# Adjudicator's Field Manual

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## Chapter 25 Petitions for Removal of Conditions on Conditional Residence.

25.1 Immigration Marriage Fraud Amendments of 1986 (Form I-751) has been partially superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of November 21, 2019.

25.2 Entrepreneurs (Form I-829), has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of November 30, 2016

## 25.1 Immigration Marriage Fraud Amendments of 1986

References: Section 216 of the Act

8 CFR 216

(a) General .

The Marriage Fraud Amendments of 1986 ("IMFA") were enacted in response to a growing concern about aliens seeking permanent residence in the U.S. on the basis of marriage to a citizen or resident when either the alien acting alone, or the alien and his or her reputed spouse acting in concert, married for the sole purpose of obtaining permanent residence. Congress was particularly moved by the testimony of numerous citizens whose alien spouses had left them shortly after obtaining residence, as well as the t estimony of Service representatives concerned with "marriage for hire" schemes. Congress also acknowledged the inherent difficulties faced by the Service in determining whether the marriage is fraudulent and whether the alien intended to leave the marital union once lawful permanent residence was granted.

In response to these concerns, Congress passed IMFA, which added section 216 to the Immigration and Nationality Act. Section 216 created a conditional residence requirement for aliens who acquire permanent residence based on recent marriages. The condition being that persons subject to the provisions of IMFA were required to petition the Service two years after obtaining residence for removal of the conditional basis of the residence. Failure to do so, or denial of the removal petition, would result in the alien losing residence status and being removed from the U.S. as a deportabl e alien. Section 216 also includes a waiver provision because it recognizes that under certain circumstances (e.g., if the marriage had dissolved through no fault of the alien), the alien's loss of residence and deportation from the U.S. would be inappropriate.

The conditional residence provisions of section 216 apply to:

- Any alien who, based upon a marriage to either a citizen of the U.S. or a lawful permanent resident of the U.S., obtains permanent residence within two years of such marriage (i.e., as a spousal Immediate Relative or second preference classification); and

- Any child of such alien who also obtains permanent residence through his or her parent's marriage within 2 years of the marriage.

Note:

Confusion can arise regarding to whom a reference is being made (especially in spousal second preference conditional residence situations due to both parties, husband and wife, being aliens). In order to clarify which party is being referred to, the alien who is subject to the IMFA conditions is known as a "conditional permanent resident," while the citizen or LPR who had filed the I-130 petition on behalf of such alien is known as the "petitioning spouse."

The section 216 provisions do not apply to:

- An alien who obtains permanent residence through a marriage which is more than two years old at the time of admission or adjustment;

- An alien who obtains permanent residence on a basis other than marriage (e.g., a woman who adjusts through an employment-based petition, even if she is married to a citizen at the time);

- An alien who (regardless of the age of the marriage at the time) obtains permanent residence as an accompanying or following to join dependent of an alien who obtains residence under:

– a special immigrant classification;

– a refugee or asylee classification;

– a preference classification other than second preference;

– any other provision of the Immigration and Nationality Act, or any other law, which allows dependents to accompany or follow to join a principal alien.

Note:

It is extremely important that inspectors and adjudicators be very conscious of the date of the marriage at the time the alien is admitted or adjusted. It is not unusual for an alien to be issued a conditional resident immigrant visa by a consular officer shortly before the second anniversary, but to apply for admission after that second anniversary. Likewise, an applicant for adjustment might file a Form I-485 (or even be interviewed regarding such application) prior to the second anniversary, but not be granted adjustment until after that second anniversary. In such cases, the alien should be admitted, or adjusted, without conditions (see 8 CFR 235.11(b) regarding the authority of inspectors to amend the visa classification on an immigrant visa in such situations).

(b) Notification Requirements .

The Marriage Fraud Amendments of 1986 require that a conditional permanent resident be notified of his or her obligations under the law at specified points:

• At the time an alien acquires conditional permanent residence through admission to the U.S. with an immigrant visa or adjustment of status under section 245 of the Act, the Service shall notify the alien of the conditional basis of the alien's status. The Service will notify the alien of the requirements for removal of the conditions within the ninety days immediately preceding the second anniversary of the date the alien was granted status, and will inform the alien that failure to apply for removal of the conditions will result in automatic termination of the alien's lawful status in the U.S. This notification is done (either verbally or in writing) by the inspector or adjudicator who admits or adjusts the alien to conditional resident status .

• Approximately 90 days before the second anniversary of the date on which the alien obtained conditional permanent residence, the Service must (attempt to) notify the alien a second time of the requirement that the alien and petitioning spouse must file a petition to remove the conditional basis of the alien's lawful permanent residence. The notification will be mailed to the alien's last known address. However, failure on the part of the Service to provide notification (which can occur, for example, if the alien fails to notify the Service of a change of address) does not relieve the alien and the petitioning spouse of the requirement to file a joint petition within 90 days preceding the second anniversary date of the alien's conditional status. This notification is done on an automated basis by the Immigration Marriage Fraud Amendments System . (This system is known in some offices as IMFAS (“im-FASS”) and in others as MFAS (“MAY-fiss”).)

(c) Filing for Removal of Conditions .

