CHAVEZ & VALKO LLP
IMMIGRATION LAW FIRM

REMOVAL OF CONDITIONS (I-751) IN FAMILY BASED APPLICATIONS

*by Gary Frost**

I. History
  A. Pre 1986
    1. In the interest of family unity, Congress exempted the spouses of USC's from the per country ceilings imposed by the INA
    2. As far back as 1953, the Supreme Court held that marriages entered into for the purpose of securing immigrant status with no intent of entering into a marriage relationship would be treated as if the marriage never existed. [*Lutwak* v. U.S., 344 U.S. 604 (1953)]
    3. Marriage fraud was a deportable offense and there was a presumption that marriages less than two years old that ended in divorce were fraudulent [§241(c) 1952]
  B. 1986 and Later
    1. Immigration Fraud Amendments of 1986
      a. Law passed as the direct result of statistics provided by INS to Congress indicating rampant marriage fraud. [*But see*, 66 Interpreter Releases 1011, September 11, 1989]
      b. Amends part of the INA and adds new sections such as §§204(h), 216, 245(e)
    2. Immigration Act of 1990
      a. Among other things, attempted to address problems that defined how an alien could maintain status despite the breakdown of the marriage
      b. Removed the "race to the courthouse" interpretation by the INA and added a battered spouse waiver
    3. Violence Against Women Act of 1994
      a. Among other things, amended the INA to allow any credible evidence of extreme mental cruelty to prove abuse to battered victim

II. Conditional Status
  A. Conditional Permanent Resident Status of Certain Alien Spouses and Sons and Daughters INA §216
    1. The spouse and derivative children of petitioner shall be considered conditional residents if the marriage is less than two years old at the time of admission for permanent resident status [216(a)(1)]
      a. The conditional status applies regardless of whether the petitioner is a USC or LPR, but for practical matters only the spouses of USC's are subject to the condition because:

i. the availability immigrants visas for the spouse and children of LPR's is more than two years
ii. the stepchildren (less than 18 years old at marriage) of USC's require a separate visa petition and may or may not be subject to the condition
iii. the stepchildren (18 or older at marriage) will require visa petition from conditional resident and the availability immigrant visas is more than two years

b. Condition only exists where marriage is the basis of the principal petition

2. Conditional residents have all of the rights and privileges of other lawful permanent residents [8 CFR §216.1]
   a. May reside and work in the US
   b. May travel
   c. May file for reentry permits
   d. May file immigrant visa petitions for other family
   e. Must register with Selective Service if required
3. The time spent in conditional status counts toward naturalization eligibility [§216(e)]
   a. A conditional resident may even apply for naturalization while I-751 application is pending if alien qualifies [79 No.3 Interpreter Releases 66, 89-90 (Jan. 14, 2002)]

III. How to Remove the Conditional Status

A. Joint Petitions

1. What's the issue? - **Was the marriage bona-fide at the time of its inception?** [*See, Matter of McKee*, 17 I&N Dec 332 (BIA 1980); *Matter of Mendes*, 20 I&N Dec 833 (BIA 1994); *Matter of Jara Riero*, 24 I&N Dec 267 (BIA 2007); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975)]
2. Who is required to file a removal of condition application? - The spouse and alien granted conditional resident status are required to file a joint application for the removal of condition (Form I-751) [§216(c)]
   a. BUT SEE, [Matter of Rose, 25 I&N Dec 181 (BIA 2010)] Conditional resident is not required to file a "joint petition" so long as she timely files the I-751 and attends a requested interview. Such an alien need not file a waiver application. Applicant should check the "My spouse is deceased" box in Part 2.
3. When is the application required to be filed?
   a. Filing Deadline
      i. In general, the application must be filed during the 90 day period before the second anniversary of the alien's admission for permanent residence (**Practical Tip** – tell your client to count back 90 days from the expiration date of their resident card

to determine when the window opens) [§216(d)(2)(A)]

ii. Applications may be filed late if the alien can establish good cause and extenuating circumstances for failing to file on time [§216(d)(2)(B)]

iii. Conditional residents that are seeking a non-joint or waiver petitions may file the I-751 before, during or after he 90 day period. [8 CFR 216.5; Matter of Stowers 22 I&N Dec 605]

b. Application is filed at the Service Center having jurisdiction based on residence [8 CFR 216.4(a)(3)]

c. Alien need not be present in the US at the time of filing but would have to return if called to an interview [8 CFR 216.4(a)(4)]

d. Failure to file will result in the termination of the alien's status and the initiation of removal proceedings [8 CFR 216(a)(6)]

