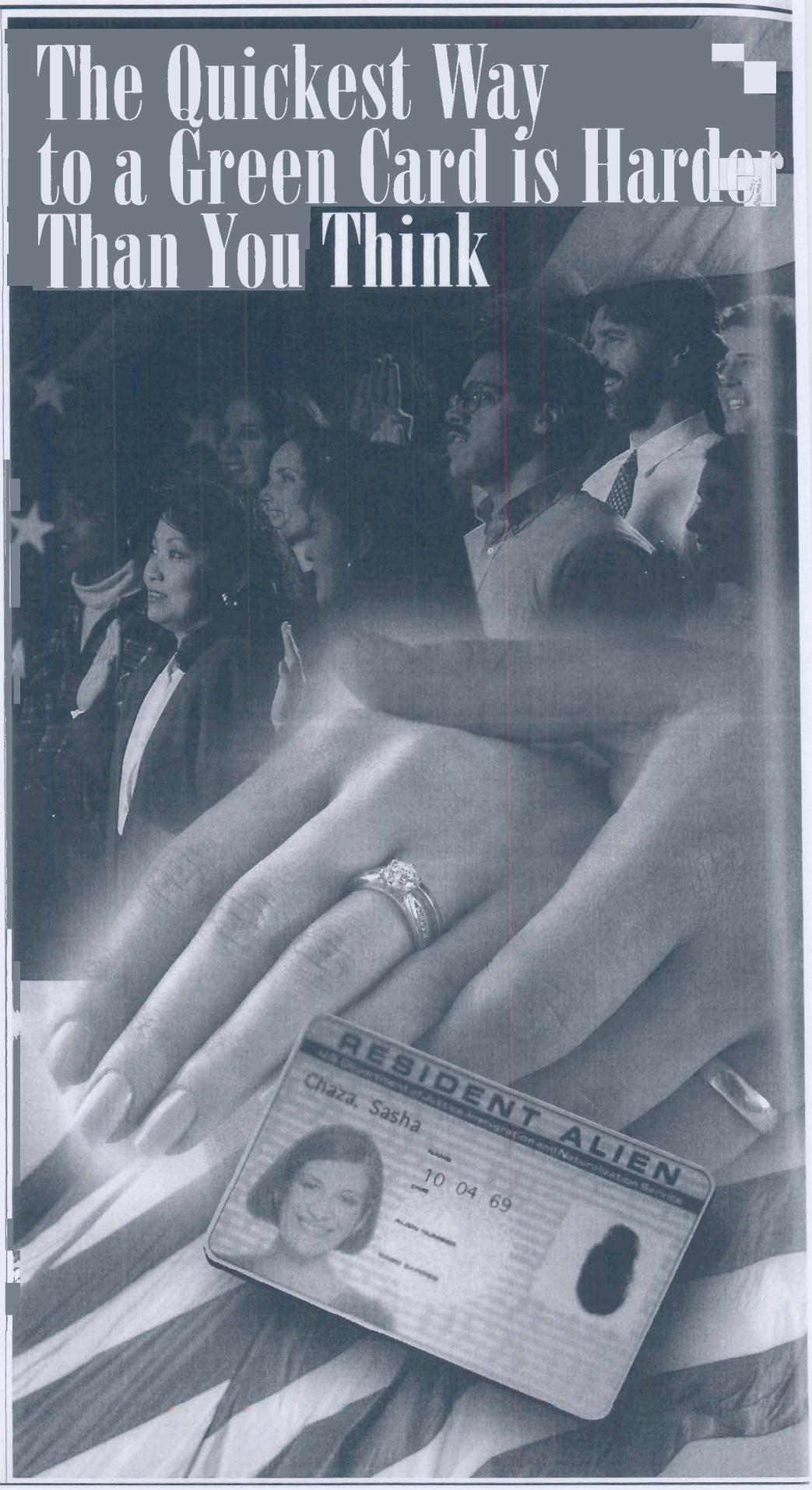
The Quickest Way to a Green Card is Harder Than You Think

