

INTRODUCTION TO CONDITIONAL PERMANENT RESIDENCE AND FILING THE PETITION TO REMOVE THE CONDITIONS ON RESIDENCE (FORM I-751)

## I. Overview

This practice advisory is designed to introduce practitioners to the concept of Conditional Permanent Residence, and to explain the requirements and processes for removing the conditions on residence, thereby enabling the conditional resident to obtain Lawful Permanent Residence that can last indefinitely.

## II. Introduction

In general, lawful permanent residence (LPR), commonly known as having a "green card," lasts until one of three things happen: (1) the person naturalizes and becomes a U.S. citizen, or (2) the person receives a final order of removal, or (3) the individual chooses to voluntarily give up her LPR status.

However, people who apply for permanent residency based on a marriage to a U.S. citizen or permanent resident spouse that is less than two years old at the time their residence is granted receive green cards that are only valid for two years. These people are called "Conditional Permanent Residents." Before their conditional residence expires, they must file an additional application, called a "Petition to Remove Conditions on Residence" (Form I-751) in order to extend their status to indefinite Lawful Permanent Residence.

The reasoning behind conditional permanent residency is to prevent sham marriages, where someone marries another person just to get a green card, and then divorces shortly afterwards. Couples who have already been married for two years or longer at the time the immigrant is granted permanent resident status do not have to go through this extra step in the process.

As will be discussed below, the I-751 petition must be filed within a certain timeframe, and there is a different process if the couple is no longer together at the time it is filed. Children of a conditional resident spouse must also go through this process if they immigrate within two years of the parent's marriage to a U.S. citizen or LPR.

Conditional residence expires two years from the date it was granted. For conditional residents who immigrated through consular processing, the date conditional residence began is the date s/he first entered the United States with the immigrant visa. For conditional residents who immigrated through adjustment of status, the date of the grant is the date the person received final approval of the adjustment application from USCIS. In either situation, if the immigrant has almost reached her two-year marriage anniversary to the petitioning spouse just prior to the date her residency may be granted, it may be worth delaying entry to the United States or the adjustment interview, for example, to avoid having to do this extra filing (which, as with most immigration applications, requires supporting documentation and payment of a filing fee—at the time of this writing, \$595 in addition to \$85 biometrics fee).

Except for the two-year expiration date, conditional resident status is identical to lawful permanent residence. Conditional residents can work, travel in and out of the United States, and count the time they spend as conditional residents towards the residence requirements for U.S. citizenship.<sup>1</sup>

Conditional residence was added to the Immigration and Nationality Act (INA) by the Immigration Marriage Fraud Amendments of 1986 (IMFA),<sup>2</sup> due to Congress' concern that many marriages between U.S. citizens or permanent residents and foreign citizens may be sham marriages, entered into for the sole purpose of obtaining permanent residence. By requiring conditional residents to file a petition to remove the conditions on residence after two years, proving they are still together or if not, providing a good reason why not, Congress created an additional screening process for those who immigrate through a recent marriage. As mentioned above, individuals who have already been married more than two years when immigrating through a spouse do not have to go through this I-751 conditional residence process.

There are a few different ways to remove the conditions on residence, depending on the status of the conditional resident's marriage at the time the waiver is filed:

- If the conditional resident is still married to her petitioning spouse, she must "jointly" file the I-751. This means that her U.S. citizen or LPR spouse through whom she obtained her status must sign the I-751, in addition to the conditional resident, and must attend an interview on the I-751, if any, with the conditional resident. The joint I-751 must be filed within 90 days of the date that the conditional residence expires.<sup>3</sup> If an applicant misses that deadline, there are some circumstances in which USCIS may accept a late jointly filed I-751 that are discussed below.
- If the conditional resident is no longer married to her petitioning spouse, she may request a waiver of the joint filing requirement. In this situation, the conditional resident files the I-751 on her own, and she may file the I-751 waiver at any time before, during, or after the 90-day window. An I-751 waiver can only be filed in the following circumstances:

- The marriage was entered into in good faith, but the marriage has terminated, or the petitioner has died; and/or
- The marriage was entered into in good faith, but the conditional resident or her child was subject to abuse; and/or
- o Termination of conditional residence would cause extreme hardship.

This practice advisory will discuss each of these scenarios in turn.

