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Marriage, Divorce, Legal Separation and the Alien

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Marriage, Divorce, Legal Separation and The Alien

Under modern divorce law and statutory provisions, divorce and legal separation proceedings, though unfortunate, are often relatively routine, with predictable legal consequences. For the alien whose status in the Unted States is predicated upon a marriage to a United States citizen or permanent resident, however, the consequences may be far more damaging than the divorce or separation itself. Maurice A. Roberts, a leading authority on immigration law and former Chairman of the Board of Immigration Appeals, recently stated:

> Even if your policy is to turn away or refer to the specialists those clients with immigration problems, that doesn't let you completely off the hook. Such is the pervasive nature of our immigration laws that, when counseling an alien client in a field which seems to be completely unrelated, you may be setting him on a course which will ultimately involve him in grave consequences under the immigration laws. Some exposure to those laws is therefore essential, even to the general practitioner or the specialist in another field.[1]

The objective of this article is to provide the general practitioner with a simplified introduction to the pitfalls that are most often encountered when representing the alien in a family law matter involving the marital relationship.

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[1]58 Interpreter Releases, No. 50 (Dec. 23, 1981).

I. Obtaining and Retaining Immigration Benefits Based on Marriage

With each event of political unrest and economic instability in the many troubled nations of the world comes an increased demand for United States citizenship. Although there are seven different categories under which aliens can obtain permanent residence, allowing them later to obtain U.S. citizenship, visas available under these categories are subject to numerical limitations per country and are alloted on a firstcome-firstserve basis. Due to these restrictions, visas that would be obtained through many of these preference categories are often unavailable or will only become "current" many years from now. For example, sixth preference visas (skilled and unskilled workers in short supply) are oversubscribed worldwide.[2] As a consequence, the only visas for this category now being processed are those that both meet the basic eligibility requirements and were filed for before the "priority dates" which are listed in the Visa Bulletin.[3] Sixth preference visas chargeable to Hong Kong are now being processed if they were filed before February 22, 1979. The sixth preference priority date is October 10, 1979, for the Philippines, while priority dates are completely unavailable for Mexico for the third through sixth preference categories.

Immigration benefits are derived from marriage by way of two statutory classifications: immediate relative (marriage to a United States citizen) and second preference (marriage to a lawful permanent resident).[4] Immediate relatives may obtain permanent residence free of any quotas. The second preference category, though subject to quota restrictions, often is more "current" than other preference categories. As discussed below, these categories attract Immigration and Naturalization Service attention because of their potential for abuse.

Until recently, case law required that the marriage be valid and subsist as a prerequisite to receipt of permanent residence status in the United States.[5] More recent case law requires only that the marriage be valid at its inception and undissolved at the time that permanent residence is obtained.[6]

A. Validity of the Marriage

In establishing that a valid marriage exists, the burden is placed upon the party petitioning on behalf of the alien.[7] The majority of immigration cases

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[2]5 Visa Office Bulletin (No. 57; Nov. 1987).

[3]*Id.*

[4]8 U.S.C. §§ 1151, 1153(a)(2) (1982).

[5]Matter of P., 4 I. & N. Dec. 610 (A.G. 1952); United States v. Lozano, 511 F.2d 1 (7th Cir. 1975).

[6]Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980) *modifying* Matter of Mintah, 15 I. & N. Dec. 540 (BIA 1975).

[7]Matter of Brantigan, 11 I. & N. Dec. 493 (BIA 1966).

have held that the validity of a marriage, for immigration purposes, is determined by the law of the place where it was celebrated, and will be recognized as valid or invalid in accordance with that law unless it is otherwise against public policy.[8] The alien will not, however, be eligible for immigration benefits when the marriage was intended solely to circumvent immigration laws,[9] or is an unconsummated proxy marriage.[10]

If the common law marriages are valid in the jurisdiction where celebrated, such marriages will be recognized.[11] Under Washington law, for example, common law marriages are not recognized if originally contracted and consummated in Washington, though such marriages will be recognized if contracted and consummated in other states where they are lawful.[12]

B. Void and Voidable Marriages

Merely voidable marriages may be recognized for immigration purposes.[13] To the attorney representing an alien in immigration proceedings, this fine point of immigration law can be very important. If the alien's marriage is annulled during immigration proceedings, the alien loses his right to permanent residency based on the marriage relationship. A finding that the marriage was void *ab initio* will remove the alien's status, even after permanent residence has been obtained, because it will have been based on a marriage decreed to have never existed.[14]

