Overcoming Challenging Bona Fides Issues
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INTRODUCTION

Marriage-based immigrant petitions and (where applicable) concurrent applications for adjustment of status can form a major part of an immigration lawyer’s practice. This Practice Pointer will focus on traditional and creative ways to prove the bona fides of a couple’s marital relationship.

A couple who has filed an I-130 immigrant petition based on marriage must submit documentation establishing both the “standing of the petitioner (evidence of U.S. citizenship or lawful permanent residence) and validity of relationship (evidence of lawful marriage of the petitioner and beneficiary and of the termination of any and all prior marriages of both parties.)” Adjudicator’s Field Manual (AFM) ch. 21.3(a)(1)(B).

The standing of the Petitioner to file a marriage-based petition is usually relatively easy to prove: simply provide the Petitioner’s birth certificate, naturalization certificate and/or U.S. passport (if a U.S. citizen), or proof of the Petitioner’s permanent residence status. Make sure that the originals of these documents are readily available, as the adjudicating U.S. Citizenship and
Immigration Services (USCIS) officer may eventually need to review them for accuracy and validity.

It is the Petitioner’s burden to prove the validity of his/her relationship with the Beneficiary; the Petitioner’s proffered proof will be analyzed under the “preponderance of the evidence” standard, otherwise known as the “more likely than not” standard. In certain cases not addressed by this Practice Pointer, the standard of proof may be higher. The petition may be approved if the marriage is “valid and was not entered into solely for immigration purposes.”

The real adjudication regarding the validity of the marriage most frequently happens later, either at what is commonly referred to as a “245 adjustment interview” for the section of law governing Adjustments of Status or at the U.S. consular post during the immigrant visa interview. Either way, the interview is an opportunity for a USCIS examiner or a consular officer to examine the evidence that the Petitioner provides as proof of his/her bona fide marriage to the Beneficiary, and is the time when the official will make a final determination as to the Beneficiary’s eligibility to adjust or immigrate based on that I-130 petition.

If the permanent residence application is approved prior to the parties’ two-year wedding anniversary, the foreign national will be admitted to the United States as a conditional permanent resident for an initial two year period. An I-751 Petition to Remove the Conditions of Residence will need to be filed during the 90 day period immediately preceding the expiration of this period. At the time of the I-751 Petition, it will once again be necessary to demonstrate that the marriage was not entered into for the purpose of evading the immigration laws of the United States. When filing the I-751, the best practice is to provide evidence of the continuing viability of the marriage, if available.

USCIS adjudicators are trained to watch for “red flags” that indicate possible marriage fraud; you should become familiar with these red flags as well. Note that if there is “evidence that the marriage was entered into for the purpose of evading the immigration laws, the petition must be denied.” The Beneficiary may then be ineligible for future immigration benefits per Immigration and Nationality Act (INA) §212(a)(6)(c)(i), which describes a ground of inadmissibility based on fraud or willful misrepresentation of a material fact.

PROVING THAT A MARRIAGE IS VALID: THE BONA FIDE EVIDENCE

- Documenting the marriage and/or prior marriage terminations

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2 AFM ch. 11.1(c).
3 Marriages entered into while the foreign national spouse is in removal proceedings may not be approved unless the couple establishes by “clear and convincing evidence” that the marriage was entered into in good faith. INA §204(g); §245(e)(3).
4 AFM ch. 21.3(a)(2)(H).
5 See 8 CFR §216.(a)(5).
7 INA §204(c).
8 Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.).
Overcoming Challenging Bona Fides Issues

- Start with the marriage certificate and all relevant documentation regarding the termination of prior marriages.
- If your clients were married to each other in the United States, produce an original marriage certificate, not just a marriage license.
- If they were previously divorced in the U.S., they must produce an appropriate divorce decree/judgment from the relevant authorities.
- If your clients were married in a foreign country, review the *Foreign Affairs Manual*’s reciprocity tables to ensure that USCIS will accept the documentation.
- The same applies to prior divorces in foreign countries: check the reciprocity tables.

### Other Evidence

- Evidence of joint financials (several months’s or longer worth of joint bank/financial account statements with both spouses names; jointly held credit cards; jointly held savings account statements; evidence that the couple has jointly filed tax returns);
- Evidence of joint insurance (health; car/vehicle; house or renter’s, etc.);
- Estate planning documents (Documents of one spouse naming the other spouse as Health Care Proxy or granting the other spouse Power of Attorney; one spouse’s will naming the other spouse as beneficiary);
- Job benefits (401(k)) or other retirement account of one spouse listing the other spouse as beneficiary);
- Joint utility accounts (electricity; gas; water; telephone/cable, cell phone, etc.)
- Lease, property title, or mortgage in both names;
- Photographs; and, if applicable,
- Evidence related to the couple’s children, such as each child’s birth certificate listing both parents’ names.

