

Citizenship and Immigration Services Ombudsman

Improving the Process for Removal of Conditions on Residence for Spouses and Children

February 28th, 2013

Family reunification is one of the foundations of U.S. immigration policy, and the goals of protecting and preserving families are featured throughout our immigration law. Under the Immigration and Nationality Act (INA), U.S. citizens and Lawful Permanent Residents may petition for their foreign spouses and children.

Section 216 of the INA was passed in 1986 to help deter fraud in marriage-based immigration applications and petitions. It sets forth a procedure for certain spouses and dependent children to remove the conditions placed upon their permanent resident status. While the process appears to be straight-forward, in meetings with the Ombudsman's Office, stakeholders and USCIS officials identified numerous areas of concern.

Individuals filing Form I-751, *Petition to Remove Conditions on Residence*, often encounter difficulty due to lack of notice and inconsistent adjudications. These problems can result in undue burdens on spouses and children seeking immigration benefits and services, including the erroneous initiation of removal proceedings. U.S. Citizenship and Immigration Services (USCIS) has not made available to the public or incorporated into its Adjudicator's Field Manual (AFM) comprehensive, up-to-date information on policies and procedures associated with Form I-751 adjudications. The agency has also not provided sufficient training for officers responsible for the application of INA section 216.

The following review evaluates the nature and extent of problems related to removal of conditions on residence for spouses and children, and presents recommendations to address them. We hope USCIS will seize this critical opportunity to implement necessary changes and renew its commitment to delivering exemplary service to deserving families.

Sincerely,



Maria M. Odom
Citizenship and Immigration Services Ombudsman

RECOMMENDATIONS

1. Provide Timely, Effective and Accurate Notice to Petitioner(s) and Their Attorneys or Accredited Representatives on I-751 Receipt, Processing and Adjudication Requirements and Decisions;
2. Ensure AFM Chapter 25 is Updated, Accurate and Complete, or Create a Superseding Source of Consolidated Information for I-751 Adjudications; and
3. Train USCIS Staff to Apply the Updated AFM or Superseding Guidance with an Emphasis on Waiver Standards and Procedures.



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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

This review by the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) considers U.S. Citizenship and Immigration Services' (USCIS's) application of section 216 of the Immigration and Nationality Act (INA), which imposes an initial two-year period of conditional residence on certain spouses and dependent children who obtain status based on a marriage to a U.S. citizen (USC) or lawful permanent resident (LPR). It further establishes a detailed procedure for removing these conditions on status, which begins with the filing of a petition with fee, and extends through the appearance at any requested interview before USCIS of the petitioner(s) and/or derivatives.

Since the enactment of INA section 216, the former Immigration and Naturalization Service (INS) and USCIS have issued more than a dozen guidance documents related to the processing of Form I-751, *Petition to Remove Conditions on Residence* (Form I-751 or I-751). Only two appear on the agency's public website under the topic "conditional residence." The Adjudicator's Field Manual (AFM) lacks comprehensive, up-to-date information on policies and procedures associated with Form I-751 adjudications. Petitioners and their representatives find it difficult to discern which I-751 guidance remains in effect and how to ensure its proper application. USCIS adjudicators, in turn, face considerable challenges understanding and applying the universe of I-751 policies and procedures. When such guidance is misapplied, spouses and children seeking immigration benefits and services may encounter a range of undue burdens, including placement into removal proceedings. In meetings with the Ombudsman's Office, stakeholders and USCIS staff identified the following areas of concern: ineffective notice and barriers to securing information, most notably proof of status, inconsistent and inefficient adjudications, and a need for enhanced processes concerning late and/or multiple filings and referral for removal.

RECOMMENDATIONS

To address difficulties associated with the processing of Form I-751 petitions, the Ombudsman's Office recommends that USCIS:

- 1) Provide Timely, Effective and Accurate Notice to Petitioner(s) and Their Attorneys or Accredited Representatives on I-751 Receipt, Processing and Adjudication Requirements and Decisions;**
- 2) Ensure AFM Chapter 25 is Updated, Accurate and Complete, or Create a Superseding Source of Consolidated Information for I-751 Adjudications; and**
- 3) Train USCIS Staff to Apply the Updated AFM or Superseding Guidance with an Emphasis on Waiver Standards and Procedures.**