If the alien has been previously married, the attorney should determine whether the prior marriage has been legally terminated by a court of competent jurisdiction. The failure to effectively terminate an alien's prior marriage is bigamous and renders his subsequent marriage void.[15] However, if under the laws of the jurisdiction where the prior marriage took place there is a presumption of dissolution of a prior marriage by the absence of a spouse for a designated statutory period, such resumption may be recognized for immigration purposes.[16]

The attorney should be cautioned that in a recent decision of the Board of Immigration Appeals, a divorce entered into simply in order to obtain immigration benefits was held to be a "sham" divorce and cannot be

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[8]Matter of P., 4 I. & N. Dec. 610 (A.G. 1952).

[9]Matter of Kitsalis, 11 I. & N. Dec. 613 (BIA 1966); Lutwak v. United States, 344 U.S. 604 (1953).

[10]INA Sec. 101(a)(35), 8 U.S.C. § 1101(a)(35)(1982).

[11]Matter of Megaloginis, 10 I. & N. Dec. 609 (BIA 1964).

[12]*In re* Gallagher's Estate, 35 Wash. 2d 312, 213, P2d 621 (1950); DeLaGarza v. Rennebohm, 24 Wash. App. 575, 602 P2d 372 (1979).

[13]Matter of Agoudemos, 10 I. & N. 444 (BIA 1964).

[14]Matter of Samedi, 14 I. & N. Dec. 625 (BIA 1974).

[15]Beyerle v. Bartsch, 111 Wash. 287, 190 P 239 (1920); Barker v. Barker, 31 Wash. 2d 506, 197 P2d 439 (1948).

[16]Matter of Peralta, 10 I. & N. Dec. 43 (BIA 1962).

recognized for immigration purposes.[17] If it is apparent to the attorney that the marriage is voidable rather than void *ab initio*, any court proceedings challenging the marriage should, if possible, be delayed until after the alien has been granted permanent residence.

C. Continuity of the Marriage

Though an alien's marriage was valid at the time of inception, it must also be undissolved at the time immigration benefits are obtained.[18] The continuity of the marriage should be of foremost concern when representing an alien who is attempting to obtain immigration benefits through the marriage and is experiencing marital problems. A formal legal separation will have the same effect on the alien's immigration status as a final divorce and will preclude immigration benefits[19] although a mere physical separation will not.

A physical separation is a relevant factor only insofar as it bears upon the intent of the parties at the time of their marriage for purposes of proving the marriage a sham.[20] Where the parties entered into a valid marriage, and there is nothing to show that they have since obtained a legal separation or dissolution of that marriage, permanent residence cannot be denied solely because the parties are not residing together.[21]

If divorce or legal separation is inevitable and it is apparent that the alien will be granted permanent residence in the immediate future, the attorney should prolong a final determination of the dissolution proceedings, without resorting to frivolous tactics. The Ninth Circuit has recognized that permanent residence obtained through marriage cannot be rescinded solely on the basis that the marriage was "factually dead" where the marriage was still legally valid.[22]

The effects of a divorce or legal separation subsequent to the issuance of permanent residence are not as devastating as an annulment. An important distinction between divorce and annulment is, that absent fraud[23] a final

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[17]Matter of Aldecoaotalora, Interim Decision 2948 (BIA 1983).

[18]Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980).

[19]Matter of Lenning, 17 I. & N. Dec. 476 (BIA 1980).

[20]Bark v. INS, 511 F.2d 1200 (9th Cir. 1975). *See* discussion on Sham Marriages *infra*.

[21]*See* Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980).

[22]Dabaghian v. INS, 607 F.2d 868 (9th Cir. 1979), cited in Matter of Kondo, 17 I. & N. Dec. 330 (BIA 1980).

[23]There is a presumption of fraud where the Immigration and Naturalization Service has shown by clear, convincing, and unequivocal evidence that (1) the alien's marriage took place less than two years prior to entry into the United States, and (2) the marriage was judicially terminated within two years after entry. Such a marriage will not be recognized for immigration purposes. Matter of Oliveira, 13 I. & N. Dec. 503 (BIA 1979), construing 8 U.S.C. § 1251(c) (1982).

divorce decree can be rendered without adversely affecting that status,[24] whereas an annulment of the marriage subjects the alien to the possibility of a rescission of his status any time within five years after the date the adjustment of status to permanent residence was granted.[25] The attorney should therefore avoid or resist annulment proceedings when the alien client has obtained permanent residence based on marriage when there is a choice between annulment or divorce.

