

Battered Women's Legal Advocacy Project, Inc.

**REMOVING THE CONDITION FROM THE LEGAL
CONDITIONAL RESIDENCE**

This technical assistant packet was developed as an aid for advocates and attorneys helping immigrant battered women seeking to remove the condition from their conditional legal residency. Examined here are the different waivers available and the evidence needed in each case.

Originally compiled December 2009

1611 Park Avenue, Suite 2
Minneapolis, MN 55404
Toll free, 800 313 2666
Local: 612 343 9842
Fax 612 343 0786
www.bwlap.org

An immigrant who has obtained legal residency status based on a marriage that is less than two years old will have a two year conditional status before their actual permanent status is granted. During these two years, the immigrant has the same rights, privileges and responsibilities as other permanent residents, but the conditional permanent resident must take additional steps to obtain legal permanent residency status. According to INA 216(c), the spouses must file a joint petition to remove the condition at the end of the two year period. The form to be filed is Form I-751; this must be filed within 90 days before the second anniversary of the date when the person obtained the conditional residence. If the conditional resident is still legally married to the citizen or legal permanent resident, the couple will file this form as a joint petition.

There are four situations in which the Form I-175 can be filed by the spouse with the conditional residence alone, and will instead be considered an application for a waiver for the joint filing requirement, according to 8 CFR § 216.5(a)(1) (2006). These situations are:

- Marriage was entered in good faith but the spouse died.
- The marriage was entered in good faith but it ended in divorce or annulment.
- The marriage was entered in good faith but the spouse abused or exposed the conditional resident to extreme cruelty.
- The termination of the individual's residence will result in extreme hardship.

These four reasons are not mutually exclusive. The individual should claim all reasons that are applicable to her situation because the Immigration Judge has jurisdiction to review only those issues reviewed by the Bureau of Citizen and Immigration Services (BCIS.) Therefore, if the case goes from BCIS to an Immigration Judge, the judge will be able to review all possible reasons for the waiver application.

Form I-751 should be filed with the regional service center director having jurisdiction over the alien's place of residence, according to 8 CFR 216.5(c) (2006). After the BCIS receives the application to waive joint petition requirement, they will send the individual a filing receipt. This receipt will serve as evidence of the person's lawful status. 8 CFR 216.5(c) (2006). The BCIS will refer the case to the immigration local office in the conditional resident's jurisdiction. This local office will require that the alien appear for an interview in connection with the application for a waiver. The director shall deny the application and initiate removal proceedings if the alien fails to appear for the interview as required, unless the alien establishes good cause for such failure and the interview is rescheduled (8 CFR Sec. 216.5(a)(2)(d))

When filing a waiver based on the first three situations, the individual must provide evidence that the marriage was entered in good faith. The standard to qualify for approval of the good faith waiver is the same standard that applies to the approval of the marriage-based visa petition: the conditional resident must prove that there was a bona

fide intent to join their lives together when the couple married. There must be evidence of commitment by both parties. Such evidence usually include documentation of the following (all four if possible): 1) sharing of financial assets and liabilities, 2) length of cohabitation, 3) birth certificates of children born of the marriage, and 4) any other pertinent evidence. INA 216(c)(4)(B).

The following is a summary of the situations in which the Form I-175 can be filed by the spouse with the conditional residence alone, and will be considered an application for a waiver for the joint filing requirement, with the recommended evidence for each case.

- 1) The marriage was entered in good faith but the spouse has died.

In this case the conditional resident must submit evidence that the marriage was legitimate and entered in good faith and that the spouse died. In these cases there is no need to wait two years to submit the removal of the condition. The BCIS will accept the petition based on the documentary evidence and nearly always will grant the waiver without requiring an interview.

- 2) Filing a waiver because the marriage was entered in good faith but ended because of divorce or annulment. INA 216(c)(4)(B).

There is no requirement that the permanent resident/citizen spouse must be at fault in the break up of the marriage, or that the conditional resident is free from fault. There is also no requirement that the conditional resident be the party who terminates the marriage however the conditional resident must establish that he or she was not at fault in failing to file a joint I-751 petition. To apply for a waiver because of divorce or annulment, the petitioner must submit a copy of the divorce decree or other document terminating or annulling the marriage with the I-175 petition.