## III. Filing a Joint I-751 Petition to Lift Conditions on Residence – "Joint I-751"

## A. Must be filed within 90 days of the date that conditional residence ends.

If the couple is still married and cooperating with each other, they must file the I-751 within the 90 days before the expiration of conditional residence.<sup>4</sup> Whereas the U.S. citizen or LPR spouse was the "petitioner" when the foreign national was first applying to immigrate, via adjustment of status or consular processing, at the I-751 stage the conditional resident is the "petitioner" because they are petitioning to lift the conditions on their residency. "Filed" means the petition is actually received by USCIS by the expiration date, not simply postmarked by the deadline. Otherwise, conditional residence will end and the former conditional resident will become deportable under INA § 237(a)(1)(D).<sup>5</sup> Conditional residence status is automatically extended following a timely I-751 filing, until there is a decision on the I-751.<sup>6</sup> The conditional resident with a pending I-751 is entitled to an "I-551 stamp" in her passport, or an I-94 if no passport, indicating that her conditional resident status has been extended for one year (and can be further extended if adjudication takes longer than one year).<sup>7</sup>

Although USCIS will try to notify the person at the start of the 90-day filing period, the fact that USCIS does not do this or that the notice does not reach the person is not a defense against losing lawful status if the person fails to file the I-751.<sup>8</sup> For this reason, it is critical that the conditional resident and/or his or her legal representative track this date rather than rely on a reminder from USCIS. Also, USCIS is not required to send the person notice prior to terminating conditional residence if the basis for the termination is a failure to file a timely I-751 petition.<sup>9</sup>

## 1. What if the I-751 is not filed within 90 days?

USCIS may excuse a late filing if the applicant requests to be excused and submits a written explanation showing that failure to file on time was through no fault of his own. The standard for excusing a late filing is that the delay was due to extraordinary circumstances beyond the applicant's control and that the length of the delay was reasonable.

According to USCIS guidance,<sup>10</sup> some examples of what constitutes extraordinary circumstances may include:

- Hospitalization
- Long term illness
- Death of a family member
- Legal or financial problem
- Caring for someone

- Bereavement
- Serious family emergency
- Work commitment
- Family member on active duty with the U.S. military

If USCIS is unable to make a determination on whether the failure to timely file was due to good cause, it may issue a request for further evidence (RFE). Furthermore, if the issue is still inconclusive after the applicant responds to the RFE, the USCIS service center where the petition was filed may forward the file to the local USCIS office for an interview.

Filing the joint I-751 too early can also be a problem, because USCIS may reject it and the applicant might not find out about the rejection until her conditional residence has expired. If that should happen, the applicant will have to file the I-751 late and explain the circumstances.

## 2. What status does the person have if joint petition filed late?

If USCIS accepts the reason for the late filing, it will accept the late-filed I-751 and extend conditional residence until the I-751 is adjudicated. However, if it does not accept the late I-751, conditional residence will terminate, and the person will be placed in removal proceedings. At that point, the individual could renew the application before an immigration judge, or file another I-751 on another basis (see below) if applicable, with USCIS. Be aware that USCIS has original jurisdiction over the I-751, meaning that an immigration judge can only review the denial by USCIS in court.

If the immigration judge should find that the failure to file timely was for good cause, the I-751 will be returned to USCIS for adjudication on the merits of the application, and the immigration court proceedings will be continued until USCIS has issued a decision on the merits. If USCIS approves the petition, the removal proceedings will be terminated. If USCIS denies the petition, the immigration judge will review the basis for the denial and make a decision as to whether to affirm or overturn the USCIS denial.

Another option for the conditional resident and petitioning spouse in this situation is to file a second adjustment application with the immigration court. Since the marriage would be over 2 years old by this time, if the adjustment application is approved then the former conditional resident will be granted unconditional Lawful Permanent Residence.

## B. What evidence must be submitted with the joint petition?

#### 1. Proof that the marriage was legal in the jurisdiction where it took place

The legality of the marriage should have been established at the time conditional residence was granted, so the same proof that was used to acquire conditional residence can be resubmitted to confirm the marriage's legality in the jurisdiction in which it took place.<sup>11</sup>

## 2. Proof that the marriage has not been terminated

If the couple is still together and are living in marital harmony, you merely need to have them both sign the petition. If, however, separation or divorce proceedings have begun, but have not been completed, copies of the petition for separation or divorce should be submitted. USCIS will not deny a petition solely because the couple has separated, and divorce or annulment proceedings have begun. However, if the U.S. citizen or LPR spouse does not sign the joint petition, USCIS will issue a request for further evidence to obtain the signature. If the conditional resident fails to respond to the RFE, the petition will be denied and considered abandoned. In addition, if the conditional resident cannot obtain the spouse's signature, the petition may be denied for lack of a proper signature.<sup>12</sup>

USCIS may approve a jointly filed I-751 even if divorce or annulment proceedings have begun, as long as it is satisfied that the marriage was bona fide when it took place and was not entered into for immigration purposes. It is important to note, that USCIS may not deny the I-751 petition solely on the basis that the couple has initiated divorce or annulment proceedings,<sup>13</sup> and a joint I-751 may be approved where a couple is forthright about working through their problems, including considering divorce while living separately, if both remain cooperative and the petitioning spouse continues to be supportive of the conditional resident.