D. Sham Marriages

As mentioned earlier, a marriage to a United States citizen or permanent resident often offers an alien an expeditious route to obtain entrance to the United States or may provide relief from deportation. As a consequence, the INS is very concerned about the potential abuse that such marriages present. In light of this, the practitioner should also be concerned whether the dissolution of the marriage could characterize the relationship as a sham marriage. A sham marriage has been defined as a marriage entered into wherein the parties had no good faith intent to live together as husband and wife and which was designed solely to circumvent immigration laws.[26]

If the marriage is deemed to be a sham marriage prior to obtaining immigration benefits, the previously approved petition may be revoked and the alien must then disprove the basis for the revocation by establishing that the marriage was *bona fide* at its inception.[27] When permanent residence has been granted on the basis of a marriage later determined fraudulent, permanent residence may be rescinded.[28] If such a determination is made, the alien will further be precluded from obtaining immigrant benefits based on a subsequent valid marriage.[29] If the alien, having been granted permanent residence, obtains United States citizenship through a sham marriage, such citizenship is subject to revocation[30] and can result in deportation of the alien.[31] The alien and the citizen "spouse" may also be subject to criminal prosecution.[32] Attorneys have also been convicted of felonies for having knowingly participated in such acticities.[33]

There is some confusion in the literature as to the distinction that exists

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[24]*See* Matter of Samedi, 14 I. & N. Dec. 625 (BIA 1974).
[25]8 U.S.C. § 1256 (1982). *See* discussion on Sham Marriages *infra*.
[26]Lutwak v. United States, 344 U.S. 604 (1953); Matter of Phillis, 15 I. & N. Dec. 385 (BIA 1975).
[27]8 U.S.C. § 1155 (1982).
[28]8 U.S.C. § 1256 (1982).
[29]8 U.S.C. § 1154(c) (1982). Matter of Vilanova-Gonzalez, 11 I. & N. Dec. 610 (BIA 1966).
[30]8 U.S.C. § 1256(b)(1982).
[31]8 U.S.C. § 1251(C) (1982).
[32]18 U.S.C. §§ 1015, 1425 (1982).
[33]United States v. Bithoney, 472 F.2d 16 (2d Cir. 1973).

between the effects of an *adjustment of status* within the United States to permanent residence based on an immediate relative visa petition, and permanent residence obtained upon *entry* into the United States on an immediate relative *immigrant visa*. While permanent residence obtained through adjustment of status is subject to rescission by the Attorney General on proper showing for a five year period following the date when granted, permanent residence obtained upon entry with an immigrant visa can be revoked by the Attorney General, upon proper showing, *anytime* following entry regardless of time lapsed since entry.

The determination of whether a marriage was designed to circumvent immigration laws will focus on the parties' intent at the time the marriage was celebrated. The intent of the parties may be inferred by direct or circumstantial evidence. The evidence will usually consist of the lack of cohabitation, failure of the couple to hold themselves out as husband and wife, or evidence solicited from the parties, such as an agreement to dissolve the marriage upon the issuance of the visa.

1. *Detecting Fraud*

To detect fraudulent marriages the Service relies primarily on two approaches. The first approach is a tactical method whereby the Service interviews the parties under oath during the pendency of the petition. In the "marriage fraud" interview, the husband and wife are separated and asked carefully phrased questions designed to elicit discrepancies in their answers. They may be asked, for example, questions about how they met, how and when the marriage proposal was made, about the ceremony, what gifts were received, what gifts they have given to each other since their marriage, and what are the favorite activities of each. In general, the interviewer will ask questions of such an unpredictable nature and fine detail that it is virtually impossible for the parties to respond in a satisfactory fashion unless they answer truthfully and have in fact entered into a valid marriage. If it appears that the alien has a particularly weak claim, it may be provident for the alien to withdraw the petition before a finding of fraud is made. If the Service discovers evidence of fraud it may deny the alien permanent residence and will usually institute deportation proceedings.

The second method used by the Service to control marriage fraud is postmarital supervision over the alien. Often the Service will interview apartment managers, employers, and neighbors to verify the continuing existence of the marriage.

