than 18 months in adjudicating Form I-751, requesting a copy of the file may be beneficial even after you have filed Form I-751. A copy of the entire file from your client may assist you in responding to any request for more documents (RFE) issued at a later date or to prepare your client for a possible interview. The importance of consistency and accuracy in your client's affidavit and sworn statement at the interview is important because his/her credibility will be tested.

PRIMARY, SECONDARY EVIDENCE OR ANY OTHER CREDIBLE EVIDENCE IN CASES OF ABUSE OR VIOLENCE

Generally, the applicant must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.²⁰

In order to adjudicate Form I-751, USCIS requires that all primary and secondary evidence of good faith marriage be submitted in support of the petition in accordance with the regulations and other USCIS instructions.²¹ Primary evidence refers to birth certificates or marriage certificates, for example. If the birth or marriage certificate does not exist or cannot be obtained, an applicant must submit secondary evidence, such as church or school records, pertinent to the facts at issue.²²

In cases of abuse or violence where your client does not have any police reports or witnesses who can testify to your client's abuse, providing primary and secondary evidence could be challenging. In the event that USCIS issues an RFE requesting for primary or secondary evidence, be sure to verify that USCIS is applying to correct the evidentiary standard.

In cases where an applicant is filing a self-petition based on abuse or violence, such as a I-751 waiver, the law provides a more lenient evidentiary standard of – “any credible evidence” – for what evidence may be considered.²³ If the RFE insist in requesting primary or specific evidence and dismisses the evidence you already provided, but sure to point out that a self-petition may not be denied for failure to submit a particular evidence, but rather, it may only be denied on evidentiary grounds if the evidence that was submitted is not credible or otherwise fails to establish eligibility.²⁴ Explain to USCIS that spouses who are victims of domestic violence and abuse are not likely to have access to the range of primary or secondary evidence like an ordinary person. Primary and secondary evidence showing good faith marriage are exactly the kind of evidence that abusers are likely to use to control their victims. Some abusers typically and purposefully fail to include their spouses in any document that implies the spouse is an equal.

Evidence such as telephone bills, health insurance, bank statements and other account information is likely under the primary control of the abuser. Abusers purposely destroy documents to prevent

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

²⁰ 8 CFR §103.2 (b)(1).

²¹ *Id.*, 8 CFR §216.4(a)(5).

²² 8 CFR §103.2 (b)(2)(i).

²³ Legacy INS Memorandum, P. Virtue, “‘Extreme Hardship’ and Documentary Requirements Involving Battered Spouses and Children” (Oct 16, 1998) (Virtue 1998 Memo).

²⁴ *Id.*

the CR from successfully filing to remove their conditions. Therefore, due to the dynamics of the marital relationship, USCIS should not expect victims of domestic violence to possess these documents and should apply the congressionally mandated evidentiary standard.

Additionally, when responding to an RFE, emphasize that the request for additional primary evidence also confuses both adjudicators and self-petitioners, by implying that only evidence within an abuser's control will prove good faith marriage.

USE OF EXPERT WITNESS

USCIS is prohibited from requiring an evaluation from a mental health professional or other specific form of evidence to support a Form I-751 waiver based on abuse or extreme cruelty.²⁵ However, the use of a licensed therapist has been successful in circumstances where the CR has very little evidence of cohabitation and joint assets and liability.

For example, in cases where there was an unconventional marriage with different cultural backgrounds or religion, the testimony of a therapist can be used to explain the dynamics of the relationship. Therapists can use theories and professional observations as to why and how couples with extreme distinct backgrounds, religion etc can fall in love and live in a romantic bubble, which then bursts over-time leading to a recognized incompatibility.

The therapist can explain that the lack of joint bank accounts, common bills is not unusual because the marriage was forged largely in fantasy expectations. It does not mean that the couple did not marry in good faith, but simply that the couple was rather naive about the capacity to build a real life together.

SECURING WAIVERS WHEN TO SEEK, WHEN THERE ARE MULTIPLE GROUNDS AVAILABLE, AND ABUSE ISSUES

When a client seeks assistance to file a waiver for the I-751 joint filing requirements there are often multiple grounds available to the client. In determining which grounds to base the waiver on and when to file the waiver, the first step is to analyze where, if at all, in the divorce or annulment proceedings the client is.

If your client has already obtained a final Decree of Divorce or Annulment a waiver should be filed based on the termination of a good faith marriage. If the client has filed for divorce or intends to file, you should consider current USCIS processing times as well as state law pertaining to divorce and annulment proceedings, including the length of time it takes for an adjudication in the governing county or municipality before filing the waiver. 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.²⁶

²⁵ Legacy INS Memorandum, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents." (April 16, 1996) AILA Doc No. 96041690.

²⁶ *In re Stowers*, 22 I&N Dec. 605 (BIA 1999); 8 CFR §216.5 has no 90-day requirement.