There are two vehicles through which the conditional basis of residence may be removed:

(1) Joint Petition .

Within the 90-day period immediately preceding the second anniversary date on which the alien obtained permanent residence, the alien and the petitioning spouse must file a Petition to Remove Conditions on Residence ( Form I-751 ) with the Service Center having jurisdiction over the alien's place of residence. Normally, a conditional resident child is included in the joint petition filed by his or her parent and step-parent. The joint petition must be filed within this 90-day window regardless of the amount of physical presence which the alien has accumulated in the U.S. The one exception to this rule is that if either the alien or the petitioning spouse (or both) is outside the U.S. on U.S. government orders, the filing window doe s not commence until the person(s) on orders returns to the U.S.

(2) Waiver .

The conditional permanent resident, acting alone, may apply (also on Form I-751 ) for a waiver of the requirement to file the joint petition. See 8 CFR 216.5 .The waiver may be filed at any time (i.e., before, during or after the 90-day filing window). The waiver may be sought if the joint petition cannot be filed due to:

· The termination of the marriage through annulment, divorce, or the death of the petitioning spouse;

· The refusal of the petitioning spouse to join in the filing of the petition;

· A conditional resident child being unable to be included in the joint petition of his or her parent (e.g., if the parent died before seeking removal of conditions);

· The conditional resident being unable or unwilling to file the joint petition because the petitioning spouse is an abusive spouse or parent; or

· Any other reason which is provided for in the Act.

Note:

The alien may cite multiple reasons for filing the waiver application. In fact, other than the battered spouse/child waiver, all reasons MUST be applied for at once. (The battered spouse/child waiver may be sought either in combination with other reasons listed on the same Form I-751 , or on a separately-filed Form I-751.)

(3) Discretionary Procedures for Petitioning Military Members and Their Dependents . [Chapter added on 09-22-2009 ]

When adjudicating a Form I-751 filed by a military member on behalf of his or her alien spouse or child, Service Center ISOs must follow the steps below:

· Review every properly filed petition in chronological order by the receipt date; and

· Determine whether the petition involves an active duty military member (by checking the file for military orders) before issuing a request for evidence (RFE);

Note

The evidence necessary for the issuance of an RFE in this situation includes but is not limited to the list of documents listed in the memo entitled Standalone Form I-130 and Jointly Filed Form I-751 : Discretionary Procedures for Petitioning Military Members and Their Dependents, Sept. 22, 2009. See Appendix 21-8

· Review the evidence submitted to determine the nature of the member's deployment; the claimed bona

fides of the marriage and relationship to any children involved. See memo entitled Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and Their Dependents, Sept. 22, 2009. See Appendix 21-8

| If | And the ISO believes | Then |
|---|---|---|
| The evidence to support the standalone I-130 is received and all items provided are sufficient | That the I-130 petition is approvable | The ISO will approve standalone Form I-130 and continue the normal post adjudication process |
| The evidence to support the I-751 is received and all items provided are sufficient | That the I-751 petition is approvable | The ISO will approved the Form I-751 and continue the normal post adjudication process. If there are any interfiled or concurrently filed Form N-400 applications, the ISO must refer to Processing N-400s Filed Under INA 328 and 329 When Applicant Fails to Respond to a Request for Evidence, April 15, 2009, memorandum for further guidance. See Appendix 21-10 . |

(d) Ineligibility for Adjustment of Status .

Chapter 25.1(d), Ineligibility for Adjustment of Status, has been superseded by USCIS Policy Manual, Volume 7: Adjustment of Status as of November 21, 2019.

(e) Documentation .

(1) Joint Petition .

A Form I-751 being filed as a joint petition shall be accompanied by evidence that the marriage was not entered into for the purpose of evading the immigration laws of the U.S. Such evidence may include:

· Documentation showing joint ownership of property;

· Lease showing joint tenancy of a common residence;

· Documentation showing commingling of financial resources;

· Birth certificates of children born to the marriage;

· Affidavits of third parties having knowledge of the bona fides of the marital relationship ( Note: the affiant must be available to appear at the joint petitioners' interview if required); or

· Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the U.S.

(2) Waiver .

A Form I-751 being filed as a waiver application shall be accompanied by:

· Evidence to establish the facts of the case on which the alien is seeking the waiver; and

· Evidence that the marriage was not entered into for the purpose of evading the immigration laws of the U.S., as described in paragraph (1), if the marriage was not entered into for such purposes. However, be aware that the extreme hardship waiver provision does not require that the applicant establish that the marriage was entered into in good faith.

(f) Termination of Status for Failure to File .

Failure to properly file Form I-751 within the 90-day period immediately preceding the second anniversary

of the date on which the alien obtained lawful permanent residence on a conditional basis shall result in the automatic termination of the alien's permanent residence status and the initiation of proceedings to remove the alien from the U.S. Form I-751 may be filed after the expiration of the 90-day period only if the alien establishes to the satisfaction of the director, in writing, that there was good cause for the failure to file with in the required time period.

(g) Adjudication of Form I-751. [Section (g) updated December 10, 2018]

(1) Interviews.

