

IMMIGRATION ISSUES IN FAMILY LAW



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IMMIGRATION LAW

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Federal Agencies

- ❑ *USCIS*: United States Citizenship & Immigration Services is responsible for administering immigration benefits and adjudicating naturalization cases.
 - ❑ *USICE*: United States Immigration & Customs Enforcement has investigatory responsibilities within the U.S., as well as the detention and removal of aliens found not lawfully present.
 - ❑ *USCBP*: United States Customs & Border Patrol functions as the "one stop" immigration and customs inspection arm at the borders, airports and other ports of entry.
 - ❑ *DOS*: The Department of State is responsible for visa issuance at American consulates abroad, and for issuance of U.S. passports.
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Classes of Non-Citizens

- ❑ ***Nonimmigrant***: person holding a valid visa or other authorization to remain temporarily in the United States for a specific purpose (e.g., study, tourism, business, etc.); status will have restrictions on allowed activities and a limited authorized period of stay.
 - ❑ ***Permanent Resident***: also "green card" or lawful permanent residence ("LPR"); LPR may reside in U.S. "permanently;" work and travel are authorized. LPR may abandon status by remaining outside US for lengthy period or otherwise establishing residence abroad, or may jeopardize status with certain criminal activities or immigration violations.
 - ❑ ***Refugee or Asylee***: individual granted permission to enter (refugee) or after entry was granted status (asylee) after proving persecution in home country on account of race, religion, nationality, politics, or social group.
 - ❑ ***Undocumented***: alien who entered the U.S. without inspection or without proper documentation.
 - ❑ ***Visa Overstay/Visa Violator***: any alien who overstays authorized period of stay or violates the terms of a visa.
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U.S. Citizenship

- ❑ *Birth in the U.S.* automatically confers citizenship, regardless of parent(s)' status.
- ❑ *Adoption by U.S. citizen parent(s)* may confer U.S. citizenship at time of the child's entry or adjustment of status.
- ❑ *Birth abroad* to U.S. citizen parent(s) may transmit citizenship, and naturalization of parent(s) may also confer citizenship when child is an LPR.
- ❑ *Naturalization*: after five years as LPR, may apply to become U.S. citizen; requirement is three years if LPR through marriage to U.S. citizen, if not separated from their spouse. Additional requirements include: good moral character for three or five years, physical presence in U.S. for at least half statutory period, and other requirements.

Fiancé(e) Visas: “K-1”

- ❑ Allows U.S. citizen to bring fiancé(e) to US prior to marriage.
 - ❑ Must demonstrate parties are legally free to marry.
 - ❑ Restrictions: petition by U.S. citizens only, marriage within 90 days of arrival in U.S., no extensions or changes of status allowed.
 - ❑ Must file for “adjustment of status” based on marriage to same U.S. citizen petitioner.
 - ❑ Non-citizen will be granted adjustment to “conditional permanent resident status” for two-year period.
 - ❑ Validity of relationship confirmed during visa interview at U.S. Consulate, during adjustment interview, and at two-year anniversary of adjustment.
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Children

- ❑ *In-wedlock*: recognized as child of either parent, regardless of the marriage's continued existence or viability.
- ❑ *Out-of-wedlock*: statute distinguishes relationship to mother, father; natural mother recognized with proof of maternity; father of out-of-wedlock child must establish both paternity and a bona fide parent child relationship.
- ❑ *Stepchildren*: child under age 18 when parent and stepparent marry; survives divorce between the parent and stepparent, so long as the original marriage was bona fide; no legal adoption or other formal acceptance of parental responsibility need be undertaken for the relationship to be recognized for immigration purposes.
- ❑ *Adopted Children*: only recognized if prior to age 16 (18 if natural sibling of other adopted child); certain requirements for residency if not an orphan. Natural parents/siblings prevented from acquiring immigration benefits from child.

Marriage

- ❑ Validity of marriage governed by the law of the jurisdiction where the marriage took place; includes common law marriages where recognized.
- ❑ Same-sex marriages now qualify for immigration benefits.
- ❑ Bona Fides of Relationship: determined by examining intent of the parties at the time of the marriage; viability is not an issue except insofar as it reflects on the initial sincerity of the union.
 - *Proof*: document couple's "shared life together."
 - *Prenuptial and Postnuptial Agreements*: existence and contents of agreement may be taken into account in evaluating parties' good faith.