4. What does filing do for the alien?

a. Alien automatically remains a conditional resident until the I-751 is adjudicated [8 CFR 216.4(a)(1)]

i. USCIS will issue a letter extending the validity of the card for an additional twelve months [Yates Memo, Dec 2, 2003]

ii. If USCIS does not adjudicate the application within that additional twelve months, the alien can either get an I-551 stamp put in their passport or get an I-94 [Yates Memo, Dec 2, 2003]

b. If a late application is accepted the conditional status is restored and erases any unlawful presence that may have accrued. [Sept 19, 1997 INS Memo, posted on AILA InfoNet at Doc. No. 97092240]

5. What supporting documents should be offered?

a. Documents evidencing the validity of the marriage or the marriage's good faith should be filed with the petition

i. The same types of documents that were offered during the adjustment of status should be provided: joint ownership of property, children's birth certificates, tax returns, photos, etc . . . . [8 CFR 216.4(a)(5)]

ii. **Practical Tip** – Ideally the client will have collected supporting documents about every three months for the past two years.

6. Will there be an interview?

a. In most well supported application, USCIS will not call the couple to an interview and will simply approve the case based on the submitted petition.

b. If the petition raises potential fraud issues, an interview will likely be scheduled

i. Even though the law requires interviews to be scheduled within 90 days of filing of the petition, the deadline can be ignored. [§216(d)(3)]

c. Interviews may be set on a random basis even where fraud is not suspected

d. USCIS is required to make a decision within 90 days of the interview, but this deadline is routinely ignored [§216(c)(3)(A)(ii)]

e. Failure to appear for an interview will result in the alien's status being terminated [8 CFR 216.4(b)(3)]

7. What criteria does USCIS consider?
   a. Criteria [§216(d); 8 CFR 216.4(c)]
      i. Was the marriage valid in the jurisdiction where it took place?
      ii. Was the marriage entered into in good faith?
      iii. Was the marriage judicially annulled or terminated?
      iv. Was a fee paid to the petitioning spouse to induce the filing of the petition?
   b. USCIS is required to approve the petition if it meets all of the above criteria [§216(c)(3)(B)]
   c. Since the main question is what was the couple's intention at the time they entered into the marriage, even marriages that have broken down are still approvable (**Practical Tip** – Good luck!)
      i. Separation of the couple without additional evidence is not a sufficient basis to deny the petition [*Matter of McKee*, 17 I&N Dec 332 (BIA 1980)]
8. What happens if the petition is approved?
   a. The resident alien will be issued a new I-551 that is valid for ten years
9. What happens if the petition is denied?
   a. Initially a Notice of Intent to Deny will be issued giving the alien the opportunity to rebut [8 CFR 216.4(c)]
   b. USCIS must provide written notice of the denial and state the reasons why. [§216(c)(3)(C); 8 CFR 216.4(d)(2)]
      i. Denial terminates the alien's status and permission to work on the date of the decision
      ii. No appeal of the decision, but alien will be permitted to file a motion to reconsider [8 CFR 103.5]
   c. USCIS will issue a Notice to Appear [8 CFR 216(d)(2)]
      i. Alien may seek review of the decision in removal proceedings
      ii. Immigration and Customs Enforcement bears the burden of proving by a preponderance of the evidence that petition was properly denied for substantive reasons (fraudulent marriage, marriage terminated, fee paid to spouse). [§216(c)(3)(D)] The alien bears the burden of proof if the status was

terminated for procedural reasons (failure to timely file, failure to attend interview, or showing good cause) [§216(c)(2)(B)]

d. A terminated alien who is having the decision reviewed may be issued a temporary I-551 or I-94 during the pendency of the review. [October 9, 1997 INS Memo, *reprinted* in 74 Interpreter Releases 1731 (Nov. 7, 1997)]

B. Non-Joint Petitions and Waiver Petitions

1. When would an alien file the petition on their own?

a. USC spouse has died

i. Conditional resident is not required to file a "joint petition" so long as she timely files the I-751 and attends a requested interview. [Matter of Rose, 25 I&N Dec 181 (BIA 2010)] Such an alien need not file a waiver application.

b. The marriage has terminated

c. The USC spouse can't or won't sign a joint petition or it would be risky to seek the spouse's assistance

d. A child that was granted conditional status more than 90 days after their conditional resident parent