Generally, conditional permanent residents who file a Form I-751 must appear for an interview.1 However, USCIS officers may consider waiving2 an interview if they are satisfied that:

• They can make a decision based on the record because it contains sufficient evidence about the bona fides of the marriage and that the marriage was not entered into for the purpose of evading the immigration laws of the United States;

• For I-751 cases received on/after December 10, 2018, USCIS has previously interviewed the I-751 principal petitioner3 (for example, for a Form I-485 or Form I-130);

• There is no indication of fraud or misrepresentation on the Form I-751 or the supporting documentation; and

• There are no complex facts or issues that require an interview to resolve questions or concerns.

When determining whether to waive an interview, the considerations listed above apply regardless of whether the Form I-751 is filed as a joint petition or as a waiver of the joint filing requirement.

Cases involving fraud or national security concerns must be referred to the Fraud Detection and National Security Directorate according to local procedures.

(2) Special Cases.

(A) Overseas Holds .

(i) Petitioner and/or Spouse Live Outside the United States.

If the petitioner and/or spouse live outside the United States, the case is held for a reasonable amount of time until the return of the petitioner and/or spouse to the United States, and they are able to provide a U.S. address. USCIS will resume processing of the Form I-751 if the conditional permanent resident notifies USCIS that he/she has returned to the United States.

(ii) Petitioner and/or Spouse Live Outside the United States Pursuant to Military or Federal Government Orders.

Form I-751s filed by conditional permanent residents who are currently overseas under military or Federal Government orders and who have valid APO/FPO addresses are not automatically placed on an "overseas hold," because a Permanent Resident Card (also referred to as "Green Card" or an I-551 card) can be issued and sent to an APO/FPO address if these I-751s are approved. Instead, the officer will review the Form I-751 and supporting documentation filed by the conditional permanent resident and his or her spouse to determine whether to waive the interview requirement in accordance with the guidance outlined in section (g)(1).

(B) Improperly Classified.

These are cases where the conditional permanent resident was incorrectly classified when he or she became a permanent resident (generally because the inspecting or adjudicating officer failed to notice that the alien had been married for at least two years at the time he or she was admitted to the United States as a permanent resident or adjusted his or her status to that of a permanent resident). When an officer determines that the alien was improperly classified as a conditional permanent resident, the officer should follow appropriate procedures to notify the conditional permanent resident of the misclassification.

(3) Inability of Child to Be Included in Joint Petition

As a matter of administrative convenience, the regulations allow a conditional resident child who is unable to be included in his/her parents' joint petition to file an separate Form I-751 . (This could also be thought of as a hardship issue since otherwise the child would be separated from his or her parent, but the child filing such petition need not document extreme hardship.) Circumstances under which this situation might arise include:

· A child whose conditional resident parent has died;

· A child who entered the U.S. more than 90 days after his conditional resident parent and therefore does not have sufficient residence in the U.S. to qualify for removal of conditions on the joint petition (but verify that the parent and step-parent's joint petition has been granted before approving the child's petition); and

· Any other circumstances whereby in the determination of the director, the child is prevented from being included in the joint petition of his or her parent and step-parent through no fault of the child or his or her parents.

In adjudicating the separate petition of a child, you must be satisfied that the conditional residence status was not obtained through fraud and that the petition's approval would not further a fraud scheme. For example, you would not approve a separate petition filed by a child which would enable an otherwise ineligible parent (who obtained conditional status through a questionable marriage) to make a stronger case for an extreme hardship waiver.

(h) Waiver of Joint Filing .

These are cases where the petitioner and the spouse do not file a joint petition. They are usually filed because the petitioner and spouse are divorced, or the petitioner (child of the conditional spouse) could not enter or follow to join the conditional spouse. The documentation to be submitted, and the factors to be determined in the adjudication process, depend on the type of waiver being sought. Section 216(c)(4) of the Act allows an alien to file a waiver application under one (or more) of three circumstances: extreme hardship (section 216(c)(4)(A) ), good faith and not at fault (section 216(c)(4)(B) ) , and battering or extreme cruelty (section 216(c)(4)(C) ). Note: Although section 216(c)(4) is entitled "Hardship Waiver", only waivers under paragraph (A) require that the applicant establish a level of hardship; waivers under the other two paragraphs depend on other issues.

(1) Extreme Hardship .

The waiver applicant must establish that extreme hardship would result if he or she is removed from the U.S . Some important things to remember when adjudicating a waiver filed on this basis are:

· There is no requirement that the applicant establish that the marriage had been entered into in good faith. However, indications that the marriage had been in bad faith may be considered when weighing the discretionary factors.

· Whether the alien has already suffered hardship during or prior to his or her status as a conditional resident is irrelevant. Only extreme hardship which would result from deportation (presumably to the alien's home country) is pertinent. The statute is prospective, not retrospective, in this regard. However, in some situations hardship already experienced can have a bearing on hardship which an alien might expect to experience if he or she is removed. For example, in some countries, a woman who has been di vorced may suffer extreme isolation ("shunning") in her home country or culture which rises to the level of persecution. While such conditions may be rare, they are definitely not non-existent.