Conditional Residents

- ❑ **Conditional Residence** (“CR”) granted if marriage less than two years old at time of adjudication; CR identical to Lawful Permanent Resident (LPR) status, but limited to two-year period; status terminates unless CR petitions to "remove conditions;" CR status applied to accompanying stepchild of CR spouse.
 - ❑ ***Joint Filing***: if marriage is intact, petitioner and spouse file jointly, showing continuation of the original bona fide relationship with same type of evidence submitted in support of initial petition.
 - ❑ ***Waiver of Joint Filing Requirement***: where marriage terminated must still demonstrate bona fides of relationship, but may request waiver of joint filing by showing marriage was in good faith or by showing abuse/extreme mental cruelty.
 - Query: is the petition adjudicated when the parties are separated but not yet divorced?
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Impact of Divorce

- ***Non-Immigrant Visa Holders:*** status of derivative spouse (e.g., the wife of an F-1 Student or the husband of an H-1B Professional Worker) depends both on the current status of the principal alien, as well as relationship to principal alien.
 - **Change in principal's status:** loss or violation of status will impact derivative spouse's status; if the principal changes status, the derivative must also change to remain in valid status.
 - **Impending dissolution:** derivative spouse may acquire other status independently in advance of dissolution to avoid falling out of status or risking removal.
- ***Pending Permanent Residence – Employment/Non-Family Petition:*** sponsorship for residence through employment automatically includes immediate family members.
 - Dissolution will cut off the derivative spouse's ability to obtain status and ancillary benefits such as work or travel permission.
 - The family court may be open to temporary orders or provisions in the judgment to protect the non-citizen spouse. Where a couple is contemplating dissolution, investigate the impact of divorce on the derivative spouse's eligibility for work authorization, eligibility to travel, and eventual chances to obtain permanent resident status.

Benefits for DV/Crime Victims

- ❑ Spouses, children and parents of children of USCs or LPRs, who have been battered or subject to extreme cruelty, may qualify for permanent residence via either a self-petition or in removal proceedings under the Violence Against Women Act (VAWA).
- ❑ VAWA protections are available to men and women.
- ❑ *Bona fide relationship*: must demonstrate bona fide relationship using same type of evidence as usual marriage case; standards may be relaxed if abuse makes obtaining evidence difficult.
- ❑ *Marriage terminated*: if terminated, applicant must demonstrate divorce occurred less than two years prior to filing and the divorce was related to abuse.
- ❑ *Battery or extreme cruelty*: need not be physical abuse.
- ❑ *"Any credible evidence" standard*: evidence evaluated in light of victims circumstances; potential evidence may include: victim's statement, police and hospital records, restraining orders, photos, affidavits (by the applicant and third parties), evaluations by mental health professionals, DV shelter records, and letters from domestic abuse counselors.
- ❑ *Other option*: U visa for victims of DV and other crimes.

Separation

- ❑ An informal separation should not affect a spouse's ability to qualify for a marriage-based immigration benefit. Matter of Lenning, 17 I&N Dec. 476 (BIA 1980).
- ❑ USCIS Adjudicator's Field Manual provides adjudicators with the following instructions: "You may deny the visa petition in cases where the parties entered into a valid marriage, but have since obtained a *legal* separation prior to the final adjudication of the visa petition." AFM at 21.3(a)(2)(G).
- ❑ A question remains whether legal separation under Oregon law will result in the denial of a non-citizen's immigration benefit. Ultimately, this is a question for the particular USCIS adjudicator. The laws governing legal separation in Oregon are distinguishable from the law and procedure in New York, the state involved in the Lenning decision. ORS 107.025(2)(c) specifically allows the parties to seek a judgment for separation where irreconcilable differences exist and the continuation of their status as married persons preserves or protects *legal*, financial, social, or religious interests (emphasis added). Further, unlike New York, legal separation in Oregon does not inevitably lead to divorce and, thus, does not irrevocably terminate the marital relationship.

I-864 Affidavit of Support in Family-Based Immigration

What is it? Is it enforceable in divorce proceedings and related actions for support?

