It's not Romance; it's Immigration Law: Showing Actual and Good Faith Marriage

By Sandra Grossman and Toni Maschler[1]

Introduction

"Love is blind." –William Shakespeare

Love may be blind, but you are not. The couple that walks into your office to ask for help with filing a marriage-based Adjustment of Status application (AOS) looks happy and in love. As their attorney, you've seen the pitfalls that lie ahead. Immediately you want to know: where and when were they married, is the couple living together or apart, are they filing joint taxes, did she have a valid divorce, and do they share a life insurance policy? It's not romantic; it's immigration law.

Establishing the validity of a marriage between a foreign national and a citizen or Lawful Permanent Resident (LPR) of the United States is a key factor for applying for and obtaining an array of immigration benefits including Adjustment of Status (AOS)[2], consular processing, removing conditions on Lawful Permanent Resident status[3], a self-petition under the Violence Against Women Act (VAWA)[4], as well as other discretionary relief from removal.[5]

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[2] Only those foreign nationals who were "inspected and admitted or paroled into the United States" or those persons who "having an approved petition for classification as a VAWA self-petitioner" may seek and obtain the status of Lawful Permanent Resident (LPR) from within the United States. INA § 245(a). Those persons who, for example, entered the United States without a valid visa, if otherwise admissible, would generally need to try to obtain their LPR status through processing at a U.S. consulate . (Only uninspected individuals who qualify for "245(i)"-- a special class of beneficiaries of a petition filed on or before April 30, 2001 that was "approvable when filed"--can adjust status in the U.S.)

[3] Marriage results in conditional permanent residency unless the couple has been married more than two years at the time of granting the immigrant status. *See* INA § 216. Nevertheless, a waiver may be granted if the marriage is terminated where the foreign national can show extreme hardship if he/she is removed, the qualifying marriage was entered into in good faith but terminated other than through death of the spouse, the qualifying marriage was entered into in good faith but the foreign national spouse or child was battered or subject to extreme cruelty, or the U.S. citizen or LPR spouse died during the two year period. *See* INA § 216(c)(4).

[4] A spouse, child or parent who is battered or subject to extreme cruelty by an LPR or U.S. citizen, may file a self-petition under the VAWA Act of 1994, as amended. *See* INA §§204(a)(1)(A)(iii)-(vii) & B(ii)-(iii).

[5] A USC or LPR spouse may be a qualifying relative for numerous waivers, or may serve as a factor in the exercise of discretion. For example, when weighing whether to exercise prosecutorial discretion in the context of pursuing removal proceedings against a foreign national, the adjudicating officer should consider all relevant factors, including whether the person is a relative of a U.S. citizen or Lawful Permanent Resident. As such, requests for prosecutorial discretion often include a plethora of information about the validity of the marriage. *See* Memorandum

A United States Citizen or LPR petitioning for a spouse will require proof of a valid marriage. Derivative status for those married to recipients of benefits such as asylum, employment-based visas, and the diversity lottery also require proof of valid marriage. As that starry-eyed couple's immigration attorney, it is important that you understand the evidentiary, procedural, and legal requirements of proving a bona fide marital relationship. After all, nothing is less romantic than a Request for Evidence (RFE), Notice of Intent to Deny (NOID), or a fraud finding. This article will explain what you can do to keep the love alive and lead your love-struck couple to LPR bliss.

Legal Standards: Love the Law

"Love is a better teacher than duty." – Albert Einstein

Lawyers are useless to their clients if they don't know the law. As an attorney assisting individuals with obtaining benefits based on a valid marriage, you must first read and understand the law regarding bona fide marriages. In visa petition proceedings, the burden of proving eligibility lies with the petitioner-- the U.S. citizen or LPR seeking immigration benefits for his or her spouse. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1996). This means that the U.S. citizen individual must provide documentary and sometimes testimonial evidence proving that he/she is in a valid marriage.

A marriage entered into for the primary purpose of circumventing the immigration laws, referred to as a "fraudulent or sham" marriage, will prevent a foreign spouse from obtaining immigration benefits under the immediate fraudulent marriage petition and any other future, albeit valid, marriage, as well as any other grounds for immigration benefit. *See* INA § 204(c) (stating that no petition shall be approved subsequent to a finding of a sham marriage); *Matter of Laureano*, Interim Decision 2951 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980); *see also Lutwak v. United States*, 304 U.S. 604 (1953). While even a criminal offense may not prevent a foreign national from obtaining certain immigration benefits, a finding or marriage fraud will bar the approval of a subsequent immigrant visa petition and have un-waivable consequences far into the future. *See* INA § 204(c); 8 C.F.R. §204.2(a)(1)(ii) (establishing that the district director or service center "will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence" of an attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. A conviction for attempt or conspiracy is not required, but evidence of these "must be contained in the alien's file."). The serious consequences of a finding of fraud means you, as the attorney, must be well aware of how to establish a valid marriage and rebut a fraud finding. But what is a valid marriage? Is love enough?

