



U.S. Department of Justice
Immigration and Naturalization Service

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Washington, DC 20536

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MEMORANDUM FOR REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS

FROM: William R. Yates /s/ Janis Sposato
Acting Associate Director, Operations
Bureau of Citizenship and Immigration Services

SUBJECT: Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of the
Marriage

Background

The Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. 99-639 (November 10, 1986), were enacted to combat fraud perpetrated by aliens who marry only to obtain immigration benefits. The IMFA amended the Immigration and Nationality Act (Act) by adding a new section 216, which imposes an initial 2-year period of conditional residency on a person who acquired permanent resident status based on a recent marriage. Section 216 also provides a comprehensive procedure by which a conditional resident may have these conditions removed following approval of a petition filed jointly with the citizen or lawful permanent resident spouse, or after approval of a waiver of the joint petitioning requirement (both filed on Form I-751, Petition to Remove Conditions on Residence). Section 216 further mandates termination of the conditional resident's status if he or she fails to comply with the requirements for removal of the conditions at the end of the 2-year period. Finally, section 216 allows an alien whose status has been terminated to ask the immigration judge to review this decision during deportation proceedings.

In recent months, several questions have been raised regarding whether a conditional resident can file a waiver of the joint petitioning requirement on Form I-751 after commencement of divorce or annulment proceedings but prior to final termination of the marriage. This memorandum clarifies the Immigration and Naturalization Service's (Service) position on this issue.

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Subject: Filing a Waiver of the Joint Filing Requirement Prior to
Final Termination of the Marriage

Filing a Form I-751 prior to final termination of the marriage

According to section 216(c)(4)(B) of the Act, a waiver of the joint filing requirement may be granted if the alien spouse can establish that “the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1)”. The statute clearly requires that the marriage already be terminated and, thus, the mere commencement of divorce proceedings is not sufficient. Further, in Matter of Anderson, 20 I&N Dec. 888 (BIA 1994), it was determined that an alien spouse:

[W]as ineligible to apply for a waiver under section 216(c)(4)(B) [of the Act] because she remained married to her husband . . . if the respondent had become statutorily eligible to apply for the section 216(c)(4)(B) waiver by virtue of changed circumstances, i.e., through the termination of her marriage . . . she could have sought a continuance from the immigration judge to pursue her alternative application with the Service.

In addition, the instructions to the Form I-751 clearly state that:

[Y]ou may apply for a waiver of th[e] joint filing requirement on this form if . . . you entered into the marriage in good faith, but the marriage was later terminated due to divorce or annulment . . . If you are filing to waive the joint filing requirement because your marriage has been terminated, also submit a copy of the divorce decree or other document terminating or annulling the marriage with your petition.

As such, an alien whose conditional resident status is approaching the 2-year anniversary of the grant of such status, but who is unable to file a joint petition to remove the conditions because divorce or annulment proceedings have commenced, may not apply for a waiver of the joint filing requirement based on the “good faith” exception. If an alien’s conditional resident status is terminated because he or she could not timely file a Form I-751, and he or she is placed in removal proceedings, then he or she may request a continuance from the immigration judge to allow for the finalization of the divorce or annulment proceedings. It is noted that the conditional resident whose status has been terminated should be issued a temporary I-551 during the pendency of his or her case before the immigration judge (see Genco Opinion 96-12).