However, USCIS may issue a request for a final divorce or annulment decree rather than approving the joint petition. In that situation, the conditional resident should request that USCIS treat the jointly filed I-751 as a request for a waiver of the joint filing requirement, to avoid having to file a separate petition with a separate fee later. USCIS will give the conditional resident 87 days to submit the final divorce or annulment decree. If the decree is not submitted within that time frame, the petition may be approved, denied, or referred to a field office for an interview.<sup>14</sup>

## 3. Proof that the marriage was not entered into for the purpose of obtaining residency

This is the most crucial part of the evidentiary requirements that must be submitted, as these documents should show, essentially, that the couple is still living together and did not marry just so the immigrant could get his or her green card. The instructions for the Form I-751 indicate that the couple should submit:

- Birth certificates of any children born to the marriage;
- Lease or mortgage contracts showing joint occupancy or ownership of the couple's residence;
- Financial documents showing joint ownership of assets or joint responsibility such joint savings or checking accounts, joint utility bills, jointly filed federal and state income tax returns, insurance in both parties' names, etc.
- Any other evidence that can establish that the marriage is bona fide. This could include pictures of the couple together in various settings, notes or cards they have written to one another, receipts for trips they have taken together with both their names, etc.
- USCIS also requires affidavits from at least two people who have known the couple since conditional residence was granted and can personally attest to the fact that they are living together as a married couple. Each person submitting an affidavit must provide their name, address, date and place of birth, and relationship to the conditional resident and/or the spouse, and detailed information as to how they know the couple is in a bona fide relationship.

## 4. Proof that no fee (other than an attorney's fee for representation) was paid

The purpose of this last requirement is to ensure that the relationship between the conditional resident and the petitioning spouse is bona fide, rather than an arrangement between the conditional resident and the petitioning spouse for the purpose of obtaining permanent residence by fraud.

## 5. USCIS may require an interview of the couple

USCIS will not interview every I-751 applicant, but reserves the right to do so. As noted above, an interview may be scheduled where the petition was not timely filed and USCIS is not satisfied that it should excuse the delay.

USCIS may also schedule an interview where it determines that the evidence of the bona fides of the marriage is insufficient for approval, but not so insufficient as to warrant an outright denial, or where the couple is separated and evidence that the marriage has been terminated has not been submitted.

If the couple appears at the interview and satisfies the USCIS officer that the marriage was legal at its inception, was entered into in good faith, has not been terminated, was not entered into for immigration purposes, and that no fee was paid (other than a fee for an attorney's representation), the I-751 will be approved.

## C. What happens if the joint petition is denied?

If the couple is unable to prove all these elements, the I-751 will be denied. Conditional residence will be terminated, and a Notice to Appear placing the conditional resident in removal proceedings will be issued.<sup>15</sup> However, USCIS must provide a temporary I-551 (green card) or I-94 while the

conditional resident's I-751 and status termination is reviewed by an immigration judge in removal proceedings.

Failure to appear at a scheduled interview will also result in denial of the petition and issuance of a Notice to Appear.<sup>16</sup>

There is no appeal of a denied I-751 outside of removal proceedings, in which the applicant may request that the immigration judge review the termination.<sup>17</sup> When a joint I-751 petition is denied, the government has the burden of proof to show, by a preponderance of the evidence, that the petition was properly denied.<sup>18</sup>

## IV. Requesting a Waiver of the I-751 Joint Filing Requirement – "I-751 Waiver"

As noted above, a conditional resident may request a waiver of the joint filing requirement, and file the I-751 separately, under the following circumstances:

- The marriage was entered into in good faith, but the marriage has terminated or the petitioner has died;
- The marriage was entered into in good faith, but the conditional resident or the conditional resident's child was subject to abuse; or
- Termination of conditional residence would cause extreme hardship.

Unlike the Joint Petition, a request for a waiver of the joint filing requirement can be filed at *any time*. However, the applicant should file as soon as is reasonably possible to avoid having her conditional residence expire.

A conditional resident filing a waiver of the joint I-751 filing requirement may file based on multiple waiver grounds and it is generally advisable to do so, because should the waiver be denied, and the applicant placed in removal proceedings, the immigration judge can only review the I-751 waiver based on the grounds presented to USCIS.<sup>19</sup>

# A. The marriage was entered into in good faith, but the marriage has terminated or the petitioner has died.

As with the joint petition, for this waiver ground the conditional resident must submit evidence that the marriage was bona fide, notwithstanding the fact that it did not last two years. The applicant must also show that the marriage has terminated. If the petitioning spouse has died, submission of a certified copy of the death certificate is sufficient.

