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Immigration Concerns for Family Law Practitioners

By Veronica T. Thronson

Michigan is home to a diverse population. It is highly likely that family law practitioners will encounter foreign students and workers, tourists, or people married or otherwise related to a foreign national. This article addresses immigration concerns in family law cases involving foreign nationals. Immigration law has significant connections with family relationships, impacting adoptions, parent-child relationships, divorces, and more.

The concerns addressed in this article include legal issues for foreign nationals who have experienced or perpetrated domestic violence. Specific provisions in immigration law provide remedies for victims of domestic violence, and practitioners must be aware that there could be consequences for perpetrators who are not U.S. citizens. This article highlights some of the most common considerations that family law practitioners should consider in their everyday practice.

Petitioning for Family Members to Immigrate to the United States and the Affidavit of Support

Immigration law permits U.S. citizens and lawful permanent residents to petition for family members meeting certain criteria to immigrate to the United States. The vast majority of immigrants who are lawfully admitted to the United States are admitted based on relationships with family members.[1] A citizen of the United States is able to petition for a spouse; married or unmarried children; parents; and brothers and sisters.[2] A lawful permanent resident may petition for a spouse and unmarried children who are under or over age 21.[3] It is important to note that eligibility to immigrate stems not simply from the fact of the qualifying relationship, but also from the decision of the person in that relationship with lawful immigration status to choose to petition for the intending immigrant. In situations involving domestic violence, this aspect of immigration law can provide immense power and control to abusers.[4]

After establishing eligibility for immigration based on a qualifying family relationship, the intending immigrants then must show that they are not inadmissible. Various factors are considered in determining admissibility.[5] A critical factor includes the possibility that the intending immigrant may be "likely at any time to become a public charge."[6]

To overcome the public charge ground of inadmissibility, provisions introduced in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 require that each person who petitions for a family member to immigrate to the United States sign a legally enforceable Affidavit of Support.[7] In other words, the petitioner must sign an affidavit for the intending immigrant to ensure that the intending immigrant will not fall into poverty and rely on public assistance. Millions of these affidavits have been executed since 1996.

In an Affidavit of Support, the petitioner ("sponsor") indicates that he has "enough income and/or assets to maintain the intending immigrant(s) and the rest of [the] household at 125 percent of the Federal Poverty Guidelines."[8] The sponsor must show his ability to comply with this obligation by submitting supporting documentation on assets, employment, and taxes for the past three years. The statute and Affidavit of Support set out various conditions that end the obligation.[9] While these various conditions could occur quickly, it is possible that none happen until the death of the parties involved. The Affidavit of Support itself specifically warns "that divorce **does not** terminate your obligations under this Form I-864."

The mere existence of an Affidavit of Support often will impact fundamental choices for family practitioners about framing cases, choices of forum, and discovery. For both family and immigration law practitioners, ethical considerations are prominent as they must reconsider the advice given to immigrant families at the time of immigration as much as at subsequent enforcement stages. Immigration practitioners who represent clients in family immigration must make the client aware of the legal implications of signing the affidavit not only for the intending immigrant to come to the United States but also at a later stage when the immigrant may file a lawsuit against the sponsor to enforce the Affidavit of Support. Affidavit of Support enforcement considerations must become a routine part of family practice, from initial information gathering steps to ultimate strategic decisions about where and how to file cases.[10] Of particular importance is the fact that enforcement of the affidavit could have a significant impact in obtaining financial relief for a client who may be living in a precarious situation due to lack of access to economic resources. Victims of domestic abuse may not even be aware that they

are entitled to enforcement of the affidavit to help them get on their feet and start working towards independence.