**PROVING BONA FIDES IN A NEW “MODERN,” OR “NON-TRADITIONAL MARRIAGE”**

USCIS guidelines for marriage often appear at odds with the digital age. Some couples will not have all, or even some, of the types of evidence listed above, for a variety of reasons: they are young and have not yet tackled estate planning issues; they are living in different cities due to jobs or schooling; the foreign national spouse is undocumented and cannot open a bank account without a social security number, or a public utility refuses to add a spouse’s name to the household account. Therefore, you should think creatively about other types of *bona fides* evidence that will convince an adjudicator that your clients entered into a good faith marriage.

The court in *Damon v Ashcroft*, 360 F. 3d 1084 (9th Cir. 2004) held that the adjudicator should look at the “parties’ intent at the time of the marriage and refrain from imposing [the adjudicator’s] own opinions about what a ‘real’ marriage is or should be or how parties in such a marriage should behave.” Moreover, adjudicators “should refrain from imposing their own norms and subjective standards on the determination” and “look to objective evidence.” This is especially necessary as marriages are becoming less “traditional.” For example, one in four
Americans are meeting their spouses online and four out of ten single adults in the U.S. claim to have tried an online dating site or app.\(^9\) Additionally, it is becoming more common for couples to maintain individual bank accounts. According to a study by TD bank, 42 percent of those in relationships have individual accounts in addition to a joint bank account.\(^10\) With the decrease of traditional marriage and the increase in modern dating practices, it is necessary to use original and creative ways to prove a \textit{bona fide} marriage. Even couples who can provide a significant amount of the evidence listed above should considering including:

- Evidence of trips taken together (tickets, hotel reservations, photos, etc.);
- Joint gym or other memberships;
- If a telephone account is in only one spouse’s name, evidence that each spouse’s phone number is listed on the account;
- Printout from one spouse’s checking account proving that s/he writes the other spouse a check for half of the rent every month;
- Evidence that a spouse is listed as an emergency contact on a work-related form;
- If the spouses have pets, a printout of a letter or bill from the veterinarian listing both spouses as “pet parents” (likewise, a joint pet adoption certificate);
- Affidavits from friends and family;
- Photographs;
- A printout from Netflix or a similar program showing that each spouse is listed as an approved user;
- Letters or cards addressed to the couple (preferably including envelopes, so that the adjudicator can examine the postal processing stamp to confirm its validity).

If an officer requests certain evidence that is unavailable, the spouses should be prepared to answer why they are unable to produce that evidence—for example, “Our names do not appear together on the lease because Spouse B moved into Spouse A’s apartment, and the landlord refuses to update the lease until it is up for renewal.”

**ISSUES RELATED TO SAME-SEX AND TRANSGENDER MARRIAGE**

In \textit{U.S. v. Windsor}, 133 S. Ct. 2675 (2013), the Supreme Court held that section 3 of the Defense of Marriage Act (DOMA), which previously had barred recognition of same-sex marriages for all Federal purposes, including immigration, is unconstitutional. As a result, same-sex marriage is now a lawful basis for all immigration benefits based on marriage.

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A same-sex marriage that is legally valid in the jurisdiction in which it was performed is valid for immigration purposes, regardless of whether the jurisdiction in which the parties reside recognizes same-sex marriage.\textsuperscript{11} In the immediate wake of the \textit{Windsor} decision, many same-sex married couples, many with longstanding relationships, have filed marriage-based I-130 petitions. Some of these couples have been able to provide ample \textit{bona fides} evidence because of the longstanding nature of their relationships. Other same-sex couples have had problems gathering \textit{bona fides} evidence, for a variety of reasons. These clients should be encouraged to think creatively about how to obtain \textit{bona fides} evidence in order to meet the burden of proof.

Consider the following issues, which relate both to a couple’s initial filing and the §245 interview:

- **LGBT Couples with a Dearth of Bona Fides**

  Some LGBT couples have lived for years “in the closet,” and thus they may not have access to the same types of evidence as a married couple who live their lives freely and openly. Your clients may work for an employer who discriminates (legally or illegally) against LGBT individuals, and they are thus unable to take advantage of employment-related spousal benefits; they may rent from a homophobic landlord; they may not have come out to their families. If this is the case, think creatively about what types of evidence the clients are able to obtain. You may need to supplement the available \textit{bona fides} with numerous personal affidavits from friends that confirm that the clients are not fully “out,” but are in a \textit{bona fide} marital relationship.