If the marriage was terminated by divorce or annulment, a copy of the divorce or annulment decree must be submitted.

## 1. What if divorce proceedings have been or will be initiated but the divorce will not be final before the expiration of conditional residence?

If the applicant files before the final decree has been issued, USCIS will issue a request for evidence for the final decree. If the divorce or annulment decree is not final by the date the request for evidence is due, then USCIS will deny the petition.

A conditional resident may, and often should where applicable, choose more than one basis for filing the waiver of the joint filing requirement and argue them in the alternative.<sup>20</sup> Therefore, where a divorce or annulment is not yet final, the applicant may want to request the waiver on both this ground and another, as applicable—battered spouse or extreme hardship. This may prevent USCIS from terminating the conditional residence if the divorce or annulment is not yet final.

Once the divorce or annulment is final, the applicant can either file a second waiver application based on the good faith but terminated marriage ground, or submit the decree and request that USCIS adjudicate the waiver based on this ground instead of the extreme hardship or battery/extreme cruelty ground.

## 2. Evidentiary Requirements:

Where a divorce or annulment has taken place, USCIS will examine the evidence that the marriage was entered into in good faith with extra scrutiny. It is therefore incumbent on the applicant to submit as much evidence of the bona fides of the marriage as possible.

The petition should include the declaration of the applicant, explaining the reason for requesting a waiver, and accompanied by supporting documents. Form I-751 requires that a conditional resident choose the basis or bases for the waiver from the categories listed.

In the declaration, the conditional resident should emphasize that s/he was committed to the marriage and describe the things s/he did to try to make the marriage work. If the applicant's spouse "caused" the demise of the marriage, through an affair, or abuse, or abandonment, or some other similar action, and there is documentation of this, including statements of third parties, the applicant should submit these documents.

As with the joint petition, the evidence should include proof that the marriage was legal in the jurisdiction in which it took place, and that the couple was living together in a bona fide marital relationship.

The same kinds of evidence required in the joint petition, such as evidence of joint property, insurance, bills, etc. should be submitted with the I-751. However, the quantity and reliability of that evidence should be as strong as possible. Documentation, such as joint bills, bank accounts,

insurance policies, rental agreements, etc., is essential. Affidavits or declarations from clergy, an employer, landlord or mortgage broker, rather than a friend or relative may be very helpful, because such individuals have no personal relationship with the applicant, and therefore will be considered more credible than family or friends.

# B. The marriage was entered into in good faith, but the conditional resident or his or her child was subject to battery or extreme cruelty.

As with the first waiver ground—marriage has terminated due to divorce or death—for the second waiver ground, conditional resident (or conditional resident's child) was subject to battery or extreme cruelty, the conditional resident must show that the marriage was legal and entered into in good faith. She should submit as much evidence of the bona fides of the marriage as is reasonably possible. In an abusive relationship, this may not always be easy, since frequently an abusive spouse may have control over all of the couple's documents. In that case, the conditional resident spouse's declaration, explaining the history of the relationship, should also explain both her efforts to obtain documentation, and why s/he is unable to do so.

To obtain this type of waiver, the conditional resident must show that his or her USC/LPR spouse battered the conditional resident or child or treated the conditional resident or child with extreme cruelty during the marriage. A conditional resident spouse can file this waiver if only his or her children were the victims of the physical or mental abuse. The children need not have U.S. citizenship or permanent resident status.<sup>21</sup>

According to USCIS, *extreme cruelty* includes, but is not limited to, any act of violence or threatened act of violence resulting in physical or mental injury.<sup>22</sup> The USCIS defines violence as psychological abuse, sexual abuse, or exploitation.<sup>23</sup>

The applicant need not prove that the marriage has been terminated to qualify for this type of waiver,<sup>24</sup> nor does the applicant have to prove hardship. This waiver is designed to prevent people from being trapped in abusive situations because their lawful permanent resident or U.S. citizen spouse threatened or refused to file a joint petition. This waiver allows conditional residents to secure their lawful permanent resident status without the cooperation of the abusive spouse or parent.