Marriage and Divorce

A marriage, if bona fide at inception, continues to exist for immigration purposes until a divorce judgment is entered. The critical issue is the intent to build a life together at inception, not the current state of the marital union, even if the couple is separated or if divorce proceedings are pending. Continuing viability of the marriage simply is not required to establish a relationship for immigration purposes.[11]

In domestic violence situations, one common practice of abusers is the choice to seek an annulment instead of divorce. An annulment makes the marriage invalid and null, as if the marriage never took place. For immigration purposes, if the marriage terminates in an annulment prior to the filing of a self-petition,[12] described below, the self-petitioner will not have the family relationship to qualify for the immigration benefit. Family law practitioners need to be aware of this tactic and alert the judge to be leery of granting an annulment when a case involves an immigrant spouse. Importantly, however, the legal termination of the marriage (whether by divorce, death, or annulment) after the self-petition is properly filed with the immigration service will not be a basis for denying the application.[13]

Conditional Residence

Persons who initially enter the United States as lawful permanent residents or adjust status to lawful permanent residency on the basis of a marriage that is less than two years old receive "conditional" residency.[14] Two years after acquiring this conditional status, the wife and husband are required to file a joint petition to remove the condition.[15] During this step, couples must show the bona fides of their marriage by submitting proof of a shared address, commingling of assets, beneficiaries on insurance, shared leases or mortgages, shared liabilities, children of the marriage, etc. If it is not possible to petition jointly, the conditional resident may qualify for a hardship waiver of the requirement, for example in cases involving domestic violence or divorce.[16] In cases where a divorce is pending but not complete, the removal of the condition can be tricky. In such instances, the advice of immigration counsel is often required and courts should be aware that delay tactics on the part of the non-immigrant spouse often are employed as a significant point of leverage and even intimidation in settlement of the divorce.

Divorce Triggers Two Year Period for VAWA Self-Petition

Some spouses and children who have suffered battery or extreme cruelty at the hands of a U.S. citizen or lawful permanent resident spouse or parent may qualify to "self-petition" for lawful immigration status under the Violence Against Women Act (VAWA). An application may be filed even after separation or divorce, but it must be filed within two years of a divorce.[17]

Immigrant victims of domestic violence or other crimes may qualify for immigration relief based on the abuse. It is important for family law practitioners to inquire about these issues during their intake process and throughout the representation to ensure that a proper referral is done to immigration counsel.[18]

In some divorce actions, abusers may seek to obtain copies of the abused spouse's VAWA self-petition through family court discovery. Such petitions are considered highly confidential in immigration law. Indeed, § 384(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provides that in no case may any immigration employee "permit use by or disclosure to anyone… of any information which relates to an alien who is the beneficiary of an application for relief" under the VAWA provisions, which relate to battered spouses and children.[19] This prohibition extends to any information relating to the battered spouse or child, which could include verification of status or any other routine information. Family law practitioners should be skeptical of attempts to seek copies of self-petitions via discovery which seek to accomplish little more than intimidation.[20]

Creation of a Parent-Child Relationship through Marriage

For immigration purposes, stepchildren are treated as all other children. A marriage that occurs prior to the child reaching 18 years of age creates a parent-child relationship.[21] In some instances, for immigration purposes, this relationship may survive a subsequent dissolution of the marriage that created it. As one commentator notes: "If the marriage ends in annulment, however, the step relationship is deemed to have never existed because legally the marriage never existed. If a child's immigration status is reliant on a stepparent, these considerations might have bearing on family court proceedings regarding the dissolution of the marriage even though no particular custody arrangement is required."[22]

Adoptions

Children who are adopted while under the age of 16 and have been residing with and in the legal custody of the adoptive parents for at least two years may qualify as children under immigration law.[23] This age deadline may be relaxed only where more than one sibling is adopted. In such instances, the adoption of at least one sibling must be completed before the age of 16 and all others must be completed before the age of 18.[24]

Special Immigrant Juvenile Status for Court Dependents

Through an amendment to the Immigration and Nationality Act of 1990, Congress created the classification of Special Immigrant Juvenile Status to provide immigration relief for certain undocumented children in foster care, guardianship, or adoption situations.[25] Through subsequent amendments and case law, this form of relief has become available more broadly for children in a variety of settings in which state courts are involved in making determinations of custody, such as juvenile delinquency proceedings and the placement of unaccompanied minors. For a child[26] to be eligible, a juvenile court[27] must make three requisite findings: 1) the child has been declared dependent in a juvenile court; 2) the child's reunification with one or both of his parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; and 3) the child's best interests would not be served by returning to his country of origin.[28]

