"All You Need is Love" Part II: Marriage-Based Cases

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Marriage-Based I-130 Immigrant Petition for Alien Relative

- Filed by U.S. Citizen (USC) or lawful permanent resident (LPR) spouse
- Only issue is the relationship, not admissibility
- Critical documents include marriage, birth, death and divorce certificates with English translations and evidence of USC or LPR Status of Petitioner

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Marriage-Based I-130 Immigrant Petition for Alien Relative

- Fraudulent Marriages – entered into for the primary purpose of evading immigration laws
- The central question is whether the husband and wife intended to establish a life together at the time they were married

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Immediate Relative Petitions

- Not subject to numerical limitations
- Visa overstays still eligible
- Unauthorized work in the past – still eligible
- No derivative beneficiaries, except in VAWA cases

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Family 2A Petitions

- Spouses and children of LPRs
- Priority Date is date of filing of I-130, determines order of availability of visas
- Priority date for F2A category in June 2012 Visa Bulletin is 01 January 2010

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K Visa Options

- K-1 Fiancé(e)
- K-3 Visas for Spouses of USC
  - Consul is required to disclose criminal record of petitioner to the applicant

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K-1 Fiancé(e) Visa

- Must have met fiancé(e) in person within 2 years of filing
- Must marry within 90 days of entry into U.S.
- Medical exam required abroad (not vaccinations)
- K-2 children eligible to accompany K-1

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K-3 Visas for Spouses of U.S. Citizens

- USC must file I-130 Petition
- Spouse seeks to enter U.S. to await I-130 approval
- USC petitioner files I-129F with USCIS
- K-4 derivative children – unmarried child of K-3 applicant does not need separate petition

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Affidavit of Support

What it is:

- Binding contract between sponsor (and any joint sponsors or household members) and the United States government
- Says sponsor will maintain intending immigrant <u>at or above</u> 125% of the federal poverty line (or 100% in certain cases involving members of the armed forces).
- Necessary to avoid public charge ground of inadmissibility

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Affidavit of Support

Required of:

- Immediate relatives and family-based preference immigrants
- Employment-based preference immigrants, if:
  - A relative filed the immigrant visa petition OR
  - The USC/LPR relative has 5% or more interest in the business that filed the petition

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Affidavit of Support

Not required for:

- Immigrants who become citizens upon entering the country under 320
- Self-petitioning widows, special immigrants, and victims of abuse with approved I-360s

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Affidavit of Support

- Individuals who can be credited with 40 qualifying quarters of work (through own lawful work, spouse's work, parent's work, if child is under 18).
- Individuals not subject to public charge ground of inadmissibility (i.e. refugees, asylees, adjustments under 245(m))

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Affidavit of Support

Basics:

- Sponsor
  - Must be USC or LPR
  - Must be over 18
  - Must be domiciled in the United States
  - Must earn 125% or above the FPG
  - Must be petitioner in family-based case (except for when petitioner is deceased)

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Affidavit of Support

What if sponsor does not earn at or above 125% of the FPG?

- Household Member
- Joint Sponsor
- Assets

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Affidavit of Support

Household Member:

- Sponsor can include income of relatives who live in the same residence if they are willing to combine their income to meet the income requirement
  - Must be siblings, parents, or adult children
  - Must live in the same residence of sponsor
  - Must complete Form I-864A
    - Will be liable (joint and several)

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Affidavit of Support

Joint Sponsor:

- Must be USC, LPR, or National of the U.S.
- Must earn 125% or more of FPG for family size
- Can have maximum of two per family unit
- Joint and several liability

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Affidavit of Support

Assets--If a sponsor does not have sufficient income, may use certain assets:

- Must be readily convertible into cash in a year or less
  - E.g. cash, net value of real estate, net cash value of stocks, bonds, other securities, personal property
- Value of assets must equal: 1X, 3X, or 5X difference between FPG and income.

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Red Flag Issues

- Marriage During Proceedings
- Entry Without Inspection
- Marriage between Same-Sex Couples

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Marriage in Proceedings

- General prohibition against filing visa petition *and* adjustment of status if marriage occurred while foreign national was in proceedings.
  - INA 204(g); 8 CFR 204.2(a)(1)(iii).
  - INA 245(e); 8 CFR 245.1(c)(8)

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Marriage in Proceedings

Visa Petition: Either reside abroad 2 years OR request for bona fide marriage exemption

- Exemption request must be in writing
  - Cover letter
  - Affidavit from petitioner
- Submitted with I-130

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Marriage in Proceedings

- State reason for exemption & have supporting documentation
- Documentation of Good Faith Marriage
  - Joint ownership/joint tenancy/commingling of assets
  - Birth Certificates of children
  - Affidavits of third parties

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Marriage in Proceedings

Denials are without prejudice:

- Can refile if proceedings terminated/closed OR
- If beneficiary resides abroad for 2 years OR
- Re-file/Re-open with new evidence of bona fides

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Marriage in Proceedings

Adjustment: Must show by clear and convincing evidence marriage was in good faith

Request for Exemption:

- In writing and submitted with I-485
- Supported by documentation
  - If documentation submitted under 204(g) not necessary to submit under 245(e) unless otherwise requested

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Entered Without Inspection (EWI)

- Two issues: Eligibility for Status & Admissibility

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Red Flags: EWI

Eligibility for Status:

- No adjustment under 245(a):
  - "The status of an alien who was *inspected and admitted or paroled*" may adjust
    - Certain overstays (i.e. immediate relatives) may adjust
- EWI was not inspected and admitted or paroled

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Red Flags: EWI

- EWI may not adjust unless 245(i)
  - Must get IV from consulate abroad

Consular Processing:

- Required to get status
- But see: 212(a)(9)(B) & (C)
  - So when EWI travels abroad, inadmissible for bars

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Red Flag: EWI

- 3, 10, permanent bars
  - Watch for multiple entries potential expedited removals
- Waiver of inadmissibility under 212(a)(9)(B)(v) and (C)(iii). (Form I-601)
- New Regulation—certain individuals can apply for a waiver before departing

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Marriage between Same-Sex Couples

- The U.S. Federal Government does not recognize lesbian and gay couples for immigration purposes
- Defense of Marriage Act (DOMA) bars the federal government from recognizing same-sex marriages
- Obama Administration no longer defends DOMA in court, but continues to enforce DOMA

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Marriage between Same-Sex Couples

- *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011) (AILA Doc. No. 11050565) AG certified four questions to BIA to decide concerning eligibility for cancellation of removal of an Irish citizen in a NJ civil union with a U.S. citizen

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Marriage between Same-Sex Couples

- Prosecutorial Discretion – see AILA InfoNet Doc. No. 12012568 (Posted 01/25/2012) for Practice Pointer
- DHS has issued memoranda describing goal of prioritizing removal of certain categories of non-citizens, while exercising prosecutorial discretion in favor of those who do not fall into these categories and who have favorable equities

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Marriage between Same-Sex Couples

- Consider asylum as possible form of relief for same-sex spouses
  - USCIS Guidance for Adjudicating LGBT Refugee and Asylum Claims Training Module AILA InfoNet Doc. No. 12012478 (Posted 01/24/2012)

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Timing of Filing

- General Rule:

  Foreign national spouse and USC spouse must jointly file I-751 during the last 90 days of the two year period of conditional residency.

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Timing of Filing

- FN spouse may apply for a waiver of this joint filing requirement before that 90 days period.
  - Entered Marriage in Good Faith, but spouse died.
  - Entered Marriage in Good Faith, but marriage was terminated due to divorce or annulment.
  - Entered Marriage in Good Faith, remain married, but have been battered or subjected to extreme cruelty by the USC spouse.
  - Termination of resident status and removal would result in extreme hardship.

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Timing of Filing

- **FILING AT ANY TIME:**

  If FN spouse seeking a waiver of the joint filing requirement, that may be filed at any time. Foreign national need not (and in many cases *should not*) wait for the 90 day filing window.

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Timing of Filing

- USCIS may terminate conditional residency at any time if it determines that:
  - Marriage was judicially annulled or terminated other than through the death of the spouse. So if the USC spouse dies, you are safe waiting for the end of the 2 years to file the I-751, but if there was a divorce and USCIS finds out (i.e. through a nasty letter from the USC or someone else) they can send the notice of termination.
  - Marriage was entered into for purpose of procuring noncitizen's entry for a fee, or for some other consideration.

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Timing of Filing

- **Avoiding the I-751 Altogether!**
  - If serving in the military – immediately eligible for naturalization.
  - If married to a person working for U.S. gov't abroad or military personnel who is stationed abroad within the 2 year CLPR period, under 319(b)(c) or (d) can just natz. If N-400 pending, file the I-751 when it needs to be filed. Sec. 319 N-400s are supposed to be expedited.

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Dependants – When Are They Included?

- Dependant children – defined as unmarried person under age 21
- If acquired CR status with parent (or within 90 days of parent) – can be included with parent's petition

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Dependants – When Are They Included?

- If acquired after 90 days of parent, then must file separately
- If parents cannot file jointly for any reason, child must file separate I-751
- All dependants may file separately, to have conclusive proof of extension of CR status

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Interplay With Naturalizaion

- May file N-400 after 2 years, 9 months CLPR status *even if I-751 not yet adjudicated*
- If not still married to USC, and I-751 filed with waiver – must wait until 4 years, 9 months of total LPR status
  - *Exception* – if filing waiver as battered spouse or based on extreme cruelty by USC spouse or parent

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Good Faith Marriage that Has Been Terminated

- Qualifying marriage entered into in good faith
  - Marriage Terminated
  - CR meets the requirements of joint filing under 212(c)(1)
  - Good Faith must have existed when marriage entered into
  - Events occurring post-marriage that result in demise of marriage are not relevant

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Good Faith Marriage that Has Been Terminated

- 8 CFR 216.5(e)(2) - Director shall consider evidence relating to the amount of commitment by both parties to the marital relationship. Regs contain non-exclusive list of documentation that may be presented.
- Any credible evidence as to bona fides of marriage should be submitted and considered by USCIS
- Divorce proceeding no longer must be final in order to file under this waiver provision as per Neufeld Memo (April 03, 2009) AILA Infonet Doc. No. 09072166.

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Impact of Death of the Petitioner on Marriage-Based Case

- Historically, the service held that the death of the petitioner voids the family-based petition
- FY2010 DHS Appropriations Act, Pub. L. No. 111-83, October 28, 2009, 123 Stat 2141 provides that the I-130, Application to Adjust Status and any related applications shall be adjudicated notwithstanding the death of the qualifying relative

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Questions & Answers

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