METHODOLOGY

In conducting this review, the Ombudsman's Office met with USCIS managers and staff in headquarters, service centers and district offices. These meetings involved detailed discussion of adjudication responsibilities and procedures as well as direct observation of Form I-751 interviews and decision-making. The Ombudsman's Office also studied specific case assistance requests and general feedback received from stakeholders around the country.¹ Statistical data provided by USCIS regarding I-751 petitions is included in Appendix A. Naturalization issues pertaining to conditional permanent residents and procedures for members of the military are not included in this review.²

BACKGROUND

Legal Framework

Promoting family unity is an essential feature of the INA. It is toward that end that the INA affords extremely high priority for acquisition of permanent resident status to qualified immediate relatives. The Immigration Marriage Fraud Amendments Act of 1986 (IMFA) was passed to address marriage fraud in requests for immigration benefits and services.³ Congress enacted IMFA in response to a growing concern about "aliens seeking permanent residence in the U.S. on the basis of marriage to a citizen or permanent resident when either the alien acting alone, or the alien and his or her purported spouse, acting in concert, married for the sole purpose of obtaining an immigration benefit."⁴

Section 216 of the INA, which IMFA added, imposes an initial two-year period of conditional residence on certain spouses and dependent children who obtain immigration status based on a marriage to a U.S. citizen or LPR.⁵ Section 216 further establishes a detailed procedure for removing this condition, which begins with the timely filing of a petition with fee, and extends through the appearance at any requested interview before USCIS by the petitioner(s) and/or derivatives.

Unless otherwise specified by the statute or regulations, an individual granted conditional permanent resident (CPR) status under section 216 enjoys the same rights, privileges, responsibilities and duties as other permanent residents.⁶ These include but are not limited to the right to apply for naturalization (if

¹ Preparation for this recommendation included in-person and teleconference sessions in 2010-2012.

² For coverage of these topics, see USCIS Memorandum, "Conditional Permanent Residents and Naturalization under Section 319(b) of the Act Revisions to *Adjudicators Field Manual* Chapter 25 (AFM Update AD09-28)" (Aug. 4, 2009) and USCIS Memorandum, "Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and their Dependents" (Sept. 22, 2009).

³ Immigration Marriage Fraud Amendments Act of 1986 (IMFA), Pub. L. No. 99-636 § (b), 100 Stat. 3537, 3543 (Nov. 10, 1986), H.R. Rep. No. 906, 99th Cong. 2d Sess. (on H.R. 3737), *reprinted in part in 1986 U.S.C.C.A.N.* 5978-86; Sen. Rep. No. 99-491 (Sept. 26, 1986) (on S. 2270).

⁴ The Adjudicator's Field Manual (AFM) Chapter 25.1(a), updated through March 12, 2012. The AFM further states, "Congress was particularly moved by the testimony of numerous citizens whose alien spouses had left them shortly after obtaining residence, as well as the testimony of Service representatives concerned with 'marriage for hire' schemes."

⁵ Where a marriage that is less than two years old forms the basis for conditional status under INA § 216, the recipient must demonstrate eligibility in all respects, including admissibility to the United States. Under 8 CFR § 216.4(2), dependent children of a conditional permanent resident who acquired immigration status concurrently (meaning on the same date or within 90 days of the parent) may be included in the parent's joint I-751 petition. Children not included in a parent's petition must file a separate I-751. A child filing separately *may file at any time* and is not required to file during the 90-day period preceding the expiration of her/his CPR status, but *must file* before the second anniversary of that same date. The child should include a written statement explaining the separate filing.

⁶ 8 C.F.R. § 216.1. See also INS Memorandum, "Legal Opinion: Status of a conditional permanent resident after denial of I-751 during pendency of review by EOIR" (Aug. 6, 1996); INS Memorandum, "Status of Conditional

otherwise eligible), the right to file petitions on behalf of qualifying relatives, the privilege of living and working in the United States, and the duty to register with the Selective Service System, when required.⁷ Because INA section 216(c)(3)(D) “specifically conditions termination of permanent resident status upon review in deportation [or removal] proceedings,” where a respondent has requested such review, he or she remains eligible to receive proof of status until an immigration judge enters a final administrative order of deportation or removal.⁸

Notice and Proof of Status

At the time USCIS confers permanent residence under INA section 216, the agency *must* notify the recipient of the conditional basis of his or her status,⁹ the need to apply for removal of the conditions within the 90 days immediately preceding the second anniversary of having been granted such status, and that failure to apply for removal of the conditions will result in automatic termination.¹⁰ Under the regulations, USCIS *should* provide a second notification by mail approximately 90 days before the second anniversary of when the individual obtained CPR status.¹¹ The Adjudicator’s Field Manual (AFM) at Chapter 25.1(b) *requires* USCIS to attempt to notify a conditional permanent resident a second time regarding the need to timely file Form I-751.¹²