· Because the adjudication of a waiver application is a matter of discretion, factors which are not directly related to the marriage fraud provisions may be taken into account. However, only the most significant negative factors would justify denial of an application where the applicant has sufficiently established that he or she would be subjected to extreme hardship if deported. As with any adjudication proceeding, the applicant bears the burden of proof to establish eligibility for the benefit sought.

(2) Good Faith, Not at Fault .

Despite the best intentions, marriages do not always work out, and sometimes even bona fide marriages fall apart in less than 2 years. IMFA was not meant to be a tool to be used against unlucky or unlikely marriages; it was meant to be a tool against fraud. Accordingly, IMFA provides for a waiver if the alien can establish that he or she entered the marriage in good faith and he or she was not at fault in failing to meet the IMFA requirements. Things to consider when adjudicating this type of waiver include :

· Weight is not given to who filed the divorce. (Initially, the statute required that the alien had to be the moving party in the proceedings to terminate the marriage (i.e., that the alien had terminated the marriage for "good cause"). This occasionally resulted in what became known as "the race to the courthouse." Since the issue was meant to center on whether the alien had good faith when immigrating, not on whose attorney could file for divorce faster, this requirement was dropped.)

· It does not matter if the conditional resident's spouse entered the marriage in good faith, only the intent of the conditional resident him or herself is relevant. Interviewing the conditional resident's former spouse (either in response to a call-in letter, a field examination or a referral to Investigations) may provide relevant and valuable information on the alien's intent, or it may only result in a spiteful diatribe. Adjudicators should always be aware of the source and motivation of information provi ded. Also, when interviewing a former spouse, always be extremely careful not to divulge any information (such as the alien's current location) which could result in the alien being subjected to abuse or battering.

· In determining good faith, it is usually helpful to look at the actions of the parties following immigration to the U.S. The same clues which can be useful in an ongoing marriage (e.g., did they establish joint bank account, were health insurance issues coordinated, etc.) are valuable indications of a fraudulent marriage. Perhaps assets which were commingled at the beginning of the marriage would have just been divided at the end. Reviewing the property settlement, which usually accompanies the divorce decr ee, may provide valuable information.

· The statute requires that the alien establish that he or she "was not at fault in failing to meet the requirements" for filing a joint petition for removal of conditions. This should not be read as requiring that the alien's divorce decree finds his or her spouse to have been at fault, nor does it require that the divorce was obtained on a no-fault basis. You still might determine that the alien was wholly or partly responsible for not meeting the joint petitioning requirements. Likewise, a divorce decree s tating that the alien was "at fault" (with regards to the breakup of the marriage) does not preclude you from independently determining that he or she was not at fault, at least with regard to the requirements of the immigration law.

As the adjudicator, you must make your own determination on this issue. While the language of the divorce decree may provide useful information on the reasons why the marriage was terminated (and therefore why a joint petition was not possible), and may even significantly increase the alien's burden of proof, the decision on whether to grant the waiver belongs to the Service, not to the divorce court judge. Remember that in the worst marriage fraud cases, the parties to the fraud would agree in advance that the alien would file for divorce and that the petitioning spouse would accept fault for the breakdown of the marriage.

· The statute uses the phrase "has been terminated" when talking about the marriage. 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).

(3) Battering or Extreme Cruelty.

The original IMFA (as enacted in 1986) did not contain a separate waiver provision for victims of battering or extreme cruelty. Although in most cases, such victims could easily qualify for either of the two waiver provisions, Congress found that there was a need to spell out that victims of such treatment are entitled to special consideration under the law. As a result, section 216 of the Act was amended by section 701 of the Immigration Act of 1990 to add this waiver. 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. Other issues to bear in mind when adjudicating a battering or extreme cruelty waiver include:

· Persons who have been subjected to such treatment may have difficulty in discussing their experiences.

While it is almost always necessary to discuss the abusive events with the applicant, such discussions should be carried on in a professional manner which does not further abuse the applicant by forcing him or her to unnecessarily re-live abusive episodes.

· 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. Conversely, in the worst marriage fraud cases it is not unheard of for evidence of abuse or battering to be fabricated (someone who is willing to commit marriage fraud would not be unwilling to file a false police report).

(i) Interview at the Field Office. [Section (i) updated December 10, 2018]

Unless the interview is waived, an interview must be conducted by an immigration services officer at the field office having jurisdiction over the petitioner's residence.

(1) Joint Petition .

An interview based on a joint petition is used to determine the bona fides of the marriage. As such, it is quite similar to an interview conducted in relation to a pending I-130 petition or a (marriage-based) adjustment application. (See Chapter 21.3 and Chapter 23 of this field manual, resp. General interview techniques and procedures are also discussed in Chapter 15 of this field manual.)

It is important to remember that the only issues being resolved through the I-751 interview process are those relating to the bona fides of the marriage and the removal of conditions. Should any other issues arise, they must be dealt with outside the I-751 interview and adjudication process. (Since there is no discretionary authority to be exercised when adjudicating a joint petition, the other factors have no bearing on the case at hand.) For example, if during an I-751 interview you determine that you have no doubts about the bona fides of the marriage but also determine that the conditional resident had been arrested and convicted for a crime involving moral turpitude, you could not deny the Form I-751 joint petition on that basis. Instead, you would have to either initiate rescission proceedings under section 246 of the Act (see Chapter 26 of this field manual) or refer the case to Investigations for initiation of removal proceedings (depending on when the arrest and conviction occurred).