by Heather L. Poole



Marrying a U.S. citizen has traditionally been the quickest route to U.S. permanent residency (most commonly referred to as having a "green card"). Even now, despite the crackdown on sham marriages entered into in the 1980s and early 1990s, immigration attorneys receive calls to this day from people openly admitting they married to obtain a green card and money exchanged hands as if its common practice and easy to get around. The penalties for marriage fraud, if a person is caught, are steep, including a possible five-year jail sentence, a $250,000 fine and, perhaps the worst consequence for an immigrant, a lifetime bar to ever receiving a family or marriage-based immigrant visa that could otherwise lead to a green card. (8 USC §1325(c), Immigration and Nationality Act §275(c); 18 USC §§371, 1001, 1546.) For many, though, the benefits of this arrangement still outweigh the risk. Working illegally as a bar to receiving a green card does not apply when an immigrant is married to a U.S. citizen spouse sponsoring him or her for a green card. (INA §245(c).) Overstaying a visa and then residing illegally in the U.S. without lawful immigration status is forgiven when an immigrant is married to a U.S. citizen spouse sponsoring him or her for a green card. (INA §212(a)(6)(A).)

In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA), based on the premise that the surest way to counteract and detect fraudulent marriages entered into for the sole benefit of obtaining a green card was to primarily test the longevity of the relationship. (Immigration Marriage Fraud Amendments Act of 1986 (Pub. L. 99-639, 100 Stat. 3537).) This law, which amended the Immigration and Nationality Act, established the "conditional" green card. Now, consuls abroad and U.S. Citizenship and Immigration Services ("CIS"), formerly known as INS inside the U.S., issue "green cards" for only two years. These condi-

tional green cards are issued to an immigrant whose marriage to a U.S. citizen is less than two years old at the time the green card case is approved. This conditional status is usually granted at the green card interview in front of the spouses or subsequently, if a decision cannot be made at the interview due to a pending background check or other issue with the file.

This "conditional green card" will expire two years after the initial permanent residency status was approved if, in most cases, the couple cannot prove that they are still living together as husband and wife at the end of that two-year period. The immigrant has a 90-day window immediately prior to the permanent residency's expiration to file with their spouse to remove the conditional basis of residence. If this window is missed, permanent residency expires, will be officially terminated, and the immigrant spouse will be subject to deportation.

Usually, the immigrant spouse's goal is to keep their green card by timely filing to remove the condition and make their residency permanent. In rare cases, immigrant spouses just leave the U.S. after their green card expires, abandoning their residency. The immigrant will have to start all over as a temporary, nonimmigrant visa holder, in most circumstances, and apply for re-entry into the U.S. at a later point. This may be more difficult to accomplish, requiring the immigrant spouse to convince a consular officer and port of entry officer that, although s/he was a former lawful permanent resident and lived in the U.S., s/he has no current intent to "move back" to the U.S. by trying to qualify for, or enter the U.S. with, a temporary visa.

A "permanent" green card is valid for ten years, is easily renewable and, once issued, is no longer affected by the split of the parties through divorce or death of the petitioning U.S. citizen spouse. Unconditional lawful permanent residency is not U.S. citizenship but it does allow the immigrant to live in the U.S. for the rest of his or her life unless the card is abandoned by moving outside of the U.S. or the immigrant is deported for, in most situations, criminal acts.

Oops. Forgot to File!

A common problem occurs when the immigrant and/or their spouse forget about the expiration of the green card and lawful permanent residency is terminated.

With an expired card, the immigrant will have no legal proof for their employer that she or he still has the legal right to work. The immigrant will also have no proof that he or she has a right to re-enter the U.S. if the immigrant travels abroad with an expired green card. This problem trickles down into every facet of the immigrant's life on paper including making it impossible to renew a driver's license, professional license, and to obtain credit. This problem also places the immigrant in a vulnerable position with a controlling or abusive spouse. An immigrant without legal status loses leverage and position in custody and alimony negotiations in divorce proceedings. The immigrant spouse, who is often worried about being deported because the other spouse will not cooperate in filing the joint petition, is often forced to sign "contracts" with their spouse. Commonly, through such contracts, the immigrant spouse, who may not know of the waiver option as an alternative to the joint petition, will sign over a jointly owned auto and an existing joint house deed to the sole property of the U.S. citizen spouse, to achieve their spouse's compliance..