Dependent and Derivative Beneficiaries

For immigration purposes, a dependent generally is a foreign national spouse or child who accompanies her spouse or parent who enters the United States as a student or worker. Usually dependents, while authorized to live in the United States, are not authorized to work and must rely completely on the spouse or parent with status. If the parties get a divorce while in the United States, the dependent spouse would lose her non-immigrant status. Family law practitioners must be aware of the consequences of divorce, particularly when representing a victim of domestic violence who is completely dependent on her abuser spouse.

A derivative beneficiary is the foreign national spouse who has been sponsored to obtain an immigrant visa, for example, a green card. If the parties divorce while the petition is pending, the derivative beneficiary spouse may not be able to obtain the green card anymore. Again, it is very important for practitioners to explore options for the foreign national spouse as she may be able to qualify for other remedies to remain in the United States legally.

Lawful Permanent Residents and Criminal Activity

The fact that green card holders are allowed to live and work in the United States permanently does not mean that they cannot be removed for criminal behavior. If such criminal behavior falls into a ground of deportability, the permanent resident may be ordered removed from the U.S.

Of particular concern is an offense that arises out of a domestic violence incident. For example, a lawful permanent resident could be removed from the United States if he is convicted of a crime of domestic violence; child abuse, neglect, or abandonment; stalking; or if found in a civil or criminal court to have violated a domestic violence provision of an order of protection.[29]

In addition, under the Adam Walsh Act, a conviction for certain offenses, including assault or false imprisonment, against a victim under the age of 18 can prevent a U.S. citizen or a lawful permanent resident from petitioning to get a green card for close family members in the future. The person will have to win a waiver based on a non-reviewable finding as to whether he or she would pose a threat to a family member.[30]

Conclusion

Immigration law significantly interacts with family relationships, impacting marriages, adoptions, divorces, and financial issues. It is important for family law practitioners to be aware that in addition to the most common issues in a divorce or custody action, immigrants bring an array of other concerns for which basic knowledge of immigration consequences is essential. When domestic abuse is present, practitioners must be aware that there are remedies that could help an immigrant spouse when immigration status is an issue. Immigration law has evolved to consider the needs of victims of abuse and other crimes. However, abusers will continue to try to find other forums to control their immigrant spouses and deny them the opportunity to be self-sufficient. Family courts and practitioners must be aware of this pattern of abuse and control and must work to prevent this manipulation.

About the Author

Veronica Tobar Thronson is an Associate Clinical Professor of Law and Director of the Immigration Law Clinic at the Michigan State University College of Law. The Immigration Law Clinic provides opportunities for students to experience the practice of law through direct client representation in a well supervised and academically rigorous program with a broad and diverse docket of cases before administrative agencies, Immigration Court, state courts, and appellate courts. Clients include unaccompanied minors in removal proceedings, victims of domestic violence, family based immigration petitioners, asylum seekers, and naturalization applicants. Students engage in policy research, resource development, community outreach, and systemic advocacy on issues related to immigration. Thronson routinely conducts trainings for attorneys and judges and was appointed to the faculty of The National Judicial College in 2012. In 2015, she became expert faculty with the National Immigrant Women's Advocacy Project at American University Washington College of Law, Family Law Attorneys Community of Practice.

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Endnotes

1 The U.S. Department of Homeland Security Office of Immigration Statistics reports that family-sponsored immigrants (immediate relatives of U.S. citizens and family preference classes of admission) represented 66 percent of the total legal permanent residents in 2010. Spouses of U.S. citizens represented 57 percent of immediate relatives. Randall Monger & James Yankay, U.S. Legal Permanent Residents: 2010, U.S. Department of Homeland Security Office of Immigration Statistics ed., (March 2011).