  - \textit{Example}: Your client lives in a state that has made it illegal for employers to refuse to provide marriage-based employment benefits to same-sex couples. However, when the Petitioner attempted to add his spouse to his employee benefits plan, his employer unlawfully refused. The Petitioner joined a class action lawsuit against his employer. If possible, provide documentation related to the class action lawsuit; otherwise, prepare the client to explain the situation to the USCIS officer.

  - \textit{Example}: Because they fear their families’ reactions, your clients are not “out” to their families, or else their families choose not to be part of their lives. Thus, certain desirable \textit{bona fides} evidence—family photos or other evidence of a familial relationship—are not available. Prepare the clients for potential questions from the adjudicator regarding their family relationships.

- **Prove the Marriage-related Law**

  - LGBT clients often obtained civil unions before marriage equality became the law of their locality. Some clients may mistakenly believe that their Civil Union was automatically converted to marriage upon the introduction of marriage equality to their locality. \textit{USCIS will not accept a civil union

\footnote{\textit{Matter of Zeleniak}, 26 I\&N Dec. 158 (BIA 2013).}
document alone, so the clients may need to get legally married before filing an I-130 petition!

- Refer to the U.S. Department of State’s reciprocity tables for any marriages celebrated overseas, to ensure that the clients can provide the proper documentation of their marriage.

### Transgender marriage issues

- Post-Windsor, as long as a couple is married in a jurisdiction that recognizes marriage equality, the fact that a spouse is transgender has no bearing on the validity of the marriage for immigration purposes. AFM ch. 21.3(a)(2)(J).

- If a couple is married in a locality that does not recognize marriage equality, Matter of Lovo-Lara, 23 I&N Dec. 746 (BIA 2005), still applies: “...benefits based upon marriage may be approved on the basis of a marriage between a transgender individual and an individual of the other gender if the Petitioner/Applicant establishes 1) the transgender individual has legally changed his or her gender and subsequently married an individual of the other gender, 2) the marriage is recognized as a heterosexual marriage under the law where the marriage took place…and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender.” AFM ch. 21.3(a)(2)(J).
  - USCIS will presume the validity of the marriage involving a transgender individual in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt. AFM ch. 21.3(a)(2)(J).

- See AFM ch. 21.3(a)(2)(J) for a detailed discussion of the types of documentation USCIS will recognize regarding an individual’s changed gender. The documentation includes an amended birth certificate, passport, or medical certification from a licensed physician. Note that sex reassignment surgery is not a requirement for an approved I-130, unless the law of the place of marriage clearly requires sex reassignment surgery in order for the marriage to be deemed valid.

### Conditional Resident Status Issues Amid Domestic Violence Allegations

The foreign national faces additional challenges in removing the conditions on his or her permanent residency if the marital relationship is no longer viable. One of the key waivers to the joint filing requirement for the I-751 applies where the marriage was entered into in good faith, but during the marriage, the foreign national or his or her child was abused or subjected to extreme mental cruelty by the U.S. citizen or lawful permanent resident (LPR) spouse or parent.¹²

¹² INA §216(c)(4)(C).
Thus, in addition to providing evidence of the battery and/or extreme mental cruelty to qualify for this waiver, the foreign national must again also prove that the marriage was entered into in good faith, and not for fraudulent immigration purposes. As mentioned in the above section, the burden of proof for the waiver request—including demonstrating the validity of the marriage—falls on the foreign national.13

In an abusive marriage, this may be a daunting task because many traditional forms of joint marriage evidence may be unavailable. Often in these relationships, the abuser dominates and controls his or her spouse by severely limiting the foreign national’s financial independence, thereby making the spouse wholly reliant on the abuser. This might be done by restricting access to bank accounts, credit cards, property, and other financial assets or institutions, and/or by keeping all the bills and property (such as the car and the marital home) solely under the abuser’s name. The abusive spouse may prevent the foreign national from earning a livelihood or alternatively, may completely confiscate the earnings so there is no real paper trail of joint financials. Isolation is often a hallmark of abusive relationships, thereby impacting not only the ability of the foreign national to produce evidence of a joint life, but even the ability to collect affidavits from individuals who have socialized with the couple on a regular basis. Finally, the abuser is often well-aware of the foreign national’s status and may seek to manipulate access to other forms of joint life evidence in order to continue holding that uncertain status over the foreign national’s head.