## 1. Evidentiary Requirements

In order to prove battery or extreme cruelty, the conditional resident should submit his or her own declaration, in addition to police reports, court transcripts and court orders, doctor's reports, medical records, affidavits from school officials and social service agencies reports and affidavits from police, judges, medical personnel, school officials, and social service agencies. The conditional resident should also submit affidavits or declarations of people aware of the abuse. A psychological evaluation should also be included. USCIS initially required that a psychiatrist, clinical psychologist, or licensed clinical social worker complete the evaluation. However, Congress recognized that not all immigrants have access to mental health professionals and lessened this requirement to include any credible evidence that is relevant to the petition.<sup>25</sup>

## 2. Conditional Residents in Bigamous Marriages Who Were Subject to Battery or Extreme Cruelty

A conditional resident spouse in a bigamous marriage (that is, their spouse is also married to a second person at the same time) who was subject to battery or extreme cruelty may file a waiver of the joint filing requirement if she meets the criteria set forth in INA § 204(a)(1)(A)(iii)(II), which states generally that a noncitizen in a bigamous marriage will be recognized as a spouse if she believed in good faith that that she was married, and would have been recognized as an immediate relative spouse but for the bigamy of the U.S. citizen petitioner.<sup>26</sup>

## C. Termination of conditional residence would cause extreme hardship to the applicant.

A conditional resident may also file a waiver of the joint filing requirement if he can show that extreme hardship will result if he is deported.<sup>27</sup> USCIS will consider only hardship that arose during the conditional residence period.<sup>28</sup>

Unlike the other two bases for a waiver of the joint filing requirement, the statute does not require the conditional resident filing the I-751 based on extreme hardship to prove that the marriage to the petitioning spouse was entered into in good faith.<sup>29</sup> Nevertheless, it would be prudent to submit evidence that the marriage was bona fide if you are able to do so.

At least one circuit court has held that that a person may seek an extreme hardship waiver even if the marriage was not in good faith.<sup>30</sup> However, as a practical matter, since all waivers are discretionary, it is unlikely that an extreme hardship waiver will be granted if there is evidence that the marriage was fraudulent,<sup>31</sup> unless the evidence of extreme hardship is extraordinarily strong.

The statute does not specify whose hardship counts for this waiver. USCIS officials have stated that the hardship must be to the conditional resident spouse, to a dependent child, or to a new spouse.<sup>32</sup>

## Proving Extreme Hardship

The regulations state that only in those cases where the hardship is extreme should the application for a waiver be granted, and the burden of establishing extreme hardship rests solely with the applicant.<sup>33</sup>

The standard for proving extreme hardship is the same standard applied to other areas of immigration law, such as the former suspension of deportation and waivers of inadmissibility. It means hardship that is above and beyond that which a person who was forced to leave the United States would normally suffer.

A person's age, family ties in the U.S. and the home country, health and medical needs, the economic and political situation in the home country, the person's position in and involvement with the

community, loss of career potential or educational opportunities are all relevant to determining if that person would suffer extreme hardship if the conditional resident were removed from the United States.

Include any and all evidence that could possibly prove that the applicant would suffer more than what would be typical for a person who is forced to leave the United States and return to their home country. Also consider social and cultural issues, such as if divorce is taboo in the applicant's home country, and would create difficulties for the applicant if she had to return.

Remember that the hardship need not be solely to the conditional resident, but could be to the conditional resident's child or new spouse, or possibly even to the community in which the conditional residence resides. For example, if the conditional resident is a doctor working in an underserved area, such as a public hospital, the loss of that doctor's services could result in extreme hardship to the community. Although USCIS has indicated that the hardship should be to a child or new spouse, the statute is silent on whose hardship counts, so include every bit of evidence that could possibly be relevant. The cumulative effect of all the evidence may be sufficient to prove extreme hardship even if the individual factors, by themselves, are not enough.<sup>34</sup>

Keep in mind that in order for the waiver to be granted, the extreme hardship must have arisen *during* the two-year conditional residence period. <sup>35</sup>

## V. Conditional Resident Children

Children of conditional residents also immigrate as conditional residents. This may include children who immigrate as **derivative beneficiaries**, as well as children who immigrate directly as stepchildren.<sup>36</sup> The INA calls these children **alien sons and daughters**. Like a conditional resident spouse, a conditional resident son or daughter must apply to remove conditional status.

- If the son or daughter became a conditional resident within 90 days of the date the parent did, he or she can be included in the parent's I-751 and does not need to file a separate petition.
- However, if the son or daughter received conditional residency more than 90 days before or after the parent did, he or she must submit a separate I-751 application.<sup>37</sup>
- The separate application should be submitted at the same time that the parent applies to remove conditional residency—even if the son or daughter has not yet reached the two-year anniversary.

The same standards for filing the waiver that apply to the principal conditional resident also apply to the conditional resident's children.