The CPR and his or her spouse bear the burden – ideally following successive notices from USCIS – of jointly filing Form I-751 with either the California or Vermont Service Center (CSC or VSC, respectively), depending on their place of residence.¹³ Upon accepting a properly filed Form I-751, USCIS must issue a Form I-797, *Notice of Action* (Form I-797 or I-797), extending the petitioner’s CPR status for a one-year period (unless such status had previously been terminated).¹⁴ This allows the recipient to travel, work, and otherwise enjoy benefits and protections associated with permanent residence in the United States even if his or her originally issued Form I-551, *Permanent Resident Card* has expired.¹⁵ Form I-751 petitions may remain pending for more than one year, or beyond the Form I-797 validity period due to processing delays, issuance of unnecessary RFEs, and improvident transfers to

Residents in Proceedings” (Oct. 9, 1997); and USCIS Memorandum, “Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence” (Dec. 2, 2003).

⁷ *Id.*

⁸ INS Memorandum, “Legal Opinion: Status of a conditional permanent resident after denial of I-751 during pendency of review by EOIR” (Aug. 6, 1996) at p. 2. This same guidance notes that under 8 C.F.R. § 216.4(d)(2), as of the date of the director’s written denial decision, “the alien is instructed to surrender any Alien Registration Receipt Card previously issued by the Service,” at which point, “the terminated conditional lawful permanent resident should be issued a temporary Form I-551 during the pendency of deportation proceedings.”

⁹ In some cases, the CPR will obtain status following an interview and visa issuance at a U.S. consulate abroad. USCIS remains obligated under the regulations to provide the same notice.

¹⁰ 8 C.F.R. § 216.2(a). Failure to provide notification as required does not relieve the individual and the petitioning spouse of the need to file the Form I-751. 8 C.F.R. § 216.2(c).

¹¹ 8 C.F.R. § 216.2(b).

¹² AFM Chapter 25.1(b). USCIS affirmed that the agency “must notify the CPR a second time of the requirement to petition to have the conditions removed at or about the beginning of the 90-day period before the second anniversary of his or her CPR status... [USCIS] mails the notification, which the Marriage Fraud Amendment System (MFAS) produces automatically, to the CPR’s last known address.” Information provided to the Ombudsman’s Office by USCIS (Apr. 25, 2012). In this regard, USCIS as a matter of policy imposes a higher standard of notification than the regulation.

¹³ See USCIS Instructions to Form I-751; <http://www.uscis.gov/files/form/i-751instr.pdf> (accessed Jan. 25, 2013).

¹⁴ USCIS Memorandum, “Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence” (Dec. 2, 2003) at p. 1. See also INS Memorandum, “Reentry Permits Issued to Conditional Residents with Expired Form I-551, Permanent Resident Card – IFM Update IN02-09” (May 23, 2002).

¹⁵ *Id.* It appears USCIS recently started issuing notices titled “Verification of Inclusion of a Dependent in Filing of Form I-751,” but not on the standard Form I-797. These notices extend CPR status and indicate that the recipient may continue to live and work in the United States.

district offices for interview.¹⁶ USCIS guidance issued in 2003, 2008 and 2009 indicates that if a CPR whose I-551 has expired, and whose I-797 has expired or is about to expire, requests proof of his or her status for travel or employment, the agency should, after collecting the expired Form I-551, issue either:

- A temporary I-551 stamp with a 12-month expiration date in the conditional resident's unexpired, foreign passport (if the expiration date of the passport is one year or more); or
- If the conditional resident is not in possession of an unexpired foreign passport, a Form I-94 (arrival portion) containing a temporary I-551 stamp with a 12-month expiration date and a photograph of the conditional resident.¹⁷

Adjudication of Jointly Filed and/or Waiver Petitions

In adjudicating a jointly filed Form I-751, under the regulations, USCIS must determine whether:

- 1) The qualifying marriage was entered into in accordance with the laws of the place where the marriage took place;
- 2) The qualifying marriage has been judicially annulled or terminated, other than through the death of the spouse;
- 3) The qualifying marriage was entered into for the purpose of procuring permanent resident status for the alien; or
- 4) A fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) in connection with the filing of the petition through which the alien obtained permanent residence.¹⁸

The regulations at 8 C.F.R. section 216.4(c)(4) further provide:

If derogatory information is determined regarding any of these issues, the director shall offer the petitioners the opportunity to rebut such information. If the petitioners fail to overcome such derogatory information the director may deny the joint petition, terminate the alien's permanent residence, and issue a notice to appear [NTA] to initiate removal proceedings. **If no unresolved derogatory information is determined relating to these issues, the petition shall be approved and the conditional basis of the alien's permanent resident status removed, regardless of any action taken or contemplated regarding other possible grounds for removal. (Emphasis added.)**

¹⁶ As of mid-February 2013, the California Service Center reported processing I-751 petitions received on or before June 8, 2012 and the Vermont Service Center petitions received on or before April 9, 2012.

<https://egov.uscis.gov/cris/processTimesDisplay.do> (accessed Feb. 27, 2013).

¹⁷ USCIS Memorandum, "Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence" (Dec. 2, 2003); USCIS Memorandum, "Use of the USCIS Version of the DHS Dry Seal in the Issuance of Alien Documentation, Identification Telecommunication System (ADIT) Stamp as Temporary Evidence of Lawful Permanent Resident Status" (Dec. 10, 2008); and USCIS Memorandum, "Interim Guidance for the Issuance of an Alien Documentation, Identification and Telecommunications System (ADIT) Stamp as Temporary Evidence of Lawful Permanent Resident Status" (May 15, 2009).

¹⁸ 8 C.F.R. § 216.4(c)(1)-(4).

Where the parties are unable to file jointly, the conditional permanent resident may file Form I-751 alone at any time prior to receiving a final order,¹⁹ provided he or she requests a waiver, was not at fault in failing to meet the filing requirement, and is able to establish that:

- Deportation or removal from the United States would result in extreme hardship;
- The marriage upon which his or her status was based was entered into in good faith by the conditional resident, but the marriage was terminated other than by death, and the conditional resident was not at fault in failing to file a timely petition; or
- The qualifying marriage was entered into in good faith by the conditional resident but during the marriage the spouse or child was battered or subjected to extreme cruelty committed by the citizen or permanent resident spouse or parent.²⁰

Documentary and evidentiary standards applicable to each waiver basis appear in the regulations.²¹ Over time, the former INS and USCIS have further sought to clarify the meaning of “extreme hardship” as well as what constitutes “credible evidence” of battering or extreme cruelty in this context,²² and fortified confidentiality and safe address procedures to protect victims of domestic violence.²³ Both agencies have also issued guidance regarding I-751 petitions filed prior to the termination of the marriage, which will be discussed in greater detail later in this review.²⁴

If accompanied by sufficient supporting documentation to establish the *bona fides* of the marriage, or in the case of a waiver, eligibility for the requested basis or bases, the service center may approve the Form I-751 petition without referral to the district for an interview.²⁵ Likewise, where the service center is satisfied that the marriage at issue was entered into solely to evade immigration law, and such fraud has been verified as required, the service center may deny the Form I-751 without sending it to the district.²⁶

¹⁹ 8 C.F.R. § 216.5(a)(1). Also, “A conditional resident who is in exclusion, deportation or removal proceedings may apply for the waiver until such time as there is a final order of exclusion, deportation or removal.” 8 C.F.R. § 216.5(a)(2). INA § 216, 8 C.F.R. § 216, and USCIS Memorandum, “Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions” (Oct. 9, 2009) describe requirements and consequences related to late joint but not waiver petitions. Because the latter may be filed at any time prior to entry of a final order, they do not require a showing of “good cause and extenuating circumstances,” and once pending, the petitioner is eligible to receive a temporary I-551 stamp.

²⁰ 8 C.F.R. § 216.5(a)(1)(i)-(iii).

²¹ 8 C.F.R. § 216.5(e).

²² INS Memorandum, “‘Extreme Hardship’ and Documentary Requirements Involving Battered Spouses and Children” (HQ 90/15-P; HQ 70/8-P) (no date on document) and INS 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).

²³ The Violence Against Women Act (VAWA) and Section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1367) contain confidentiality provisions that generally prohibit disclosure to a third-party of any information relating to an individual who is a petitioner for relief under VAWA. They further prohibit DHS from using information solely from a spouse or parent who has battered the petitioner or subjected the petitioner to extreme cruelty as the basis for charging the petitioner with removability.

²⁴ INS Memorandum, “Filing a Waiver of the Joint Filing Requirement Prior to Final Termination of the Marriage” (Apr. 10, 2003), and USCIS Memorandum, “I-751 Filed Prior to Termination of Marriage” (Apr. 3, 2009).