The statute allows an immigrant to file to release the condition on their green card by either joint petition or waiver even if the immigrant files "late," which is after the 90-day win-

dow before the two-year conditional residency expires. The joint petition or waiver may be filed even when CIS has already affirmatively terminated the immigrant's permanent residency. An immigrant must have "good cause" for filing late, however. "Good cause" is a term that is undefined in the statute or case law. (8 CFR 216.4(a)(6).) In practice, the shorter the time between the expiration of the green card and the filing of the waiver or joint petition, the more likely CIS will excuse the late filing. Documenting the reasons that led to the late filing (*e,g,*, family emergency, medical crisis, a move to a new city, upheaval at work) greatly improves the chances that CIS will accept the case. The petition must, however, be filed before the Immigration Court assumes jurisdiction over the immigrant, which occurs when the client is served with a "Notice to Appear" ("NTA") before an immigration judge for the commencement of removal proceedings (*i.e.*, deportation). When this will happen remains a gamble for the immigrant who never knows when an NTA will be issued; this event can occur as soon as three to six months after the card's expiration, and sometimes not at all.

Once the CIS sends a notice to the immigrant that his or her petition has been received (called a "receipt notice"), the immigrant's unlawful status since the date his or her green card expired will be backdated to the date of expiration, returning the immigrant to lawful immigrant status. And this backdating occurs even if the petition was filed late. Further, the receipt notice itself provides the immigrant with proof that his or her green card is still valid for another year or until the case is decided, whichever comes first. If the case is still not decided within a year, the green card will be extended for another year and will continue to be extended annually until the case is decided. Currently, the average processing time for the Los Angeles CIS Field Office,which oversees the Santa Ana sub-office, to issue a decision in a joint petition or waiver case ranges from one to eight months.

When the Marriage Falls Apart

Even if the couple is experimenting with a trial separation but neither has filed for divorce, it may be possible to continue with the joint petition if there is hope for reconciliation. In this situation, it is much more likely that the couple will have to interview again with CIS to verify the *bona fide* nature of the relationship, especially if separation happened within the first six months after the immigrant's initial green card was approved. The more common occurrence immigration attorneys face, especially given the divorce rate in this state, is that the couple has no intent to reconcile and usually one of the spouses has already filed for divorce.

Marriages that are on the rocks as the two-year expiration date approaches can greatly interfere with the immigrant's desire to keep their permanent residency. Even if a marriage was initially entered into for "love," but is now leading to divorce due to domestic violence, adultery, or other "irreconcilable differences" near the time the immigrant's green card is about to expire, a joint petition may not be feasible by the time the green card expires. In most cases, requiring the cooperation of the petitioning U.S. citizen to sign and file to have the condition removed creates a power-struggle between a feuding couple and, worse, gives a potentially or already abusive U.S. citizen spouse even more power and leverage over the immigrant.

There are limited exceptions available to an immigrant spouse when his or her U.S. citizen spouse will not cooperate in filing to have the condition removed from the green card. If a

couple separates or divorces at any time after the green card is first issued, it is unlikely that the originally sponsoring U.S. citizen, or "lawful permanent resident," spouse will cooperate in helping the immigrant spouse for a number of reasons. If this happens, it may be possible for the immigrant spouse to apply to have the condition removed from his or her own green card by applying for a "waiver." The waiver allows the immigrant to apply to remove the condition on his or her green card without the assistance, and sometimes even without the knowledge, of their U.S. citizen spouse. The other benefit, applicable to each of the three grounds for a waiver, is that the waiver may be filed before the 90-day expiration of the immigrant's green card and, in some circumstances, even after permanent residency has terminated for failure to file before expiration. (*Matter of Stowers*, 22 I & N Dec. 605 (BIA 1999)(noting that, although the statute only specifically mentions that the extreme cruelty waiver may be filed before or after the 90-day window, it is logical to conclude that Congress intended to allow any of the waivers to be filed at any time, assuming joint filing is not possible or feasible).)