2. When should the petition be filed?

a. As stated above non-joint and waiver petitions may be filed before, during, or after the 90 day window for joint petitions.

i. Aliens in removal proceedings must file a waiver petition before a final order is entered [8 CFR 216.5(a)(2)]

ii. Waiver petitions may be filed even if a joint petition was previously filed and denied [Opinion Letter, INS General Counsel, *reprinted* in 67 Interpreter Releases 168 (Feb. 5, 1990); *See also*, Matter of Mendes, 20 I&N Dec. 833 (BIA 1994)

3. What are the waiver grounds?

a.. Extreme hardship [§216(c)(4)(A)]

i. This waiver is available regardless of whether the marriage exists or not

ii. The claim is the based on the extreme hardship that would occur to the alien, children or even a subsequent spouse. ["INS Responds to Marriage Fraud Questions," Question No. 57, *reprinted* in 67 Interpreter Releases 341 (Mar. 19, 1990)]

iii. The hardship must be based on factors that arose after the granting of conditional status [8 CFR 216.5(e)(1)]

iv. The hardship must be extreme

v. There is no requirement to show that the marriage was entered into in good faith [*Matter of Balsille*, 20 I&N Dec. (BIA 1992)]

vi. Burden is on alien to prove hardship [8 CFR 216.5(e)(1)]

b. Good faith [§216(c)(4)(B)]
   i. This waiver is only available after the marriage has been judicially terminated [April 10, 2003 Yates Memo , *posted on* AILA InfoNet at Doc. No. 03050643]
   ii. Alien must prove that she entered into the marriage in good faith

c. Battered Spouse or Child and Extreme Cruelty [§216(c)(4)(C)]
   i. This waiver is available regardless of whether the marriage exists or not [8 CFR 216.5(e)(3)(ii)]
   ii. Requires that the marriage was entered into in good faith and that the spouse or child was battered or subject to extreme cruelty during the marriage
   iii. Alien parent may file the waiver based on the abuse to her child regardless of the child's immigration status [8 CFR 216.5(e)(3)]
   iv. The regulations provide specific examples of violent acts that are considered extreme cruelty 8 [CFR 216.5(e)(i)]
   v. There is a conflict between the regulations and the code. The regulations require that extreme cruelty claims include an evaluation from recognized professionals. [8 CFR 216.5(e)(iv-vii)]. However, the 1994 Amendment to the Act permits "any credible evidence" to be considered. [§216(c)(4)]
   vi. USCIS must keep any information concerning the abused spouse or child confidential [§216(c)(4)]

4. Can an alien use one or more of the waiver grounds?
   a. Yes. It does not matter whether all valid claims are presented at the same time or one after the other in new waiver petitions. However, an IJ can only review the grounds on which the application was denied. If the alien is prima facie eligible for another ground, the IJ should continue the proceedings to permit the alien to file a new waiver petition with the Service. [*Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994); *Matter of Tee*, 20 I&N Dec. 949 (BIA 1995)]
5. Will there be an interview?
   a. All but guaranteed and as before, failure to appear for the interview will result in termination of conditional status
6. Does USCIS have discretion in granting waiver?
   a. Yes, but if the waiver is denied, the Service must give written notice of the decision and the reasons for the denial. Again there is no appeal of the decision but the decision may be reviewed by the IJ in removal proceedings. [8 CFR 216.5(f)]

7. Can conditional resident children petition on their own?
    a. Yes. Where the child was not included on the parent's petition, the child may file their own petition. [8 CFR 216.4(a)(2)]

IV. Removal Proceedings
A. Scope of Review
1. IJ can only review petitions that have been denied by the Service. [§216(b)(2), (c)(2)(B) and (c)(3)(D); 8 CFR 216.3(a), 216.4(d)(2), and 216.5(f)]
2. IJ can only review the basis on which the petition was denied [*Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991)
3. The scope of review is not defined but appears to be *de novo*. [*See*, *Matter of Tee*, 20 I&N Dec. 949 (BIA 1995); Legal Opinion, INS General Counsel, *reprinted in* 69 Interpreter Releases 627 (May 18, 1992)]

B. New grounds
1. The alien should move for the proceedings to be continued where the alien is prima facie eligible to file a waiver on a new ground. [*Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994); *Matter of Tee*, 20 I&N Dec. 949 (BIA 1995)]

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