PRACTICE TIP: In some jurisdictions, the court may accept evidence or attorney testimony in order to expedite divorce proceedings. A practitioner should contact either the client’s divorce attorney or the court directly to determine if they can submit a statement or affidavit explaining the potential consequences if the proceedings are not decided in a timely manner. If an RFE has already been issued, the due date should be included in any communication.

In situations where a client has not received a final Decree of Divorce or Annulment but has colorable arguments demonstrating that both extreme hardship would result if the noncitizen spouse were to be removed and that 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, a waiver can be filed using either or both grounds. As abuse and hardship are often interrelated and the existence of abuse or extreme cruelty can support an argument of hardship. If the foreign national would be removed to a country or culture where a victim may be “ostracized or...stigmatized” for separating from a spouse, it may be advantageous to file using both grounds.²⁷

Although an attorney cannot in good faith file a waiver based on the grounds that a marriage has been terminated, while the divorce is still pending, evidence that divorce proceedings have commenced should also be included no matter the grounds for the waiver. If the divorce is finalized during the pendency of the waiver adjudication, an amended response can be filed changing the waiver category. This can be an effective tool when an onerous RFE has been issued challenging the often limited evidence available in abuse cases or claiming the “extreme hardship” threshold has not been met.

ETHICAL CONSIDERATIONS IN DUAL REPRESENTATION

As we all know, when practicing immigration law, we are frequently engaged in dual representation. Dual representation of a married couple is permitted, but there are many ethical issues that can arise during this representation. Therefore, it is important at the outset to lay out the rights and responsibilities of all parties when engaging in dual representation. First, let’s start with the Model Rules of Professional Conduct to review the general rules attorneys will have in dual representation.

The Model Rule of Professional Conduct 1.7(a) provides that “[a] concurrent conflict of interest exists if:

- the representation of one client will be directly adverse to another client; or
- there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

²⁷ Virtue 1998 Memo.

Finally, Model Rule of Professional Conduct 1.16(a)(1) provides that a lawyer shall withdraw when “the presentation will result in violation of the rules of professional conduct or other law.” Later 1.16(d) states:

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.”

Every dual representation should commence with a retainer agreement signed by both clients, which explains the nature of the representation and what will happen if there is an apparent conflict of interest. That notice is not a waiver, however, and should a conflict arise such a separation, divorce, or disagreement about how to proceed with the representation, the attorney must withdraw representation, notify both parties of the withdrawal, and inform each party as to their rights going forward.

PRACTICE TIP: Since some abusers may be lethal, in the event of separation due to abuse or domestic violence, you may need to consider the extent of the risk for the abused party, the potential harm and weight the disclosing of information against the potential physical harm. Since both spouses have several interests at stake, you may be limited in telling both clients that they must seek their own counsel in the event of a withdrawal.

In the retainer agreement, an attorney should inform all dually represented clients under what circumstances the attorney must withdraw, and what will happen to client files and with client refunds. Joint clients can agree in advance as to who gets what documents upon termination. Without such a provision, the attorney has an equal duty of loyalty to both and since an attorney must turn over the entire file if requested to “the client” a conflict arises if both parties to a dual representation demand the same original documents or refund payment.

PRACTICE TIP: To avoid fights over the return of original documents, upon receipt of original documents many attorneys simply make copies/scans of the documents and immediately return the original documents so there is no concern about their return in the future.

Additionally, for the attorneys who handline I-751s on a flat fee basis, it is recommended to break down the various steps or services within the I-751 to avoid possibly having to refund all the legal fees if a case is not completed. For example, rather than saying in a fee agreement that the attorney is charging a certain amount for the filing of an I-751, the attorney is better served stating that they are charging a certain amount to start the case, another amount to collect all documents, another amount to finalize and submit and application, and finally another amount to prepare for and attend an interview in the event an interview is scheduled. Thus, if the attorney has already completed some of the work on the case, they will not be required to refund the entire retainer in the event of a conflict.

Some attorneys state in flat fee agreements that in the event withdrawal is required that a refund will be based on the percentage of a case completed. This is not advisable because determining how much of a percentage is completed can itself lead to conflicts, often for amounts that aren't worth the attorney's time fighting over. In fact, it is against many state's rules of professional conduct to convert flat fees to percentage determinations or hourly fee determinations in the event of withdrawal.

REPRESENTATION OF A FOREIGN NATIONAL ON A DIVORCE OR ABUSE WAIVER I-751 AFTER REPRESENTATION OF COUPLE DURING INITIAL I-130

Sometimes a foreign national who an attorney previously represented as the beneficiary of an I-130 returns to request representation on an I-751, but explaining that there has been a separation, divorce, or abuse during the marriage. This is a potential conflict because if the attorney represented the couple on the I-130, it may be a conflict to proceed with representing just the foreign national after a conflict between the couple.

Model Rule of Professional Conduct 1.9 provides that:

“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless “both the present and former client consent after consultation.”

In this situation should the attorney wish to continue representation of just the foreign national, the best practice is to get informed consent in writing from the initial petitioning spouse that they agree to the ongoing representation. Indeed, under the professional rules of many states, this may be required.