(2) Waiver of Joint Petitioning Requirement .

When interviewing an applicant for a joint waiver, remember that he or she may have suffered an extreme hardship, may be uncomfortable about the dissolution of his or her marriage, may even have been the victim of spousal (or parental) abuse (otherwise he or she should not have filed the waiver application). While you are required to conduct a thorough interview to uncover the facts of the case, you should do so in a professional manner which avoids unnecessary discomfort or embarrassment to th e alien.

In determining whether extreme hardship exists or existed, be aware that the statute only allows factors and circumstances which occurred or arose during the time when the alien was a conditional permanent resident. Factors arising, or events occurring, outside of that time period should not be considered (unless they can be tied to related events which happened during such time period).

Normally, an alien will only seek a waiver on one of the grounds set forth in section 216(c)(4) of the Act. However, on occasion an alien may claim to be eligible for a waiver on more than one ground. If so, the applicant must indicate all applicable waivers on the Form I-751 , with the exception of the spousal/parental abuse waiver (which may be sought either on the same application or on a separate application). Your interview must cover all of the grounds for which waiver eligibility is claimed. If you find that the alien is not eligible under each of the grounds claimed, the waiver application must be denied.

Note

While the applicant is required to state all grounds on the one application (with the exception of the spousal/parental abuse waiver), the failure to do so at the time of filing may be cured by amending the form at the time of interview, if the interviewing officer determines that a different waiver ground is more applicable. Likewise, if after the application has been denied it is determined that the alien would have had a better claim based on a ground other than the one(s) claimed, the applicant may file a motion to reopen the proceedings and amend the application. The Service would then have to decide whether there is sufficient justification for reopening the proceeding and (if so) render a new decision on the merits of the reopened case.

Unlike joint petition proceedings, the statute on IMFA waiver proceedings grants the Attorney General discretionary authority. Accordingly, if significant negative factors are discovered during the waiver interview (such as the alien having a criminal record) which outweigh the positive factors, they can be used to deny the waiver application.

(j) Post-adjudication Actions .

(1) Approval .

If the Form I-751 is approved, the alien is notified of the approval (which may be by the CLAIMS system if the approval is done at a service center, in person if the approval is done during the interview at a local office, or by letter if it is done by a local office at a later date). The alien is also either processed for a new Form I-551 or (if the approval is not done at the interview) instructed on how to be processed for a new I-551. Do not forget that an approval of a Form I-751 joint petition or waiver application al so applies to any conditional resident children who are included on the form and are eligible for removal of conditions. (But not to a child who has not acquired at least 21 months of residence; that child would have to file a separate I-751 at a later date under the regulatory waiver provision.)

(2) Denial .

There is no appeal from the denial of a Form I-751 filed as either a joint petition or a waiver application. Instead, the alien is placed in removal proceedings where he or she may renew the petition or application before the immigration judge. Do not forget that an approval of a Form I-751 joint petition or waiver application also applies to any conditional resident children who are included on the form and are eligible for removal of conditions.

(k) Naturalization Issues Relating to Conditional Residence . [Chapter 25.1 updated 08-04-2009]

Generally, before approving a naturalization application filed by a conditional permanent resident, the adjudicator should ensure that the applicant has met all of the applicable requirements of section 216 of the Act as evidenced by an approved Form I-751 .

Note:

There are special circumstances to consider in cases involving conditional permanent residents applying for naturalization under section 319(b) of the Act. See guidance provided in AFM Chapter 25.1(k)(2) .

Additionally, any conditional permanent resident who is otherwise eligible for naturalization under section 329 of the Act (based on military service), and who is not required to be lawfully admitted to the United States for permanent residence as provided for in section 329 of the Act, is exempt from all of the requirements of section 216 of the Act. This is because section 329 does not require certain otherwise eligible applicants to have a lawful admission for permanent residence in order to qualify. See section 329 of the Act. Therefore, these applicants are not required to have an approved Form I-751 before their Form N-400 s are approved.

(1) Treatment of Period under Conditional Status for Purposes of Naturalization .

Section 216(e) of the Act provides that for purposes of naturalization an alien in conditional status "shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence."

While this provision ensures that the time spent in the United States as a conditional permanent resident may, after the conditions have been removed, be considered for purposes of establishing the residence and physical presence requirements for naturalization (such as those in sections 316(a) and 319(a) of the Act), it does not relieve a conditional permanent resident applying for naturalization from the requirements of section 216 . See sections 216(c) , 216(d) , and 216(e) of the Act. Also see H.R. REP. 99-906, 1986 U.S.C.C.A.N. 5978.

Note:

There are special circumstances to consider in cases involving conditional permanent residents applying for naturalization under section 319(b) of the Act. See guidance provided below in AFM Chapter 25.1(k)(2) .

(2) Form I-751 and Form N-400 Issues .

(A) Concurrent Adjudication of Pending Form I-751 and Form N-400 .