While love certainly helps, the law states that the petitioner must submit evidence of the couple's intent to establish a life together at the time of the marriage. *See e.g., Matter of Soriano*, 19 I&N

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by John Morton, Director, ICE, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (Immigration and Customs Enforcement June 17, 2011) [*hereinafter* "Morton Memo"]

Dec. 764, 765-766 (BIA 1998). The conduct of the couple before and after the marriage is relevant to their intent at the time of their marriage. *Id.* Interestingly, the intent to establish a life together does not always require that the couple actually be living together at the time they apply for the immigration benefit. *See Matter of Peterson,* 12 I&N Dec. 663 (BIA 1968). Additionally, even a couple that is legally separated at the time of an adjustment of status interview may continue to establish eligibility for residency, so long as they are able to prove that the marriage was valid at inception. *See Matter of Boromand,* 17 I&N Dec. 450 (BIA 1980). However, when a couple is living separately, there will need to be a good explanation and substantial other documentation of good faith to meet the couple's burden of proof.

The general burden of proof for establishing a good faith marriage is a "preponderance of the evidence," also known as the "more likely than not" standard. "If the petitioner submits relevant, probative and credible evidence that leads the director to believe that the claim is probably true or "more likely than not", the applicant or petitioner has satisfied the standard of proof." AFM Ch 11.1(c) and Appendix 74-14; See also *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965) ("In visa petition proceedings, the petitioner has the burden of establishing eligibility for the benefit sought under the immigration laws. This burden is the ordinary one applicable in civil matters, i.e., a preponderance of the evidence."); Requests for Evidence (RFE) and Notices of Intent to deny (NOID), William R. Yates, February 16, 2005 HQOPRD 70/2 page 3. Generally, an AOS based on a marriage which took place while the foreign national was or had been in removal proceedings may not be approved unless it is established by "clear and convincing evidence" that the marriage was entered into in good faith – a higher evidentiary standard. INA §§ 204(g); 245(e)(3). *Matter of Fuentes*, 20 I&N Dec. 227 (BIA 1991); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988)The petitioner must request the exemption in writing when he/she submits the I-130 petition along with evidence that he/she meets the "clear and convincing evidence" standard. *See* INA 245(e)(3); Adjudicator's Field Manual 21.3(M).

Whether in removal proceedings or not, the petitioner must present evidence to support the legality of the marriage, i.e., the marriage certificate and proof of termination of any prior marriages are always required. *See* AFM 21.2(a)(1)(B), stating that the parties must submit "evidence of the lawful marriage of the petitioner and beneficiary and of the termination of any and all prior marriages of both parties)." The law of the place of marriage governs. *U.S. v. Gomez-Orozco*, 28 F. Supp.2d. 1092 (C.D. Ill. 1998) *rev'd on other grounds*, 188, F.3d 422 (7th Cir. 1999); *Matter of Ceballos*, 16 I&N Dec. 765 (BIA 1979); *Matter of Da Silva*, 15 I&N Dec. 778 (BIA 1976). Additional documentary evidence is discussed below.

Attorneys are well-served by reviewing USCIS's own guidelines on the adjudication of marriage-based petitions. According to the Adjudicators Field Manual (AFM), Section 21.3, which is the resource that USCIS officers look to for adjudicating the validity of a marital relationship, there are a host of factors that would flag a marriage as a possible fraud. Some indications include: a large disparity of age, an inability of a petitioner and beneficiary to speak each other's language, vast differences in cultural and ethnic backgrounds, family or friends that are unaware of the marriage, a marriage arranged by a third party, a marriage contracted immediately following the beneficiary's apprehension or receipt of a notification to depart the United States, discrepancies in statements on questions for which a husband and wife should have a common knowledge, no cohabitation since the marriage (though that is not required by

relevant case law), and whether the petitioner has previously filed other petitions on behalf of other foreign nationals.