Affidavit of Support: What is It?

- ❑ Immigrants must demonstrate that they will not become public charges. Petitioner-sponsors in family-based immigration cases must file Form I-864 Affidavit of Support, with some limited exceptions.
- ❑ The Form I-864 instructions state:
 - “By signing this form, you, the sponsor, agree to support the intending immigrant and any spouse and/or children immigrating with him or her.”
 - “I agree to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the federal poverty guidelines.”
 - “I understand that my obligation will continue until my death or the sponsored immigrant(s) have become U.S. citizens, can be credited with 40 quarters of work, depart the United States permanently, or die.”
- ❑ The support obligation begins only when the immigrant’s application for admission or adjustment of status to permanent residency is granted by the government.
- ❑ The I-864 obligation encompasses reimbursement for the immigrant’s access to means-tested benefits, which include: Food Stamps; TANF (if not to USC children); and state/local cash assistance programs. States independently determine which, if any, of their programs qualify for reimbursement.

Affidavit of Support: Enforceability

- ❑ Courts have found the I-864 enforceable and have ordered support payments to a former spouse. See, e.g., Stump v. Stump, No. 1:04-CV-253-TS, 2005 WL 2757329, 2005 U.S. Dist. LEXIS 26002 (N.D. Ind. Oct. 25, 2005) [finding I-864 enforceable and ordering defendant to pay former spouse support at 125% of the poverty guidelines].
- ❑ The Federal District Court in Oregon found that a beneficiary was precluded from a claim seeking support under an I-864 where the I-864 was considered in the spousal support determination of the earlier divorce proceeding: Nguyen v. Dean, No. 10-6138-AA, 2011 U.S. Dist. LEXIS 3803, 2011 WL 130241 (D. Or., Jan 14, 2011).
- ❑ In Matter of Khan, No. 44814-9-II (Wash. Div. 2, Aug. 5, 2014), the court held that the beneficiary could not receive maintenance payments based on the I-864, but could pursue I-864 support in a separate contract action.
- ❑ At least one federal court has determined no jurisdiction exists to hear an I-864 support claim case because it was not one of federal question subject matter jurisdiction, but rather of contract. Winters v. Winters, No. 6:12-cv-536-Orl-37DAB, 2012 U.S. Dist. LEXIS 75069 (M.D. Fla., Apr. 25, 2012).

Affidavit of Support: Enforceability

- ❑ Pre-nuptial agreements to waive I-864 benefits and obligations generally have been found ineffective. *See, e.g.* :
 - Erler v. Erler, Civil No. 12-2793, 2013 WL 6139721 (N.D. Cal. Nov. 21, 2013);
 - Shah v. Shah, Civil No. 12-4648 (RBK/KMW), 2014 WL 185914 (D. N.J. Jan. 14, 2014);
 - Toure-Davis v. Davis, Civil No. WGC 13-916, 2014 U.S. Dist. Lexis 42522 (D. Md., Mar. 28, 2014).
 - *But see* Blain v. Herrell, 2010 WL 2900432, 2010 U.S. Dist. LEXIS 76257 (D. Haw., July 21, 2010) [dismissing complaint with prejudice to enforce I-864 and finding that prenuptial agreement barred enforcement because it is a “basic principle of contract law that a party may waive legal rights”].

Affidavit of Support: Points of Interest

- ☐ A beneficiary successfully suing on an I-864 is entitled to attorneys fees and costs of collection.
- ☐ Support can be retroactive to effective date of I-864.
- ☐ Support awarded is based on federal poverty guidelines, not on state support guidelines.
- ☐ File I-864 claims in federal or state court.
- ☐ I-864 obligation *not* dischargeable in bankruptcy.

Resources

- ❑ www.uscis.gov
 - <http://www.uscis.gov/adoption>
 - <http://www.uscis.gov/i-864>
- ❑ <http://travel.state.gov/content/travel/english.html>
 - <http://travel.state.gov/content/adoptionsabroad/en.html>
 - <http://travel.state.gov/content/childabduction/english.html>
- ❑ www.aila.org
- ❑ www.americanimmigrationcouncil.org
- ❑ www.asistahelp.org
- ❑ www.i-864.net

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