U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Domestic Operations Directorate
Washington, DC 20529-2110

U.S. Citizenship and Immigration Services

APR - 3 2009

Memorandum

TO: Field Leadership

FROM: Donald Neufeld
Acting Associate Director

SUBJECT: I-751 Filed Prior to Termination of Marriage

Background and Purpose

A Conditional Permanent Resident (CPR) who obtained his or her status through marriage to a U.S. citizen or lawful permanent resident must file Form I-751 to remove the conditions on his or her residence. Section 216(c)(1)(A) of the Immigration and Nationality Act (hereinafter "INA") and Title 8 Code of Federal Regulations Part 216.4(a)(1) (hereinafter "8 C.F.R.") require the CPR and his or her petitioning spouse (unless deceased) to jointly file the I-751 petition. However, INA §216(c)(4) and 8 CFR §216.5 permit the CPR to request a waiver of the joint filing requirement if the CPR establishes that:

- Removal from the United States would result in extreme hardship;
- The CPR entered the marriage in good faith, but the marriage was terminated (other than through death); or
- The CPR entered the marriage in good faith, but the petitioning spouse or parent battered the CPR spouse or child.

This memorandum provides guidance on how to adjudicate an I-751 petition if the CPR and petitioning spouse are legally separated or have initiated divorce or annulment proceedings, but the marriage has not been terminated.

Waiver Request Petitions

There is no waiver of the joint filing requirement based solely on the fact that a CPR may have entered the marriage in good faith, but he or she is legally separated from the petitioning spouse or is currently in divorce or annulment proceedings.[1] If a Service Center Immigration Service Officer (ISO) encounters a waiver request on the basis of termination of marriage, but the CPR is currently legally separated or in pending divorce or annulment proceedings, the ISO issues a Request for Evidence (RFE) with a response

[1] See Immigration and Naturalization Service Memorandum, "Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of the Marriage," dated April 10, 2003.

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waiver request on the basis of termination of marriage, but the CPR is currently legally separated or in pending divorce or annulment proceedings, the ISO issues a Request for Evidence (RFE) with a response period of 87 days. In many cases the divorce will take place during the response period to the RFE, which affords the CPR the opportunity to establish eligibility for the waiver by submitting a copy of his or her final divorce decree or annulment. If the CPR establishes eligibility for the waiver, the ISO adjudicates the petition on the merits in accordance with established procedure. If the CPR does not respond to the RFE, or if the CPR's response does not establish eligibility for the waiver, the ISO denies the I-751 and issues a Notice of Termination of Conditional Resident Status. The ISO then refers the case through the proper chain of command for issuance of a Notice to Appear (NTA).[2] In denying the I-751, the ISO notifies the CPR that he or she is ineligible for a waiver of the joint filing requirement because his or her divorce or annulment is not yet finalized; however, he or she may be able to establish eligibility for the waiver before an immigration judge in the event the marriage is terminated during the pendency of removal proceedings.

Jointly Filed Petitions

Unless a CPR is able to establish eligibility for a waiver, he or she must file the I-751 jointly with his or her U.S. citizen or Lawful Permanent Resident spouse. INA §216(c)(3)(A) and (B) and 8 CFR §216.4(c) provide that U.S. Citizenship and Immigration Services (USCIS) may approve the I-751 petition and remove the CPR's conditions if:

- The CPR and petitioning spouse (unless deceased) jointly file an I-751 within the 90 days immediately before the two year anniversary of the date the CPR obtained permanent resident status;
- The CPR and petitioning spouse (unless deceased) appear for an interview; and
- USCIS determines the following facts are true:
    - The marriage was legal where it took place;
    - The marriage has not been terminated;
    - The marriage was not entered into for the purpose of procuring permanent resident status; and
    - No fee (other than to an attorney for filing assistance) was paid for the filing of the underlying I-130 or I-129F.

The statute and regulations require approval of the I-751 petition if the above conditions are met. USCIS may not deny a petition solely because the spouses are separated and/or have initiated divorce or annulment proceedings. However, legal separation or initiation of divorce or annulment proceedings may suggest that the CPR entered into the marriage for the sole purpose of procuring permanent resident status.

If a Service Center ISO encounters an I-751 petition[3] jointly filed by co-petitioners who are still married but are legally separated and/or are in pending divorce or annulment proceedings, the ISO issues the CPR

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[2] A CPR who is separated from the petitioning spouse, or has initiated divorce or annulment proceedings with the petitioning spouse, may only file a waiver of the joint filing requirement if he or she can establish that removal from the United States would result in extreme hardship or that the CPR entered the marriage in good faith, but the petitioning spouse or parent battered/ abused the CPR spouse or child. In such instances, the waiver would be based on the hardship or battery, not on the separation or the divorce or annulment proceedings.

[3] If the CPR marked Part 2 Box A for a joint filing, but the petitioning spouse did not sign the form, the adjudicator should follow current operating procedures to obtain the spouse's signature. If the CPR does not respond to the signature request, the adjudicator should deny the case for abandonment. If the CPR responds to the request but

a Request for Evidence with an 87-day response period. In the RFE, the ISO specifically asks the CPR to provide a copy of the final divorce decree or annulment along with a request stating he or she would like to have the joint filing petition treated as a waiver petition. This affords the CPR an opportunity to provide evidence that the proceedings have been finalized and it affords the CPR an opportunity to request a waiver to the joint filing without refiling.

If the CPR provides evidence that the proceedings have been finalized, the ISO amends the I-751 petition to indicate that the CPR is eligible for a waiver of the joint filing requirement based on termination of marriage and adjudicates the petition on the merits in accordance with established procedure. In so doing, the ISO determines whether there is sufficient evidence the CPR entered the marriage in good faith, or whether the case warrants relocation to a Field Office for an in-person interview.[4]

If the CPR fails to respond to the RFE, or the CPR's response does not satisfactorily establish that the marriage has been terminated, the ISO assesses evidence of the *bona fides* of the marriage to determine whether the petition should be approved, denied, or relocated to a Field Office for an in-person interview.[5]

If the Service Center relocates the I-751 to a Field Office, the ISO places a memorandum in the file with the following notation to the Field Office ISO: "The co-petitioners are separated or have initiated divorce or annulment proceedings, and the evidence of the record does not sufficiently demonstrate that the marriage was bona fide." The Field Office ISO conducts an interview to determine whether or not the four required facts are true. If both co-petitioners appear for interview and the ISO determines the four required facts are true, the ISO approves the I-751 petition and removes the CPR's conditions. However, if the ISO determines one or more of the four facts is not true, he or she denies the petition, terminates the CPR's status, and processes the case for NTA issuance.

Any questions regarding this memorandum should be directed through appropriate supervisory channels to Felicia Cameron, Program Manager, Office of Service Center Operations or David Johnson, Program Manager, Office of Field Operations.

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does not submit the appropriate signatures, the adjudicator should deny the case under 8 CFR §216.4(a)(1) for failure to submit proper signatures.

[4] See USCIS Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence," dated June 24, 2005.

[5] See USCIS Memorandum, "Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence," dated June 24, 2005.