The good news is that now that you know the law, and the "red-flags" adjudicators are looking for, you are well-situated to explain it to your clients, who will need to play a primary role in helping you get the evidence you need to the decision makers.

Preparing the Evidence to Prove a Bona Fide Marriage:

Sometimes the Heart Sees What is Invisible to the Eye. – H. Jackson Brown

Indeed, your clients' love is not apparent to the adjudicator sitting across from them or to the service center employee reviewing an I-130 petition. You must help your clients gather the tangible evidence that will meet the required legal standards. In *Matter of Soriano*, the BIA explained exactly what kind of evidence can be used to show a good faith marriage: [s]uch evidence could take many forms, including, but not limited to, proof that that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experience. 19 I&N Dec. 764, 765-766. Documentation of shared residence and experience can include anything from photos from different stages of the couple's relationship, boarding passes showing shared trips, utility bills, joint membership in health clubs, or mail addressed to the couple. In the age of social media, the lawyer can get more creative with documentation including Facebook pages and pictures, twitter messages, and email quotes. It is also possible to obtain records of text messages and take screen shots of pictures and videos that may have been placed on line. This evidence should be attached to any filing, and in the case of an AOS interview, the couple should bring original documents for inspection by the adjudicator.

For a beneficiary in removal proceedings, for I-130 revocation proceedings, and for motions to reopen based on AOS availability, the petitioner is subject to the higher "clear and convincing" evidentiary standard, and must submit additional documentary evidence. The Regulations contain a list of recommended documentation for marriages during proceedings, including documentation showing joint ownership of property, comingling of financial resources, birth certificates of children born to the beneficiary and petitioner and affidavits of third parties having knowledge of the bona fides of the marriage. *See* 8 C.F.R. §204.2(a)(iii)(B). In the absence of other documentation, personal affidavits may play an important role in establishing the validity of a marriage.

In the case of affidavits, just a few lines acknowledging the marriage won't do. In *Matter of Patel*, the Board reversed a fraud finding by USCIS and stated that affidavits from family were "credible and worthy of considerable weight because they [were] detailed, internally consistent, and plausible; they include[d] explanations of how the affiants acquired knowledge of the facts set forth; and [we]re corroborated by historical evidence." 19 I&N Dec. 774, 786 (BIA 1998). Taking this into account, affiants must explain how they came to know the couple, when the author personally observed the couple interacting, and also provide examples of time spent with the couple. Affidavits that follow these guidelines can be very useful when other primary evidence of wedded bliss is not available, or they can be submitted in addition to this evidence.

Try though they may, USCIS may not ignore honest, consistent and properly submitted evidence establishing the validity of a marriage, and it is up to you to hold them accountable when they do. For example, the BIA has recognized that revocation of an I-130 is a serious and life-changing matter and that this decision may not be based on "unsupported statements and or unstated presumptions." *See Matter of Estime,* 19 I&N Dec. 450 (BIA 1987). In reality, it is difficult to judge a marriage from the outside and at the very least we must expect and insist that the authorities apply the law.

Dealing with Problems: Lawful marriage, Divorce, Law of the Place where the Marriage took Place

"Being loved by someone gives you strength, while loving someone deeply gives you courage." Lao Tzu

And courage you will need, when dealing with the Government on something as personal as who you love. Although the good faith of the marriage is usually the focus of USCIS, do not neglect to carefully establish the plain existence of a lawful marriage. Always ask clients for copies of marriage decrees (and divorce decrees if applicable) early in a case. Remember that if the marriage is not properly documented, this fact alone will almost certainly derail the case. The first step should always be looking at your clients' documents and comparing them to the relevant marriage laws in effect at the time and place of the marriage. Remember to read the documents carefully to determine the marriage date and location. Check whether the date of the document marks the date on which the marriage occurred, or whether it is merely recording a marriage which had already occurred previously.

For establishing the validity of foreign marriages, look at the descriptions in the Foreign Affairs Manual's reciprocity tables by country at http://travel.state.gov/visa/fees/fees_3272.html to see what is required to show a valid marriage from the country in question. Click on the relevant country, then scroll down to "civil documents" and see what information is available about marriage documentation. Common law marriages may exist in some nations and U.S. states, and should be recognized by the U.S. *See* Gomez-Orozco, 28 F. Supp.2d. 1092 (C.D. Ill. 1998) *rev'd on other grounds*, 188 F.ed 422 (7th Cir 1999). However, whenever possible, a civil ceremony registered with the relevant authorities will make life far easier for you and your clients.