## VI. Conditional Residents in Removal Proceedings

#### A. Termination of Conditional Residence

USCIS has the authority to affirmatively terminate a person's conditional residence and to place that person into removal proceedings.<sup>38</sup> Termination of conditional permanent residence can occur in three ways.

First, under section 216(b)(1) of the Act, USCIS may terminate conditional resident status before the 2-year conditional period expires, where it determines either that the qualifying marriage is fraudulent or was judicially annulled or terminated, or that a fee or other consideration was given for the filing of a pertinent petition.<sup>39</sup>

Second, USCIS may terminate conditional residence for failure to timely file a joint petition or appear for an I-751 interview.<sup>40</sup>

Third, USCIS may terminate conditional residence upon adjudicating the joint petition and determining that the facts and information contained in it are not true.<sup>41</sup>

USCIS must establish the basis for termination by a preponderance of the evidence,<sup>42</sup> meaning more likely than not or approximately 51 percent.

Each of these determinations is reviewable in removal proceedings.<sup>43</sup>

#### B. Renewal of the I-751 in Removal Proceedings

As noted above, USCIS has original jurisdiction of the I-751 petition. If USCIS denies the I-751, the conditional resident will be served with a Notice to Appear (NTA) and placed in removal proceedings.

An immigration judge can only review the reasons for the USCIS denial. Therefore, if the conditional resident wishes argue that the petition should be approved on a different basis than the one adjudicated by USCIS, s/he cannot do so in immigration court. Instead, a new I-751 must be filed with USCIS on the new basis for removing the conditions. The individual can then file a motion to continue the removal proceedings while the petition is pending before USCIS.<sup>44</sup> The motion to continue must include proof that the new I-751 has been filed with USCIS. If that petition is approved, then the person can file a motion to terminate removal proceedings. If that new I-751 petition is denied, then the immigration judge can review that denial in removal proceedings.

While the I-751 is pending with the immigration court, conditional residence will be extended until the immigration judge makes a final determination on the petition.

## What if the I-751 filed with the Court is Incomplete?

A conditional resident may submit additional evidence before the immigration judge to prove that the waiver should be granted, even though that evidence was not before USCIS, if the ground for the waiver is the same as was submitted to USCIS.<sup>45</sup>

## C. Other Issues in Removal Proceedings: Rescission, Deportability & Inadmissibility

The I-751 petition asks whether the conditional resident is in removal, deportation or rescission proceedings, as well as whether the conditional resident has ever been arrested, detained, charged, indicted, fined or imprisoned for a criminal offense.

Like any other permanent resident, a conditional resident can be subject to the grounds of recission under INA § 246, or deportability at INA § 237(a), or theinadmissibility grounds at INA § 212(a).

1. Recission

INA § 246(a) authorizes the government to rescind an erroneous grant of adjustment of status within five years of the grant. Since a conditional resident, by definition, has been a resident for less than 5 years, USCIS can rescind conditional resident status if it determines that the status was granted in error.

USCIS will send a notice of intent to rescind to the person. If the person contests the finding within 30 days, there is a hearing before an immigration judge.<sup>46</sup> However, if the person fails to respond within 30 days, no hearing is required.<sup>47</sup>

The rules of evidence are not binding, but the standard of proof that the government must meet is "clear, convincing, and unequivocal."<sup>48</sup>

## a. Deportability

The deportability grounds in INA § 237(a) include several categories. For example, someone who was granted conditional residence in error, could be subject to either rescission or could be found deportable under § 237(a)(1)(A), for being inadmissible at the time of admission.

The deportability grounds also include termination of conditional residence,<sup>49</sup> marriage fraud,<sup>50</sup> smuggling,<sup>51</sup> various crimes,<sup>52</sup> document offenses,<sup>53</sup> and security offenses,<sup>54</sup> among other things.

Screening for criminal grounds of deportability is important. A few common crime grounds of deportability are noted here, but it is important to assess any arrest or conviction for possible immigration consequences. A conditional resident can be found deportable if convicted of a crime of moral turpitude within 5 years of admission that carries a potential sentence of one year or longer,<sup>55</sup>or if convicted of 2 or more crimes of moral turpitude any time after admission,<sup>56</sup> or an

aggravated felony.<sup>57</sup> A conditional can also be found deportable if convicted of a crime of domestic violence.<sup>58</sup>

Note that the government bears the burden to prove deportability by clear and convincing evidence,<sup>59</sup> and that for the most part, the criminal grounds of deportability require a *conviction* before that ground can apply.<sup>60</sup> Moreover, only certain documents are acceptable to prove a conviction.<sup>61</sup>

This means that practitioners should not concede deportability; rather, the government should be put to its burden of proof.