I-751 waiver should not be decided until the divorce is final. In many cases the divorce or annulment proceedings have begun and are in advanced stages, but are not finalized yet. In those cases BCIS has accepted the waiver petition but delayed the adjudication until receiving documentary evidence that the divorce decree is final.

- 3) Filing a waiver because the marriage was entered in good faith but the spouse abused or exposed the conditional resident to extreme cruelty.

In an abusive situation, if a divorce is in progress, the petitioner should cite both the abuse and the divorce as reasons for the waiver, but there is not a requirement that the marriage be terminated. Examples of qualifying abuse are: being the victim of any acts of violence or threatens, including any forceful detention, sexual abuse or exploitation, rape, molestation, incest (if the victim is a minor) or forced prostitution. Evidence of physical abuse may include, but is not limited to, expert testimony in the form of reports and affidavits from police, judges, medical personnel, school officials and social service

agency personnel. The service must be satisfied with the credibility of the sources of documentation submitted in support of the application. 8 CFR § 216.5(e)(3)(iii).

It is important to highlight that a conditional resident or former conditional resident who has not departed the United States after termination of resident status may apply for the waiver. The conditional resident may apply for the waiver regardless of his or her present marital status. The conditional resident may still be residing with the citizen or permanent resident spouse, or may be divorced or separated. (8 CFR Sec. 216.5(e)(3)(ii).

The petitioner can also claim “extreme mental cruelty” instead of or in addition to abuse. 8 CFR § 216.5(e)(3). The best evidence for this claim would be documentation from specially trained professionals such as clinical social workers, psychologists, and psychiatrists. However, there are often practical problems involved with this type of evidence, because these types of evaluations may be too expensive for the conditional resident. Therefore, the former INS has clarified that they will not require the recommendation of a mental health professional or any other specific form of evidence to support a Form I-751 waiver based on abuse or extreme cruelty. If the conditional resident can prove she/he is a victim of extreme mental cruelty through other means, then there may not be a need for documentation from specially trained mental health professionals. The evaluation of any expert must include the professional’s full name, professional address and license number, and the authority which licensed, certified, or registered the expert. 8 CFR § 216.5(e)(3)(iv) (2006). The BCIS only accepts evidence of factors and events arising since the acquisition of the conditional residence. The BCIS also requires that the extreme cruelty must have effected the conditional resident’s life in a way that now limits the resident’s ability to work or to lead a productive life.

In addition to filing for this waiver, it is a good strategy to file – if possible - a VAWA self-petition. VAWA cases are assessed by professionals trained in the dynamics of domestic violence, while the officials assessing I-751 forms are not trained in the dynamics of domestic violence. Also, if the waiver (the I-751 form) is file late or denied, a VAWA self-petition may still apply.

4) The termination of the individual’s residence will result in extreme hardship.

The Form I-751 states that the conditional resident must choose a good faith or an extreme hardship waiver, the grounds are not exclusive. An applicant may claim and argue for either basis.

The waiver will only be granted where the hardship is extreme. Removal will always cause some type of hardship; therefore the burden to prove that the hardship is extreme falls to the conditional resident. The hardship which would result from the conditional resident’s removal from the United States could be the hardship to her child or subsequent spouse may experience. Typically the hardship cannot be mere economic hardship unless combined with other factors, such as the person’s age, family ties in the United States and in the home country, state of health, ties to and position in the

community in the United States, economic and political conditions in the home country (which should be thoroughly documented with reasons why they would be singled out for persecution), immigration history, and whether any other options exist for remaining in the United States. All of the ways in which removal will cause hardship must be documented as thoroughly as possible.

As stated before, the hardship waiver can be granted even if there is no evidence that the marriage was entered into in good faith.

The BCIS director shall provide the alien with written notice of the decision on the application for waiver. If the decision is adverse, the director shall advise the alien of the reasons therefore, notify the alien of the termination of his or her permanent residence status, instruct the alien to surrender any Resident Card issued by the Service and issue a notice to appear placing the alien in removal proceedings. No appeal shall lie from the decision of the director; however, the alien may seek review of such decision in removal proceedings.