There are three different grounds to apply for a waiver:
(1) *good faith marriage;*
(2) *extreme hardship;*
(3) *extreme cruelty.*

The Good Faith Marriage Waiver

The good faith marriage waiver requires that the immigrant's marriage is over, *i.e.,* that a final divorce decree has been issued prior to filing the case. (W. Yates, Acting Assoc. Dir. Operations, "Filing a Waiver of the Joint Filing Requirement Prior to the Final Termination of the Marriage," INS Mem. HQADN 70/23.12 (Apr. 10, 2003).) The immigrant must also prove that the marriage was entered into in good faith and was terminated through no fault of the immigrant. (INA §216(c)(4)(B).)

This waiver creates a timing issue for an immigrant trying to prove the *bona fide* nature of the relationship, especially in states such as California with minimum waiting periods of six months before a final divorce decree may be issued. If the immigrant does not want to gamble with the possibility of facing deportation and falling out of status until his or her divorce becomes final, the immigrant will file the divorce early to ensure that the final decree is issued prior to the permanent residency's two year expiration. The problem this creates is that it necessarily shortens the amount of time that the couple remains married or even living together on paper after the green card's initial issuance, thereby creating the appearance of a sham marriage because of its short duration. To counteract the effect of the limited duration of the marriage, the immigrant will likely have to prove – through numerous joint accounts that remained active and used by both spouses during the period following the initial grant of lawful permanent residency to the date of separation – that the marriage was indeed real and not entered into for the sole benefit of a green card.. Although the seminal authority in marriage-based cases, *Matter of McKee,* indicates that the standard of review in any marriage case is whether the marriage was valid *at its inception*, CIS, in practice, chooses to focus solely on evidence showing a good faith marriage *during* the conditional two-year period. *(Matter of McKee,* 17 I & N Dec. 332 (BIA 1990)(holding that the focus should not be on whether there is a presently subsisting "viable" marriage, but rather whether the marriage was entered into for the primary purpose of circumventing the immigration laws in the first place).)

The Extreme Cruelty Waiver

The extreme cruelty waiver, added when IMFA was amended by the Immigration Act of 1990, also requires that the immigrant demonstrate that s/he entered the marriage in good faith but was battered or otherwise subjected to extreme cruelty by their spouse during the marriage. (Pub. L. No. 101-649, 104 Stat. 4978 (IMMACT90), now reflected in INA §216(c)(4)(C).) Extreme cruelty as defined in the regulations may include:

> . . . being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. (8 CFR §216.5(e)(3)(i).)

Although not mentioned specifically in the statute or regulations, extreme cruelty also includes financial abuse,. If one incident of violence is severe enough, there will be no need to

establish a pattern of abuse. In most cases, however, there is not one moment of abuse that stands out in the relationship. Consequently, CIS has adopted a "totality of the circumstances" approach to reviewing these cases. Even periods of contrition by the abusive spouse may count towards establishing abuse if the abused immigrant is being influenced psychologically and is unavoidably caught in the cycle of violence. (*Hernandez v. Ashcroft*, 245 F.3d 834 (9th Cir. 2003)(overturning the Board of Immigration Appeals decision in a suspension of deportation case and holding that extreme mental cruelty existed during the contrition period of the abuse cycle).)