So what can be done to demonstrate a good faith marriage? In these situations, it’s particularly important to think creatively and expansively about documenting and demonstrating the bona-fides of the relationship. Consider the following:

- **Keep it in context:** Frame the available and unavailable evidence within the context of the abusive relationship and within the spirit of this waiver.
  - **The availability of evidence:** If controlling, isolating, and/or manipulative behavior by the USC or LPR spouse accounts for missing or unavailable evidence, explain these circumstances in detail, especially in the foreign national’s affidavit. Similarly, explain the significance behind the available, less-traditional bona-fide evidence, its role in the history of the relationship, and how it demonstrates the foreign national’s good faith intent in entering the marriage.
  - **Congressional intent behind the waiver:** The original legislation14 which created the conditional residence status and attendant requirements did not address the situation of abusive marriages. To remedy the hardship faced by vulnerable foreign national victims in such relationships, Congress enacted the 1990 amendments to the INA15 creating this specific waiver16 in addition to amending existing waivers.

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13 8 CFR §216.5(a)(1).
14 Immigration Marriage Fraud Amendments Act of 1986 (IMFA).
16 Id. at § 701(b) (codified as INA § 216(c)(4)(C)).
Accordingly, the AFM reminds adjudicators that “Congress found that there was a need to spell out that victims of such treatment are entitled to special consideration under the law. . . . It is important that in adjudicating such waiver applications INS officers are aware of and in accord with the views of Congress in passing this legislation.” Argue that abuse victims are entitled to special consideration of the limited availability of traditional types of joint-life evidence.

- **Document the battery and extreme mental cruelty**: Providing evidence of the abuse is part and parcel of establishing the challenge of obtaining joint life evidence in abusive relationships and of providing the broader context within which to examine such evidence.
  - Work with the client to obtain documentation of the abuse such as police reports, medical reports, protective orders, etc.
  - Obtain affidavits and letters from counselors, clergy, friends and family to whom the foreign national has disclosed the abuse. Contemporaneously-disclosed information tends to carry more probative weight. The affidavits should also discuss the bona-fides of the relationship if the person providing the affidavit is knowledgeable.
  - A mental health evaluation can not only provide expert medical evidence of the battery and/or mental cruelty, but can also include expert testimony on why the abuse cycle tends limit the victim’s access to, and ability to provide, the traditional bona-fide marriage evidence.

- **Brainstorm with the client about alternative joint-life evidence**: Think creatively. Ask your client what other kind of accessible documents would reflect their courtship, marriage, joint residence, and joint life together. Some less traditional types of evidence might include:
  - ESL or other class enrollment records which demonstrate a shared address;
  - Cellular and internet text messages, emails and other electronic correspondence;
  - Social media postings, and photographs (it may even be possible to print off a “timeline” reflecting the relationship history);
  - Evidence of a wedding registry or other wedding planning; evidence of gifts, letters, and cards given throughout the relationship and marriage.

- **Help your client complete a thorough affidavit**: This is the foreign national’s best opportunity to explain in his or her own words how they entered the marriage in good

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17 AFM ch. 25.1(h)(3).
18 Practitioners can further analogize to the “any credible evidence” standard under the Violence Against Women Act, and the Service’s recognition that evidence normally available to family-based petitioners may not be accessible because of the dynamics of domestic violence. INA § 204(a)(1)(J); 8 CFR § 204.2(c)(2)(i).
19 However, while such records are compelling, they are not dispositive, and other types of evidence can suffice. “Police reports and hospital records can be key documents in establishing that battering or extreme cruelty existed, but not all cases of abuse contain these items. Officers must be prepared to accept and evaluate other, less traditional, forms of documentation.” AFM ch. 25.1(h)(3).
faith and why he or she is now seeking and qualified for the waiver. The affidavit should discuss, among other key issues:
- The foreign national’s intention of marrying in good faith and for love;
- The relationship, dating, and marriage history, including when and where they met and when and where he or she lived together with the abusive spouse;
- How the abuse and/or extreme mental cruelty curtailed the availability and access to joint life evidence and how the abuse and mental cruelty has impacted the foreign national.

Anytime a foreign national client indicates that he or she has been abused by his or her USC or LPR spouse, the attorney should consider and analyze how the victim might qualify for self-petitioning benefits under the Violence Against Women Act (VAWA). Under these circumstances, a full discussion of how VAWA might benefit a foreign national to immigrate independently should be considered.