A marriage must have been recognized in the jurisdiction where it was performed to be recognized by USCIS or the Department of State.*See, e.g.* AFM 21.3; *Gomez-Orozco, supra*; *Matter of Ceballos*, 16 I&N Dec. 765 (BIA 1979); Matter of Da Silva, 15 I&N Dec. 778 (BIA 1976). For example, a religious marriage may not be accepted as valid unless registered with civil authorities. In countries in which the religious ceremony alone is accepted by the home country, the U.S. government will likewise accept the marriage. *See Matter of Ceballos*, *supra* (holding that a Colombian religious marriage has the same validity as a civil marriage.)

While most countries have uniform family laws, some, such as the United States and Mexico, have distinctions in law between individual states. Particularly for same-sex marriages, laws

governing domestic relations are rapidly changing, and it is important to be sure what the relevant law was at the time and location of the client's marriage.

An invaluable resource for finding and documenting foreign law is the Law Library of Congress. An attorney can call the library at 202-707-5079 and explain the question at issue. Usually the librarian will direct the attorney to the specialist in the proper area, who may be able to email relevant legal materials, or even prepare an opinion letter evaluating whether the marriage was done properly and would have been recognized by the relevant foreign authorities at the relevant time and place. Alternatively, for people in the DC area, going physically to the Library of Congress may be a viable option. (It is a simple process to become a member of the library.) Alternatively, a foreign attorney may be needed as an expert on foreign law. AILA's global immigration listserv may be able to assist with finding an attorney in the country at issue who can research and present the law to show that a given marriage meets the relevant criteria for the time and place of the procedure.

A marriage which is voidable but not void, such as one between minors, will be recognized for immigration purposes. *Matter of G.,* 9 I&N Dec. 89 (BIA 1960). *See also Matter of Agoudemos*, 10I&N Dec. 444 (BIA 1964). Although nearly always the law of the place of celebration of the marriage will determine whether USCIS or State recognizes the marriage, there are limited exceptions. There must be proof of post-marital consummation for proxy marriages to be recognized by US immigration authorities. *Matter of B-*, 5 I&N Dec. 698, 699 (BIA 1954). Polygamous marriages are not recognized in general. *Matter of H-,* 9 I&N Dec. 640 (BIA 1962) (polygamous marriage is against public policy and will not be recognized).

For a marriage to be valid, any prior divorce must have been valid under the laws of the place it took place. *Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978); *Matter of Hann*, 18 I&N Dec. 196 (BIA 1982). The couple may also need to demonstrate that the divorce would be recognized in the country where the couple resided. *Matter of Weaver*, 16 I&N Dec. 730, 733 (BIA 1979). Normally, this requires a civil divorce. *But see Matter of Kodwo,* 24 I&N Dec. 479 (BIA 2008) (reversing USCIS denial based on refusing to recognize validity of customary divorce of prior marriage because under current Ghanian law, detailed affidavits may be sufficient to establish a customary divorce).

Again, the attorney's first step after examining the documents should be to compare them with the Foreign Affairs Manual (FAM) and any sources of foreign law such as the Library of Congress and/or foreign attorneys to check that your client has a valid divorce. In some rare cases, the rules for foreign divorce documentation will be so convoluted that it makes more sense to re-divorce the first spouse and remarry the U.S. citizen to be sure that the person has a marriage which will be recognized by USCIS. While Ghana and other countries may legally recognize customary divorce, for example, it is often nearly impossible to get these divorces recognized by U.S. authorities unless the customary divorce is registered with civil authorities. At a minimum, detailed affidavits from witnesses will be required. Other countries, such as Pakistan, according to the FAM, have different divorce requirements for different areas of the country and depending on whether the divorce was initiated by the man or the woman. Establishing previous valid divorce and lawful marriage is a *sine qua non* for a successful marriage-based petition.

Conclusion

"The hunger for love is much more difficult to remove than the hunger for bread." – Mother Theresa

As long as love survives, immigration attorneys will have plenty of work to do before the U.S. immigration authorities. While we are definitely on our clients' sides, it's important to ask sufficient questions and do due diligence before agreeing to take on a case. This kind of "prep work" will minimize the chances of unwelcome surprises during the course of representation and/or USCIS issuing an RFE, NOID, or denial notice. Additionally, as the couple's lawyers you must also protect your bar license and your reputation by investigating that the marriage you are hired to represent is a valid one. If difficulties do arise, thorough research and knowledge of the law will provide the attorney the best chance of obtaining a successful result for the clients.