Evidence frequently used by the government to establish fraudulent intent includes a showing that the parties were not acquainted before the marriage, evidence of great disparity in the spouse's ages, a showing that the couple never resided together, and testimony indicating that the parties did not intend to continue the marriage relationship. As mentioned earlier,

nonviability of the marriage will not in itself destroy the alien's immigration status but it will be an important consideration in determining the intent of the parties.[34]

2. *Defending Against Deportation*

The strict rules of evidence followed in judicial proceedings are not applicable in administrative deportation hearings, nor are deportation proceedings subject to the hearing requirements of the Administratve Procedure Act.[35] Thus, an alien's prior admissions or extra judicial statements made by his attorney will often be admissible in subsequent rescission or deportation proceedings.[36] Even the normally recognized privileged communications between husband and wife may be admissible in such proceedings.[37]

The lack of strict rules of evidence can also work in the alien's favor because any oral or documentary evidence is admissible, including hearsay evidence, provided that it is not irrelevant, immaterial, or unduly repetitive.[38] Evidence that may be useful to the alien includes proof that the couple resided together as husband and wife after the wedding, correspondence between the parties, testimony from individuals who observed the parties during the marital relationship or who observed the developing relationship between the parties. Also helpful is the testimony of individuals with whom the parties discussed in advance the reasons for their marriage.

II. Divorce

If divorce proceedings have been instituted, the attorney must address two considerations. First, the alien must be adequately represented in the family law proceedings, and second, the representation should be designed to preserve the alien's basis for prevailing in any subsequent immigration proceedings. The latter would primarily involve the creation of a record to demonstrate that the marriage was not a "sham." For example, if the parties have sought the aid of a marriage counselor in an attempt to resolve their differences, this fact should be presented in the divorce proceedings to disprove the nonviability of the marriage in collateral immigration proceedings.

The attorney should treat the tangible evidence of the marriage just as the

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[34]Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980).

[35]*See generally* 5 U.S.C. §§ 556 and 557.

[36]Matter of Boromand, 17 I. & N. Dec. 450 (BIA 1980); Matter of K., 5 I. & N. Dec. 175 (BIA 1953).

[37]Matter of Yaldo, 13 I. & N. Dec. 374 (BIA 1969); Matter of J., 6 I. & N. Dec. 496 (BIA 1955).

[38]Leidigh, Defense of Sham Marriage Deportations, 8 U.C.D. L. REV. 309, 319 (1976).

attorney would treat property rights and provide for their distribution in the divorce decree, realizing that the evidence might be needed in the future and should be preserved. Where a great deal of animosity exists between the respective parties at the time of the divorce, the attorney may want to take depositions of parties who would otherwise be unavailable at subsequent immigration hearings. It is also advisable that a court reporter be present at divorce proceedings to record the testimony of the witnesses. Animosity may move the opposing party to make statements purposefully damaging to the alien's immigration status such as claiming that the marriage was entered only to obtain immigration benefits for the alien. The attorney must resist such claims.

The tangible evidence to be specified in the divorce decree should include such items as family albums, insurance policies naming both parties as insured or the spouse as beneficiary, joint bank statements and cancelled checks, and any other evidence which indicates that the alien and spouse resided together in a marital relationship. All too often, evidence of this nature has been lost or destroyed by the time rescission and deportation proceedings are initiated, often years later. This is particularly true in the case of rescission proceedings since the Government can, upon proper showing, rescind permanent residence status anytime within five years after the alien adjusted his status in the United States.[39] It may also be beneficial to the alien if the court makes a special finding that the parties had a good faith intent to enter into the marriage relationship.

III. Conclusion

The general practitioner representing the alien in legal matters predicated on a marital relationship is not expected to be familiar with the specifics of immigration law; however, it is essential that the attorney be able to recognize immigration problems that may be lurking in the background. A tragedy occurs when the attorney fails to discern and provide for a resolution of the latent immigration problems. In providing adequate representation to the alien, the attorney should thoroughly interview the alien concerning the marital relationship, always keeping in mind that inadequate representation could result in preclusion or rescission of immigration benefits, denaturalization, and deportation, as well as charges of malpractice brought against the attorney by the client.

[39]8 U.S.C. § 1256 (1982). This time limitation does not apply if entry was originally on an immigrant visa.