Because of differences in the adjudication processing times for Form I-751 and Form N-400 and because conditional permanent residents are eligible to apply for naturalization (if otherwise eligible) pursuant to 8

CFR 216.1 , there may be instances when a conditional permanent resident admitted pursuant to section 216 of the Act will apply for naturalization while their Form I-751 is pending.

Unless otherwise provided by the Act, the adjudicator should ensure that the Form I-751 filed by the conditional permanent resident applying for naturalization is adjudicated in accordance with section 216 prior to, or concurrently with, the adjudication of Form N-400 . In all cases where a final decision on Form I-751 has been reached, the adjudicator should update MFAS accordingly.

Note:

There are special circumstances to consider in cases involving conditional permanent residents who have both a pending Form I-751 and Form N-400 filed under section 329 of the Act. See guidance provided in the introductory paragraphs of AFM Chapter 25.1(k)(2) .

(i) Form N-400 with Pending Form I-751 at Different USCIS Office.

Generally, a Form N-400 should not be continued to await the final adjudication of a Form I-751 that is pending at a different USCIS office. The adjudicator should conduct the Form N-400 examination as scheduled and should request the pending Form I-751 from the other USCIS office. Once the adjudicator receives the Form I-751, the adjudicator may adjudicate to completion both the Form N-400 and Form I-751 in accordance with all applicable provisions.

However, while the adjudication of a conditional permanent resident's naturalization application should not be delayed solely because of USCIS processing delays of Form I-751 , a pending Form N-400 should not be approved under any circumstances prior to the adjudication of a pending Form I-751, unless otherwise provided by the Act. In all cases where a final decision on Form I-751 has been reached, the adjudicator should update MFAS accordingly.

(ii) Form N-400 Filed under Section 319(a) or 319(b) .

In almost all cases, a Form N-400 that is filed while a Form I-751 is pending will have been filed pursuant to section 319(a) or 319(b) of the Act. These provisions require a higher level of evidence of marital union and joint residence than is required for the approval of Form I-751 filed jointly.

If a Form I-751 is pending at the time of the conditional permanent resident's Form N-400 examination, the adjudicator should conduct the examination for naturalization. The adjudicator should ensure that the applicant has established that they are the spouse of the qualifying U.S. citizen and that they are in a bona fide marriage prior to the favorable adjudication of their Form N-400.

If the Form I-751 is in the applicant's A-file and the applicant establishes their eligibility for naturalization under Section 319(a) or 319(b) , and also established that they have met the requirements under sections 216(b)(1) and 216(d)(1)(A) of the Act (as evidenced by such documentation listed in 8 CFR 216.4(a)(5) ), the adjudicator may approve the applicant's Form I-751 and Form N-400 concurrently. See AFM Chapters 25.1(k)(2)(A) and 25.1(e).

If the Form I-751 is not in the applicant's A-file, the adjudicator should proceed with the naturalization examination and request the pending Form I-751 from the USCIS office with custody of the petition. However, the applicant's Form N-400 should not be approved until the pending Form I-751 is reviewed and approved based on a determination that the applicant meets the requirements of section 216 of the Act. See AFM Chapter 25.1(k)(2)(A)(i) .

(iii) Form N-400 Filed under Provision Not Requiring Marital Union.

Regardless of whether a Form N-400 is filed under a provision of law that does not require marital union (in contrast to Section 319(a) or 319(b) , the adjudicator should request any applicable Form I-751 that is pending prior to the final adjudication of Form N-400. After receipt of the Form I-751, both the Form I-751 and Form N-400 may be concurrently adjudicated to completion as instructed in AFM Chapter 25.1(k)(2)(A)(i) .

(B) Reaching Form I-751 Filing Period while Form N-400 is Pending.

Unless otherwise provided by the Act, any conditional permanent resident admitted pursuant to section 216 who files for naturalization, to include those filing under section 319(b) , who reaches the 90-day period for filing Form I-751 prior to the final adjudication of their naturalization application or prior to taking the Oath of Allegiance for naturalization should be instructed to file Form I-751 in accordance with section 216(d)(2) of the Act.

After the conditional permanent resident has properly filed Form I-751 , the adjudicator should proceed with the adjudication of the naturalization application in accordance with the guidance provided AFM Chapter 25.1(k)(2)(A) .

(C) Naturalization under Section 319(b) Prior to Form I-751 Filing Period.

Conditional permanent residents admitted pursuant to section 216 are permitted to naturalize under section 319(b) of the Act, if otherwise eligible for naturalization under section 319(b), prior to filing Form I-751 so long as they have been conditional permanent residents for less than one year and nine months, and have therefore not reached the Form I-751 filing period at the time of the final adjudication of their naturalization application and at the time of taking the Oath of Allegiance for naturalization.

Note:

Applicants for naturalization pursuant to section 319(b) of the Act are not required to establish any specific period of residence or physical presence in the United States. See 8 CFR 319.2 and AFM Chapter 73 . Therefore, in many cases, a conditional permanent resident who applies for naturalization under section 319(b) of the Act may not yet have reached the Form I-751 filing period when they file their application for naturalization.

