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How Will a Divorce Impact a Client's Immigration Status?

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Divorces are complicated under the best of circumstances, but when one or both of the spouses has temporary immigration status in the United States, the case can have serious consequences for the entire family. Whether a U.S. citizen marries a foreign national, or a family comes to the United States from abroad on temporary visas, every member of the family is impacted when the spousal relationship dissolves.

Every year, thousands of foreigners enter the U.S. legally on temporary visas valid for a few months or several years. U.S. immigration law favors keeping families together and thus allows spouses and minor children to accompany a principal visa holder to the U.S. Under the same principle, the law also allows the foreign national spouses of U.S. citizens to become U.S. permanent residents. To do so, the U.S. citizen spouse must sponsor their foreign national spouse for a "green card." In these instances, a divorce or separation naturally may impact the dependent spouse's immigration status. When a marriage ends, careful analysis of the immigration issues is necessary, particularly if there are children involved who may become separated from one of their parents if the parent loses his right to remain in the U.S. after a divorce.

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Families on Temporary Visas

With the U.S. economy becoming more global every year, foreigners often come to the U.S. as a result of one spouse being transferred to the U.S. on a work assignment or for temporary study or training. The spouse and minor children of the foreign national who is transferring to the U.S. are eligible for dependent visas. Under this type of visa, the consequences of a divorce are harsh for the dependent spouse—when the couple's divorce becomes final, the dependent spouse will immediately lose his or her immigration status and be required to leave the U.S. or explore options to remain in another visa status.

A divorce in such a case can pose complicated custody issues, as the children may remain in the U.S. through their dependent visa status but there are limited avenues for the dependent parent to remain legally. On the matrimonial front, it may be appropriate to enter into a legal separation agreement addressing the division of assets and the responsibility for support.

Green Card Applications

A foreign national who applies for a green card based on an offer of employment in the U.S. may include his or her spouse and children on the application, so that each family member receives a green card. The green card process raises more challenges for couples facing the possibility of divorce. The timeline to adjudicate an employment-based green card is quite lengthy at U.S. government agencies—ranging from one year to many years.

If a couple decides to separate or begin a divorce action, a settlement agreement would address any necessary steps to maintain the dependent spouse's legal status.

Foreign Nationals Sponsored

U.S. citizens are uniquely eligible to sponsor foreign spouses for green cards, and such green cards are granted on a priority basis by the U.S. Citizenship and Immigration Services (USCIS). In marriage-based green card applications, the couple must prove to the USCIS that they did not enter into the marriage for the sole purpose of securing a green card for the foreign national spouse. As part of the application process, the USCIS will request proof that the marriage is not a "sham." Couples must therefore maintain a bona fide relationship throughout the application process. Evidence of a bona fide marriage may include children born of the relationship, or the commingling of financial assets such as property, bank accounts and credit cards.

However, if the couple marries and subsequently divorces during the application process—and even after a green card is granted—it can have a profound impact on the foreign

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national spouse. A divorce judgement during the application process will effectively terminate the application, as there will be no valid marital relationship. Specifically, if the marriage is dissolved prior to USCIS approving the green card application, the foreign national is not eligible for a green card and in fact, risks losing his or her ability to remain in the U.S. at all, if the foreign national does not have an underlying visa status.

Even a separation may impact the foreign national spouse if the couple can no longer provide evidence that they have a bona fide marriage. Matrimonial courts look very unfavorably upon any party that may be using the green card as leverage during divorce proceedings and may go as far as finding the parties engaged in immigration fraud or penalizing them with disproportionate financial responsibilities after divorce.¹

Moreover, if a marriage is less than two years old at the time the application is approved, the foreign national spouse is granted "conditional" lawful permanent residence, meaning the green card is valid for only two years.² To "remove" the conditions two years later, the lawful permanent resident (LPR) spouse must demonstrate to USCIS that the marriage was entered into in good faith and remains bona fide.³ The application to remove the conditions must be filed jointly by the couple.⁴