## b. Grounds of Inadmissibility

Because conditional residents have been admitted to the United States, they are usually not subject to the grounds of inadmissibility. However, a conditional resident returning from a trip abroad will be deemed to be inadmissible if he or she fits within the criteria set forth in INA § 101(a)(13)(C), which states:

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien:

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,

(v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

The government bears the burden of proving both that a returning resident, including a conditional resident, falls within the grounds set forth in INA § 101(a)(13)(C), <sup>62</sup> and that the person is inadmissible, by clear and convincing evidence.<sup>63</sup>

## VII. Other Relevant Issues

## A. Copy of Conditional Residence Card

When filing Form I-751, the conditional resident must submit a copy of his or her resident alien card, as well as those of his or her children.

#### Address and Filing Fees

Every conditional resident filing Form I-751 must submit the I-751 filing fee in addition to a biometrics fee. It is best to consult the USCIS website to determine where to file the petition and confirm the filing fees required, since these things are subject to change.<sup>64</sup>

## B. Continuance of Conditional Residence While the I-751 is Pending

Once a properly filed Form I-751 is submitted, USCIS will generate a receipt notice with a temporary extension of conditional residence while the application is pending. Conditional residents may use this extension to work and travel abroad while the I-751 is pending.

## C. Military Spouses

Conditional residents who live abroad pursuant to military or government orders must submit two passport-style photos of each applicant and dependent child, plus two fingerprint cards (Form FD-258).

These petitioners are required to indicate on top of the Form I-751, "ACTIVE MILITARY" or "GOVERNMENT ORDERS" and submit a copy of their current military or government orders along with the petition

## D. Dealing with Criminal Issues

Any conditional resident with a criminal record (other than minor traffic violations) is required to submit the following evidence:

- 1. An original or court-certified copy of the sentencing record for each incident, and evidence of completion of the sentence, specifically:
  - a. An original or certified copy of the probation or parole record; or
  - b. Evidence that the person completed an alternative sentencing program, or rehabilitative program;
- 2. An original or court-certified copy of the court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction; or

3. If no record is available, an original statement from the court that no record exists of the arrest or conviction.

Any conditional resident with a criminal record should seek the advice of experienced immigration counsel before filing the I-751 to determine if she is inadmissible or deportable.

Those who are inadmissible or deportable for criminal offenses would be wise to seek assistance from an attorney with expertise in both immigration and criminal law to determine if their criminal convictions can be eliminated for immigration purposes before filing the I-751. Or, if they are filing a joint petition within the 90-day filing period, they should immediately seek assistance to resolve any inadmissibility or deportability issues before the petition is adjudicated.

#### **End Notes**

- <sup>3</sup> 8 CFR §§ 216.4(a)(I) & 1216.4(a)(I).
- <sup>4</sup> There is an exception to this requirement for conditional residents or their spouses who are serving abroad in the military. They have the option of filing any time after the 90-day filing period begins. See INA § 216(g). 5 INA S 216(g)(2)

<sup>5</sup> INA § 216(c)(2).

<sup>6</sup> See USCIS Memo, "Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence," (Dec. 2, 2003), available at

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\_Files\_Memoranda/Archives%201998-2008/2003/crextensn120203.pdf.

<sup>7</sup> Id.

8 INA § 216(a)(2)(C).

<sup>10</sup> USCIS Interim Policy Memorandum, "Revised Guidance Concerning Adjudication of Certain I-751 Petitions," December 23, 2012.

<sup>11</sup> You may check the validity of a marriage document for a foreign country by going to the US State Department's Visa Reciprocity schedules at <u>https://travel.state.gov/content/visas/en/fees/reciprocity-by-country.html</u>.

<sup>12</sup> 8 CFR § 216.4(a)(1).

<sup>13</sup> USCIS Memo, "I-751 Filed Prior to Termination of Marriage," (Apr. 3, 2009), available at

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\_Files\_Memoranda/2009/i-

751\_Filed %20Prior\_Termination\_3apr09.pdf or AILA Doc. No. 09072166.

<sup>14</sup> See Neufeld Memo on Adjudication of I-751 for Legally Separated Couple, April 3, 2009, AILA Doc. 09072166. <sup>15</sup> INA § 216(c)(2)(A).

<sup>16</sup> Id.

<sup>17</sup> 8 CFR §§ 216.4(d), 216.5(f), *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994).

<sup>18</sup> 8 CFR § 216.4(d)(2).

<sup>19</sup> See, e.g., Matter of Anderson, 20 I&N Dec. 888 (BIA 1994) (IJ has no authority to review request for waiver where respondent asserted different basis before INS).

<sup>20</sup> See Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992).

<sup>21</sup> 8 CFR § 216.5(e)(3).