Such conditional permanent residents (who seek naturalization under section 319(b) and who have not reached the Form I-751 filing period) must, however, comply with the applicable requirements of section 216 because section 319(b) otherwise requires "compliance with all the requirements of the naturalization laws." This includes the requirement that naturalization applicants establish they have been lawfully admitted for permanent residence "in accordance with all applicable provisions" of the Act as stipulated in section 318 of the Act.

Accordingly, conditional permanent residents admitted pursuant to section 216 who apply for naturalization under section 319(b) must, therefore, comply with the requirements of , though such applicants who have not reached the 90-day Form I-751 filing period described in section 216(d)(2) of the Act at the time of their naturalization under section 319(b) should not file Form I-751 because they would not be within the designated filing period.

However, such conditional permanent residents admitted pursuant to section 216 who seek naturalization under section 319(b) prior to the Form I-751 filing period must nevertheless establish, before they may be naturalized under section 319(b), that the qualifying marriage (1) was entered into in accordance with the

laws of the place where the marriage occurred; (2) has not been judicially annulled or terminated; (3) was not entered into for the purpose of procuring an alien's admission as an immigrant; and (4) that no fee or other consideration was given (other than attorney's fees) for filing the immigrant or fiancé(e) visa petition that forms the ba sis for their admission to the United States.

The adjudicator should pay particular attention to issues surrounding the bona fides of the qualifying relationship in such cases and should review the record for documentary evidence of the type required to support an I-751 petition, in addition to the eligibility criteria for naturalization, though the applicant is not required to file Form I-751 . See sections 216(b)(1) and 216(d)(1)(A) of the Act. Also see 8 CFR 216.4(a)(5) and AFM Chapter 25.1(e) .

Under no circumstances can an application for naturalization be approved under section 319(b) of the Act unless the applicant meets their burden of proof of demonstrating compliance with the requirements of section 216 of the Act or as otherwise provided by the guidance in AFM Chapter 25.1(k) .

Note:

If the documentary evidence suggests that there are legitimate concerns that can be properly articulated about the bona fides of the qualifying marital relationship, the adjudicator is reminded that they are authorized to request for further evidence or for the attendance of witnesses, to include the U.S. citizen spouse, as part of the naturalization examination. See section 335(b) of the Act and 8 CFR 335.2(d) .

(D) Form I-751 Filed by a Naturalized Citizen.

The requirement to apply for the removal of conditions through the filing of Form I-751 does not apply to conditional permanent residents who were admitted pursuant to section 216 of the Act and who have already naturalized under section 319(b) of the Act (or under section 329 in accordance with the guidance provided in the introductory paragraphs of AFM Chapter 25.1(k)(2) , or as otherwise provided by the Act) prior to the Form I-751 filing period described in section 216(d)(2) of the Act.

If a naturalized U.S. citizen files Form I-751 either jointly with their petitioning spouse or individually as a waiver under section 216(c)(4) of the Act, the adjudicator should advise the naturalized U.S. citizen in writing that, as a citizen of the United States, the removal of conditions provisions do not apply.

Moreover, the Form I-751 filing fee should be refunded in cases where the U.S. citizen filed a Form I-751

because of USCIS error (for example, if the U.S. citizen received a computer-generated notice advising they should file). In such cases, the Form I-751 should be counted as a statistical denial.

Note

If the naturalized citizen is the parent of a child who was admitted as a conditional permanent resident based on the parent's marriage, and that child did not also become a citizen, the child is required to file Form I-751 for removal of conditions in accordance with section 216 of the Act and 8 CFR 216.4(a)(2) .

(l) Precedent Decisions .

The following precedent decisions pertain to the adjudication of joint petitions to remove conditions and applications for waivers of the requirement to file such joint petitions:

· Matter of Lemhammad , 20 I&N Dec. 316 (BIA 1991) - Original jurisdiction to rule on the merits of an Application for Waiver of Requirement to File Joint Petition for Removal of Conditions rests only with the Service, and not the immigration judge.

· Matter of Mendes , 20 I&N Dec. 833 (BIA 1994) - Where the parties to a marriage have jointly filed a Petition to Remove the Conditions on Residence, but one of the parties withdraws support from the petition before its adjudication, the joint petition shall be considered withdrawn and shall be adjudicated under section 216(c)(2)(A) of the Act (i.e., the CPR status terminated). When a respondent in deportation proceedings has not filed an application for a waiver under section 216(c)(4) of the Act and is prima facie eligible for such relief, the proceedings should be continued in order to grant the respondent a reasonable opportunity to file the application before the Service and for the Service to decide the application.

· Matter of Anderson , 20 I&N Dec. 888 (BIA 1994) - A conditional permanent resident alien who seeks to remove the conditional basis of that status by means of a waiver under section 216(c)(4) of the Act should apply for any applicable waiver provided under that section. An alien whose application for a specific waiver under section 216(c)(4) of the Act has been denied by the Service may not seek consideration of an alternative waiver under that section in deportation proceedings before the immigration judge. Where an alien beco mes eligible for an additional waiver under section 216(c)(4) of the Act due to changed circumstances, the proceedings may be continued in order to give the alien a reasonable opportunity to submit an application to the Service. Inasmuch as the Board of Immigration Appeals only has authority to review a waiver application after the Service and the immigration judge have considered it, an alien may not apply for a waiver under section 216(c)(4) of the Act on appeal.