2 8 U.S.C.§1151(b)(2)(A)(i).

3 8 U.S.C.§1153(a).

4 For more information, Veronica T. Thronson. "Domestic Violence and Immigrants in Family Court." 63 Juv. & Family Ct. J. 63 (2012).

5 8 U.S.C. §1182 (establishing numerous grounds of inadmissibility based on issues ranging from criminal history to ideology to health).

6 8 U.S.C. § 1182(a)(4)(A).

7 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724, 8 U.S.C. §1182(a)(4)(C)(ii).

8 This commitment is responsive to the statutory requirement that the "sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable." 8 U.S.C. §1183a(a)(1)(A).

9 The obligation to support continues until the sponsored immigrant becomes a U.S. citizen; can be credited with 40 qualifying quarters of work in the United States; no longer has lawful permanent resident status and has departed the United States; becomes subject to removal, but applies for and obtains in removal proceedings a new grant of adjustment of status, based on a new affidavit of support, if one is required; or dies. Form I-864, available at http://www.uscis.gov/i-864.

10 For a more detailed analysis of the Affidavit of Support, see Veronica T. Thronson, " 'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses." 50 Fam. Ct. Rev. 594 (2012).

11 "[I]t has long been established that the nonviability of a marriage at the time of adjustment [to obtain lawful immigration status] is not a permissible basis for denying a petition." *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003); *Matter of Boromand*, 17 I. & N. Dec. 450, 454 (BIA 1980). ("[T]he denial of an adjustment of status application or the subsequent rescission of such a grant cannot be based solely on the nonviability of the marriage at the time of the adjustment application."); *United States v. Qaisi*, 779 F.2d 346, 348 (6th Cir. 1985). ("Decisions from the Immigration and Naturalization Service and the district courts have universally held that the viability of a marriage is not a material factor in deciding to confer or deny an immigration benefit.")

12 In 1994, Congress passed the Violence Against Women Act (VAWA) which includes specific provisions to help battered spouses abused by their U.S. citizen or lawful permanent resident spouses to "self-petition" for lawful status without having to rely on the abuser. 8 U.S.C. §1154(a)(1)(A)(iii) (2015).

13 T. Alexander Aleinikoff, Executive Associate Commissioner, *Memorandum: Implementation of Crime Bill Self-Petitioning for*

Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents (Apr. 16, 1996) (addressing VAWA provisions for battered immigrants).

14 8 U.S.C. § 1186a(a)(1).

15 8 U.S.C. § 1186a(c)(1).

16 8 U.S.C. § 1186a(c)(4).

17 8 U.S.C. § 1154(a)(1)(ii)(II)(aa)(CC)(bbb).

18 For more detailed analysis on the immigration remedies available for victims of domestic violence, see Veronica T. Thronson. "Immigration Remedies for Domestic Violence Survivors." 43 Mich. Fam. L.J. 45 (2013).

19 8 U.S.C. § 1367(a)(*2)*

20 Guillermo M. Hernandez. "Closing the Courthouse Doors: The Implications of the Discovery of Immigration Related Facts and the Effects of §30.014 of the Texas Civil Practice & Remedies Code." 13 Scholer 673, 701-704 (2011).

21 8 U.S.C. § 1101(b)(1)(B).

22 David B. Thronson. "Custody and Contradictions: Exploring Immigration Law as Federal Family in the Context of Child Custody." 59 Hastings L.J. 453, 493 (2008).

23 8 U.S.C. § 1101(b)(1)(E)(i).

24 8 U.S.C. § 1101(b)(1)(E)(ii).

25 8 U.S.C. § 1101(a)(27)(J).

26 8 U.S.C. § 1101 (b)(1) (defining a child for immigration purposes). A person may qualify as a child for immigration purposes until age 21 under most circumstances.

27 For immigration purposes, a "[j]uvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a).

28 8 U.S.C. § 1101(a)(27)(J).

29 8 U.S.C. § 1227(a)(2)(E).

30 42 U.S.C. §16911.

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