<sup>22</sup> 8 CFR § 216.5(e)(3)(i).

<sup>23</sup> Id.

<sup>24</sup> 8 CFR § 216.5(e)(3).

<sup>25</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. NO.103-322, § 40,702 Stat. 1796, 1955 amending INA § 216(c)(4).

<sup>26</sup> See INA § 216(c)(4)(D).

<sup>27</sup> INA § 216(c)(4)(A).

<sup>28</sup> INA § 216(c)(4)(D); see also, Matter of Monroe, 26 I&N Dec. 428 (BIA 2014); Singh v. Mukasey, 536 F.3d149 (2d Cir. 2008) & Hammad v. Holder, 603 F.3d 536, 545 (9th Cir. 2010).

<sup>29</sup> See INA § 216(c)(4).

<sup>30</sup> Waggoner v. Gonzales, 488 F.3d 632,634-38 (5<sup>th</sup> Cir. 2007).

<sup>31</sup> See Darif v. Holder, 739 F.3d 329 (7th Cir. 2014).

<sup>32</sup> See 67 Interpreter Releases 341 (March 19, 1990).

<sup>33</sup> 8 CFR § 216.5(e)(1).

<sup>34</sup> Matter of L-O-G-, 21 I&N Dec. 413, 417 (BIA 1996).

<sup>35</sup> INA § 216(c)(4)(D).

<sup>36</sup> INA § 216(h)(2).

<sup>37</sup> 8 CFR § 216.4(a)(2).

<sup>38</sup> See INA §§ 216(b), (c), 241(a)(1)(D)(i); 8 C.F.R. § 216.3-216.5 (1998).

<sup>&</sup>lt;sup>1</sup> See 8 CFR § 216.1 (definition of conditional permanent resident).

<sup>&</sup>lt;sup>2</sup> PL 99-639 § 5(b).

<sup>&</sup>lt;sup>9</sup> See INA §§ 216(a)(2)(C), 216(c)(2)(A), and 8 CFR § 216.4(a)(6).

<sup>39</sup> See Matter of Lemhammad, 20 I&N Dec. 316, at 320; 8 C.F.R. 216.3. <sup>40</sup> INA § 216(c)(2)(A); 8 C.F.R. § 216.4. <sup>41</sup> INA § 216(c)(3)(C); 8 C.F.R. § 216.4(d)(2). <sup>42</sup> INA §§ 216(b)(2) & 216(c)(3)(D) 43 INA § 216(b)(2), (c)(2)(B), and (c)(3)(D); Matter of Gawaran, 20 I&N Dec. 938, 942 (BIA 1995), aff'd, 91 F.3d 1332 (9th Cir. 1996); Matter of Lemhammad, supra; 8 C.F.R. " 216.3(a), 216.4(d)(2). 44 See Matter of Mendes, 20 I&N Dec. 833 (BIA 1994). <sup>45</sup> Matter of Herrera del Orden, 25 I&N Dec. 589, at 595 (BIA 2011). <sup>46</sup> 8 CFR §§ 246.1, 246.3, 1246.1 & 1246.3. <sup>47</sup> See Ali v. Reno, 22 Fed. 3d 442 (2d Cir. 1994). <sup>48</sup> Yaldo v. INS, 424 Fed.2d 501 (6th Cir. 1970). 49 INA § 237(a)(1)(D). <sup>50</sup> INA § 237(a)(1)(G). <sup>51</sup> INA § 237(a)(1)(E). 52 INA § 237(a)(2). 53 INA § 237(a)(3). 54 INA § 237(a)(4). <sup>55</sup> INA § 237(a)(2)(A)(i). 56 INA § 237(a)(2)(A)(ii). 57 INA § 237(a)(2)(A)(iii). 58 INA § 237(a)(2)(E). 59 INA § 240(c)(3). <sup>60</sup> See generally INA § 237(a)(2); one exception to this rule is certain violations of protective orders. See § 237(a)(2)(E)(ii). 61 INA § 240(c)(3)(B). <sup>62</sup> Matter of Rivens, 25 I&N Dec. 623, 624-27 (BIA 2011).

- 63 Landon v. Plasencia, 459 US 21 (1982) and Cameron v. Holder, 755 F.3d 115, 118-20 (2d Cir. 2014)
- <sup>64</sup> Go to <u>www.uscis.gov/i-751</u> for information on filing the I-751.



San Francisco 1663 Mission Street, Suite 602 San Francisco, CA 94103 t: 415.255.9499 f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C. 1016 16th Street, NW, Suite 100 Washington, DC 20036 t: 202.777.8999 f: 202.293.2849

#### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.