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United States: Spousal Sponsorship for a Green Card

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THE UNITED STATES FEDERAL GOVERNMENT provides lawful permanent residence, in the form of a green card, to spouses of American citizens through one of two processes. The green card can be obtained through adjustment of status if a spouse is inland, or through visa processing, which requires an interview with a consular officer abroad.

Visa processing can begin at some consular offices with the filing of all documents, including the petition of the American citizen spouse who lives abroad, the application of the foreign national spouse, and supporting documents. This is often a fairly speedy process taking only months to process. If the consular office will not accept the filing, or if the American citizen spouse lives in the United States, the process occurs in steps, which drags out the time it takes to complete it. The visa processing route without the advantage of filing at the consular office can be taken by a couple where both spouses live in the United States. This process may be advantageous to some.

For an alien spouse filing for adjustment of status, there must be consideration given to the 30/60 day rule, that is, if a spouse marries and/or files for adjustment within the first 30 days after a B visitor entry, the application is likely to be denied due to preconceived intent. Within the first 60 days after B visitor entry, there is a presumption of preconceived intent, which can be overcome. Waiting to marry and file after the 60 days is the best way to overcome this potential problem.

For those who file to adjust their status from the non-immigrant work categories of H-1 or L-1, and for their dependents, the doctrine of dual intent is there to help. This permits a non-immigrant H or L to have immigrant intent, and to enter in non-immigrant status anyway. Unlike other non-immigrant statuses, an H *or* L can enter with the plan to file for adjustment of status. She can also travel freely after filing for adjustment of status on her valid H or L visa, or on her H or L approval notice, if she is visa exempt. Derivative dependent family members (L-2's and H-4's) are afforded the same privilege. The impact of dual intent is not really evident until placed in contrast to those for whom dual intent does not exist.

With limited exceptions, those who are in non-immigrant status other than H or L or for whom legal status has expired can be sponsored by a spouse and file to obtain a green card through adjustment of status. Adjustment of status applicants are entitled to open work permits while they wait out the process. Those who have not accrued sufficient unlawful presence to trigger a bar to re-entry can obtain travel permission while the process continues. While H's and L's may not always find these ancillary benefits attractive, other applicants usually do. In fact, they are so much a part of the process, their applications, when filed with an adjustment of status application, do not bear additional filing fees. An important consideration is that it can take 90 days or more to obtain these ancillary benefits, possibly leaving the alien spouse unable to work or to re-enter the United States after travel abroad for three months or more.

The accrual of unlawful presence does not generally impact upon the adjustment of status process. However, it is an important consideration in the decision to file for travel permission, known as advance parole. Such travel permission prevents the adjustment of status applicant from abandoning her

application when traveling out of the U.S. before the green card is approved. If, however, the applicant has accrued between six months to a year of unlawful presence, triggering the three-year bar, or she has accrued more than a year of unlawful presence, triggering the 10-year bar, she cannot travel outside of the United States while the adjustment of status is pending, even if U.S. Citizenship and Immigration Service mistakenly approves an application for advance parole.

Each spousal petitioner must file an affidavit of support. This is a contractually binding document permitting the federal government to sue a sponsor if the foreign national spouse obtains needs-based assistance. The American citizen spouse must be 18 or over, domiciled or intending to domicile in the United States, and have an income of 125% of the poverty level for his household size. If the sponsoring spouse does not meet the income level, assets will be considered. If assets and income come up short, a joint and severally liable sponsor can sign on. This sponsor must also be 18, domiciled in the United States, an American citizen or green card holder and qualify based on income that meets 125% of the poverty level for his household plus the alien, or qualify based on income and assets.

Sponsorship liability for all sponsors remains until the alien becomes an American citizen, dies, abandons her lawful permanent residence or accrues 40 quarters of work that qualifies for Social Security. Importantly, liability for the sponsoring spouse or a joint sponsor does not end when a couple divorces. I have warned American citizen sponsors about this many times, but not one has backed out of sponsorship because of it. A joint sponsor, the American spouse's mother, did back out of sponsorship because she knew her disabled son and his disabled wife would require assistance that would make the mother liable. That couple planned to try to pursue landed immigrant status in Canada for the American citizen spouse.

If an immigrant visa is processed, or adjustment of status is approved, before the couple's second anniversary, the alien spouse is granted two-year conditional lawful permanent residence. An application showing the *bona fides* of the marriage is filed to remove the condition in the 90 days before the two-year card (and status) expires. Lawful permanent residents who have been living in wedded bliss (or at least sharing a life in common!) with their American citizen spouses are eligible to apply for citizenship after three years of green card status, rather than waiting five years like other aliens.

Citizens of other countries are often surprised to learn that the United States federal government does not recognize any marriage other than one between a man and a woman, for which a civil marriage certificate has been issued. This means no derivative immigrant status can be obtained by an American citizen's spouse under the common law, or by the partner of a gay or lesbian alien. These individuals must qualify for status based on employment or qualifying family members.

There are a multitude of factors to consider when a couple decides in what manner an alien spouse will attempt to obtain a green card. Timing is always important. Inability to travel, or the requirement that one travel abroad for interview, can make the difference in deciding on a strategy. The ability to obtain work permission is sometimes the key. The ability to assist a client in reaching the green card goal is enhanced by the ability to choose a strategy that may also meet short-term needs or desires along the way.

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