· Matter of Nwokoma , 20 I&N Dec. 899 (BIA 1994) - The Service retains authority to deny a Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status pursuant to section 216(c)(3)(A) of the Act, notwithstanding the Service's failure to adjudicate the joint petition within 90 days of the interview of the alien and his or her spouse.

· Matter of Gawaran , 20 I&N Dec. 938 (BIA 1995) - The provisions of former section 241(f)(1) of the Act, do not waive an alien's deportability under former section 241(a)(9)(B) of the Act, because termination of the alien's conditional permanent resident status constitutes a basis for deportability which is separate and distinct from the charge that the alien is "excludable at the time of entry" within the meaning of former section 241(f)(1). In order to preserve an application for relief under section 216(c)(4) of the Act, a n alien must request before the immigration judge a review of the Service's denial of such application.

· Matter of Tee , 20 I&N Dec. 949 (BIA 1995) - An alien becomes statutorily ineligible for approval of a joint petition under section 216(c)(1) of the Act where the marriage has been terminated prior to adjudication of the petition.

Footnotes

1See INA 216(c)(1)(B).

2See INA 216(d)(3) and 8 CFR 216.4(b)(1).

3Generally, USCIS will not have interviewed I-751 petitioners with the following codes of admission: CR1, CR2, C21, C22, C23, CX1, CX2, and CX3.

**25.2 Entrepreneurs (Form I-829), has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of November 30, 2016**

**Appendix 25-1 Frequently Asked Questions About Form I-829, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of November 30, 2016.**

**Appendix 25-2 Sample NTA for Terminated Immigrant Investor, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of November 30, 2016**

**Appendix 25-3 Points of Contact for EB-5 Cases, has been superseded by USCIS Policy Manual, Volume 6: Immigrants as of November 30, 2016**

## Appendix 25-4 Model Notices to Appear (NTAs).

**MODEL NOTICES TO APPEAR (NTAs)**

Note: The allegations must be appropriately modified in the case of NTAs issued for derivatives (i.e., spouse and children).

**FOR IMMIGRANT ENTREPRENEUR TERMINATED DUE TO FAILURE TO FILE FORM** I-829 (for District Office use)

**A. Termination of Conditional Permanent Residence (Entry on Immigrant Visa)**

**ALLEGATIONS:**

1. You are not a citizen or national of the United States;

2. You are a native of _____and a citizen of _____;

3. On _____, you were lawfully admitted to the United States for permanent residence on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;

4. Your status was terminated on _____ because you failed to properly file the Request for Removal of Conditions ( **Form I-829** ).

**CHARGE:**

Section **237(a)(1)(D)(i)** of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section **216A** of the Act your status was terminated under such respective section.

**B. Termination of Conditional Permanent Residence (Adjustment)**

**ALLEGATIONS:**

1. You are not a citizen or national of the United States;

2. You are a native of _____ and a citizen of _____;

3. You were admitted to the United States at_____ as a nonimmigrant;

4. On _____ _your status was adjusted to that of a permanent resident on a conditional basis based upon your engagement/investment in a new commercial enterprise known as _____.

5. Your status was terminated on _____ because you failed to file a Request to Remove Conditions ( **Form I-829** ).

**CHARGE:**

Section 237(a)(1)(D)(i) of the Immigration and nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under Section 216A of the Act your status was terminated under such respective section.

**FOR IMMIGRANT INVESTOR/ALIEN ENTREPRENEUR TERMINATED DUE TO SUBSTANTIVE DENIAL OF FORM** I-829 (for DISTRICT OFFICE use)

**C. Termination of Conditional Permanent Residence (Entry on Immigrant Visa)**

**ALLEGATIONS:**

1. You are not a citizen or national of the United States;

2. You are a native of _____and a citizen of _____;

3. On _____, you were lawfully admitted to the United States for permanent residence on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;

4. Your Request for Removal of Conditional Residence was denied by the District Director on _____because you failed to meet the requirements necessary to remove the conditions on your status.

**CHARGE:**

Section 237(a)(1)(D)(i) of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216A of the Act your status was terminated under such respective section.

**D. Termination of Conditional Permanent Residence (Adjustment)**

**ALLEGATIONS:**

1. You are not a citizen or national of the United States;

2. You are a native of _____and a citizen of _____;

3. You (entered without inspection, were paroled, or were admitted to the United States at _____as a nonimmigrant) (specify);

4. On _____your status was adjusted to that of a permanent resident on a conditional basis based on your engagement/investment in a new commercial enterprise known as _____;

5. Your Request for Removal of Conditional Residence was denied by the District Director on _____ because you failed to meet the requirements necessary to remove the conditions on your status.

**CHARGE:**

Section 237(a)(1)(D)(i) of the Immigration and Nationality Act (Act), as amended, in that after admission or adjustment as an alien lawfully admitted for permanent residence on a conditional basis under section 216A of the Act your status was terminated under such respective section.