If a couple divorces during the conditional residence period, the LPR spouse faces the risk of losing the green card.⁵ However, the LPR spouse may request a waiver of the joint filing requirement if the LPR would suffer extreme hardship if removed from the U.S. and either, the marriage was entered into in good faith but has since been terminated or the marriage was entered into in good faith and during the marriage the LPR was battered or subject to extreme cruelty by the U.S. citizen spouse.⁶

Where the spouse's green card is still conditional at the time of divorce, the couple's settlement agreement can include cooperation by the U.S. citizen spouse for the LPR spouse's legal status. For example, it would be acceptable for the U.S. citizen to commit that he or she will assist in filing a joint petition for removal of conditions, attend or accompany the spouse to any hearings, and provide any other necessary information to show USCIS that the marriage was a sincere and valid one.

Lastly, in a marriage-based green card application, a U.S. citizen sponsor must sign an Affidavit of Support to accept financial responsibility for his or her spouse once he or she becomes an LPR.⁷ This Affidavit is a legally enforceable contract—the sponsor's responsibility lasts until the spouse becomes a U.S. citizen⁸; can be credited with 40 quarters of

work (usually 10 years)⁹; dies¹⁰; or ceases to be a permanent resident and departs the U.S.¹¹ If the LPR spouse receives any "means-tested public benefits," the sponsor is responsible for repaying the cost of those benefits to the agency that provided them.¹² Divorce does not end the sponsorship obligation.¹³

In light of the support obligation, if a prenuptial agreement is contemplated that involves a waiver of the right to receive support, the parties must be apprised of the immigration requirements because the risk of the agreement being unenforceable is much greater. Further, when drafting a prenuptial agreement under these circumstances, it would be the attorney's legal and ethical obligation to advise her client that a waiver of support or any other financial benefit may be construed as a financial arrangement in exchange for the U.S. citizen's compliance with the immigration process.¹⁴ Aside from being null and void, such prenuptial agreements can be compromising to the application for a green card because they raise the appearance of immigration fraud.

Conclusion

When a marriage faces dissolution and immigration issues are involved, additional risks and uncertainty may be present. It is therefore critical to examine the stakes and consequences for the foreign national spouse, particularly if a child is involved. While attorneys may advise their clients to wait for one parent's definitive legal status prior to filing an action for divorce, the varied circumstances do call for collaboration from both parties, with sound legal advice, to avoid deportation. While a divorce causes unforeseeable upheaval in the life of a family, with careful planning and legal advice, the immigration consequences can at least be considered and mitigated.

Endnotes:

1. [Rocano v. Rocano](#), 12 Misc.3d 1169 (A) (2006).
2. INA §216(a)(1); 8 U.S.C. §1186a(a)(1)
3. INA §216(d)(1)(A); 8 U.S.C. §1186a(d)(1)(A)
4. INA §216(c)(1)(A); 8 U.S.C. §1186a(c)(1)(A)
5. INA §216(c)(2); 8 U.S.C. §1186a(c)(2)
6. INA §216(c)(4); 8 U.S.C. §1186a(c)(4)
7. INA §212(a)(4)(B)(ii); INA §213A; 8 U.S.C. §1182(a)(4)(B)(ii)
8 U.S.C. §1183a; 8 C.F.R. §213a.2
8. INA §213A(a)(2); 8 U.S.C. §1183a(a)(2)
9. INA §213A(a)(3)(A); 8 U.S.C. §1183a(a)(3)(A)
10. 8 C.F.R. §213a.2(e)(2)(i)(E)

11. 8 C.F.R. §213a.2(e)(2)(i)(C)

12. INA §213A(b); 8 U.S.C. §1183a(b)

13. See 8 C.F.R. §213a.2(d)(Stating that the "Execution of an affidavit of support under this section creates a contract between the sponsor and the U.S. Government for the benefit of the sponsored immigrant"); 8 C.F.R. §213a.2(e) (Divorce is not a listed event when the support obligation of a sponsor ends).

14. *Heilbut v. Heilbut*, 297 A.D.2d 233, 746 N.Y.S.2d 294 (1st Dept. 2002).

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