The extreme cruelty waiver applies both to women and men. The immigrant may offer "any credible evidence" to prove their case. (INA 216(c)(4); *see also* Aleinikoff, Exec. Assoc. Comm'r, Office of Programs, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents", INS Mem. HQ 204-P (Apr. 16,1996).) Such evidence may include affidavits of witnesses, both indirect and direct, police and medical records, psychological evaluations, shelter letters, and restraining orders. Section 40702 of the Violence Against Women Act of 1994 amends section 216 of the Immigration & Nationality Act to prohibit CIS from requiring any specific form of evidence, such as the recommendation of a mental health professional, to support a conditional green card waiver based on abuse or extreme cruelty. And, although the immigrant still has to demonstrate that s/he entered into the marriage in good faith by providing copies of joint documents and evidence of a shared life together, the "any credible evidence" standard affords the immigrant the opportunity to explain why certain joint documents are inaccessible or why many joint accounts never existed in the first place given the controlling nature of the relationship.

These are usually very emotional cases. Often the immigrant has never sought counseling before and will rely on the attorney to help them come to terms with, and start recognizing, abuse. The attorney is possibly in the best position to encourage the immigrant to seek counseling and physical safety, two priorities the immigrant may have dismissed for fear of leaving an abusive situation due to potential loss of their green card. Despite the emotional nature of these cases and the time involved, there are distinct advantages to filing under this waiver ground. For one, a final divorce decree is not required. The immigrant does not even have to be separated from their spouse. Second, the petition process is completely confidential. If filed on this ground, CIS is forbidden to disclose the existence of this case to anyone outside of the agency, including the immigrant's spouse. 8 CFR 216.5(e)(3)(viii) provides for confidentiality of conditional green card waivers based on the extreme cruelty ground. CIS may not release any information about the filing without the written consent of the immigrant or by court order unless it is being released to the immigrant or the Department of Justice or other law enforcement officials. Because the batterer or abusive spouse will not learn, from any CIS source, about the existence of the case, the immigrant spouse does not have to worry about a controlling and unpredictable spouse sabotaging the waiver interview if one is scheduled. This waiver affords the immigrant the opportunity to take back control over their own immigration case, free from the whims, anger, and retaliation of their spouse.

The Extreme Hardship Waiver

The extreme hardship waiver is the only one that does not require the immigrant to prove that s/he entered into a good faith marriage. (INA, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 7 USC §§1101 *et seq.*), §216(c)(4)(A); *but see Velasquez v. INS*, 876 F.Supp 1071 (D. Minn. 1995) (upholding an INS interpretation of §216 that an alien who engages in a sham marriage is ineligible for an extreme hardship waiver notwithstanding the alien's current *bona fide* marriage).) While, at first glance, it may seem this type of waiver is the easiest to obtain – especially if the immigrant has little documentation to support the existence of a *bona fide* marriage – the extreme hardship waiver is generally thought to be the most difficult type to get approved.

The immigrant must demonstrate that s/he would suffer extreme hardship if deported to their home country. The hardship must arise from developments in the immigrant's life or country's political or economic conditions that arose during the conditional period only. (INA §214(c)(4)(A).) If the immigrant is a woman rocket scientist from Iran, a country which does not have a space program but does have a doc-

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umented educational and cultural bias against women, perhaps this is an easier case to prove. But when the immigrant comes from a country generally perceived to be politically in sync with the U.S., such as the United Kingdom, Canada, Mexico, or the Philippines, it becomes a much more difficult case to prove. The definition of what constitutes extreme hardship is left undefined in the statute and is constantly evolving in the realm of case law which varies depending on the applicable circuit. Some of the factors applied by CIS include:

- The economic and political conditions of the immigrant's home country;
- The immigrant's occupation and work skills;
- His or her immigration history;
- The immigrant's position in the community;
- Whether the immigrant is of special assistance to the U.S. or their community;
- The age of the immigrant;
- The age and number of the immigrant's children and their ability to speak the native language and adjust to life in another country;
- The immigrant's inability to obtain adequate employment in the foreign country;
- How long the immigrant has lived in the U.S.;
- The irreparable harm to the immigrant that may arise as a result of disruption of educational opportunities; and
- The adverse psychological impact of deportation on the immigrant.

(See *Matter of Kao & Lin*, 23 I&N Dec. 45 (BIA 2001); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).)

