The ABC’s Of Immigration: Obtaining Permanent Residency Through a Spouse
by Gregory Siskind

The spousal relationship is one of the most common bases for immigration to the US. US citizens can petition for foreign-born spouses as immediate relatives, meaning the spouse will have an immediately available visa number. Generally, if your non-citizen spouse is in the U.S. (through a lawful admission or parole) at the time you file the Form I-130, Petition for Alien Relative, your spouse may file a Form I-485, Application to Register Permanent Residence or to Adjust Status at the same time as part of the same petition package.

Lawful permanent residents can petition for their spouses, but the petition falls into the second preference family category. There is an annual limit of 114,200 visas in this category, plus whatever visas are unused in the first preference. The second preference also includes adult unmarried children of permanent residents. Within the second preference, spouses receive 77 percent of the visas, or just under 8,000. Spouses are also eligible to immigrate as derivative beneficiaries of a married adult child of a citizen and of brothers or sisters of citizens. These categories are backlogged several years.

What specific criterion must the marriage meet to be considered valid?

However the spouse will be immigrating, there are three very important standards that the marriage must meet.

- The marriage must have been valid at the time it was performed
- The marriage must still be in existence at the time the immigration process in completed (and not just when the application is submitted)
- The marriage must not have been entered into for immigration purposes

Was the marriage valid at the time of performance?

For a marriage to be valid, there are two primary requirements:

- Each party must have been legally able to marry, and
- The marriage ceremony must be considered legal under the laws where it was performed (there are certain exceptions to this such as in the case of same sex marriages or polygamous marriages)

In cases where one of the parties had previously been married, the divorce must be final and valid. Divorces in which neither party was present in the jurisdiction granting the divorce are almost always invalid, whereas those granted in a jurisdiction where both parties were present are almost always valid. Divorces granted when only one person was present, particularly those that occur in countries known for granting divorces in such cases, are highly suspect. Whether a subsequent marriage is valid depends on the law of the place of the new marriage.

Common law marriages, which are now quite rare in the US and only recognized in only a handful of states, can be valid for immigration purposes if the laws of the place of residence, or last previous residence, legally recognize them.
Customary marriages, those performed according to local custom but not licensed by civil authorities, may at times be valid for immigration purposes. Whether they are depends on whether the law of the country where the marriage occurred recognizes the marriage as valid. Such questions almost always require legal assistance from someone who is an expert in the laws of the particular country of marriage.

Marriages entered into in the US are almost always valid, unless one of the parties was under the age of consent, or if the family relationship between the spouses was too close. Divorces obtained in the US are also almost always valid as well.

Is the Marriage Still in Existence?

For a person to immigrate through the spousal relationship, the marriage cannot have been legally terminated. Furthermore, if the parties are separated and do not plan to live again as husband and wife, a petition can still be denied.

In places with no-fault divorce laws, where a legal separation can mature into a divorce, the period of separation will most likely not be considered to still be in existence.

Was the Marriage Entered into for Immigration Purposes?

Over the past two decades, Congress and the INS have grown increasingly suspicious of marriages. Since 1986, a foreign-born spouse who has been married to the petitioner for less than two years is given conditional permanent residence for two years. While this conditional status is for the most part the same as regular permanent residence, it is designed to provide assurance that the parties did not marry for immigration purposes by allowing in some cases for the conditional status to be revoked if the marriage does not last two years.

It is important to note at the outset that it is not against the law to consider immigration in deciding to get married. Considering immigration benefits will only be a problem if that was the ONLY reason to marry and there are no other legitimate reasons. Therefore, it is important to know what factors will make the agency suspect marriage fraud.

Some of the most obvious of these are if the couple did not know each other for very long before marrying or had seen each other only a few times before marrying. Also, if the couple does not live together, the USCIS will be very suspicious, even more so if they have never lived together. Additionally, marriages between couples from different backgrounds, especially those that lack a common language, are sometimes viewed with suspicion (this is probably a violation of the law, but it is pretty tough to prove immigration offers are engaged in such behavior).

The USCIS is very suspicious of marriages entered into after one of the parties is placed in removal proceedings or is being investigated by the USCIS. There are a number of kinds of supporting documents that can be presented to show that the marriage is bona fide. This would include, but not be limited to, evidence of the parties’ joint ownership of property and their cohabitation, evidence of children born in the marriage, joint finances, as well as affidavits from friends and family testifying to the bona fides of the marriage.
Lawful permanent residents who obtained their status through marriage as a spouse of a US citizen or permanent resident are precluded for a period of five years from getting approval for second-preference visa petition filed for a new spouse. The bar does not apply if the petition can show by "clear and convincing" evidence that the relevant earlier marriage was not entered into for purposes of getting a green card. It also does not apply if the first spouse died.

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