Proving extreme hardship can be tricky, comparable to a mini-political asylum case relying on documents like Human Rights Watch press releases that track the current climate of political and economic unrest in a client's home country. As with asylum cases, the case for extreme hardship can fall apart if the home country's conditions improve. Evidence to support a case for extreme hardship may include a report from a licensed psychologist or Marital and Family Therapist documenting the immigrant's current mental state and the prognosis for deterioration and potential long term physical and mental effects that could be triggered by deportation. Immigrants may also produce medical reports, doctors' letters, and affidavits from friends, co-workers and even family members to describe the hardship the immigrant will suffer if separated from these relationships.

Why would an immigrant opt for an extreme hardship waiver, given the difficulty of proof? Take the case of an immigrant who is separated from his or her spouse and is quickly approaching the two-year conditional residency expiration but does not yet have a final divorce decree. Filing the extreme hardship waiver allows the immigrant to buy time, *i.e.*, to remain in lawful status until the divorce is final and then re-file under the good faith marriage ground if it will be a stronger case. The case for extreme hardship must be legitimate and documented or else filing for this waiver will create credibility issues, impairing the immigrant's chances of receiving *any* waiver approval. Lastly, this waiver has no statutory relation to the marriage itself, so an immigrant who is not on good terms with his spouse will not have to worry about the spouse's cooperation or input.

All Hope Lost? Understanding the Appeals Process

The statute is silent on whether an immigrant can apply for more than one waiver ground simultaneously, but immigrants are urged to apply for as many grounds as are applicable and

arguable. A denied waiver or joint petition cannot be technically appealed to CIS, although counsel may file a motion to reconsider within 30 days of the decision based on evidence unavailable at the time of the case submission. (8 CFR 103.5(a)(1)(i).) A motion to reopen may be possible within that 30-day period as well if counsel can prove that CIS applied an incorrect legal standard or relied on inapplicable or overturned case law. (Id.) Appeal of the CIS decision must await issuance of a Notice to Appear before an immigration judge before whom the merits of the case may be re-argued. Because an immigration judge may only review the particular ground or grounds applied for, it is in the best interest of the immigrant to apply for as many feasible and supportable grounds to preserve the possibility for appeal.

Citizenship Consequences – Waiver vs. Joint Petition

In deciding whether to file a joint petition with their spouse, or going it alone by filing for a waiver, what are the consequences for citizenship eligibility? If the immigrant who decides to file a joint petition received their green card through marriage and is still living with their husband or wife three years after the green card is initially

issued, the immigrant will be eligible to apply for U.S. citizenship, even if the joint petition to remove the condition on the two year green card has not yet been decided. Filing for U.S. citizenship will actually speed up the process by which CIS decides the conditional residency issue, as conditional residency will no longer be an issue if a person has already received U.S. citizenship.

But what happens to an immigrant's eligibility to apply for U.S. citizenship if he or she does not stay with their spouse and, instead, files a waiver petition on their own? If an immigrant is applying for a waiver because he or she is divorced, or for any other reason is not living with the spouse anymore, then the immigrant will be eligible for citizenship after five years of lawful permanent residency status. If a waiver is approved based on the "extreme cruelty" ground, the immigrant will be eligible to apply for U.S. citizenship in three years, even if no longer living with the abusive U.S. citizen spouse. (W. Yates, Office of the General Counsel, Policy Memo #89, "Instructions Regarding the Expanded Meaning of Section 319(a)", HQISD 70/33 (October 15, 2002).)

Before deciding whether to stay in a bad marriage, an immigrant must address their available options under both the waiver provisions and the joint petition provisions of the Immigration and Nationality Act. An immigration lawyer may be in the best position to help an immigrant explore the potential advantages and disadvantages of choosing a particular route and many consultations with immigration attorneys throughout the U.S. are provided free of charge. The immigrant should keep a close eye on the expiration date of their conditional green card and not let it expire before seeking legal assistance. To learn more about conditional green cards, visit the U.S. Citizenship & Immigration Services' website at *www.uscis.gov*.

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