²⁵ 8 C.F.R. § 216.4(b)(1) and USCIS Memorandum, “Delegation of Authority for I-751, ‘Petition to Remove Conditions on Residence’” (Jan. 30, 2006).

²⁶ USCIS Memorandum, “Delegation of Authority for I-751, ‘Petition to Remove Conditions on Residence,’” (Jan. 30, 2006). The agency must provide written notice to the foreign national of the denial decision and the reason(s) and issue an NTA under INA §239. 8 C.F.R. § 216.4(d)(2).

Prior to doing so, the service center must provide the petitioner with a Notice of Intent to Deny (NOID) and an opportunity to examine and rebut the evidence of record.²⁷

Referral for Interview

Where the service center is unable to resolve outstanding evidentiary or other issues, the case should be referred to the district for an interview.²⁸ USCIS guidance emphasizes that interviews should only be considered when:

- Evidence purporting to establish the *bona fides* of the marriage has been submitted, yet such evidence does not satisfy the Director that the marriage was not entered into for the purpose of evading the immigration laws of the United States; and/or
- In waiver cases, the Director has determined that the evidence submitted to establish eligibility for the requested waiver leads to an inconclusive result and that an assessment from a live interview seems appropriate.²⁹

The guidance further notes that interviews should not be used to obtain information “that can be readily requested through [the] Request for Evidence (RFE) process.”³⁰ In this respect, service centers are encouraged to utilize the RFE process and adjudicate cases on their merits in lieu of transfer to a district office, except where the petition contains:

- Information that is inconsistent with information discovered in the supporting documentation;
- Potential evidence of fraud or misrepresentation;
- Inconclusive evidence pertaining to the *bona fides* of the marriage to make a decision on the record notwithstanding receipt of a response to an RFE; or
- A particularly complex set of facts or issues that the Director feels would be best resolved by an interview.³¹

The AFM was updated in June 2006 to create a process for assigning fraud levels to pending I-751 petitions.³² More recently, USCIS has suggested to the Ombudsman’s Office that joint I-751 petitions may be referred to a district office if:

- Inconclusive evidence of marital *bona fides* has been provided, notwithstanding issuance of an RFE;
- A previous I-751 is pending, has been scheduled for interview, or denied for cause;

²⁷ *Id.*

²⁸ 8 C.F.R. § 216.4(b)(1).

²⁹ USCIS Memorandum, “Revised Interview Waiver Criteria for Form I-751, Petition to Remove the Conditions on Residence” (June 24, 2005).

³⁰ *Id.*

³¹ *Id.*

³² AFM Chapter 25.1(g)(2) states: “Assigning Fraud Levels. If an interview is deemed necessary, the case is sent to the Service Center’s Adjudications Unit and given to an adjudicator to assign a fraud level. The fraud levels of A, B, and C are assigned to the I-751 based on the documentation submitted with the application. If the adjudicator is fully satisfied that the case is approvable then a fraud level of C is assigned. If the adjudicator is less than fully satisfied, but still feels that (based on the information available at the time) the case can be approved then a fraud level of B is assigned. If the adjudicator has serious concerns about the approvability of the case and/or wants the applicant and the spouse to be interviewed, then the case would be assigned a fraud level of A.”

- The VSC/CSC is unable to determine why a previous I-751 was denied or closed, or evidence suggests fraud;
- The A-file is unavailable or has been requested for pending litigation;
- The CPR has filed Form N-400, *Application for Naturalization*, that is pending;
- The record includes unresolved discrepancies; or
- In the case of a derivative child, the biological parent is involved in a pending interview, “investigative hold,” or removal proceedings.³³

This list of reasons does not appear in written agency guidance and, like most of the guidance, is not specifically referenced in the AFM.

Notwithstanding referral by the service center to a district office, a district director may upon review of the Form I-751 and supporting material, waive the interview requirement and adjudicate the petition.³⁴ Where an interview is deemed essential, it must be scheduled by USCIS within 90 days of the date on which the Form I-751 petition was properly filed, and with written notice to the petitioner(s).³⁵

If derogatory information is found during the interview process, the district director must offer the petitioner(s) an opportunity to rebut the information.³⁶ Failure to establish eligibility for removal of conditional residence may result in denial of the petition, termination of the foreign-born petitioner’s CPR status, and placement into removal proceedings.³⁷ So, too, may failure to timely file the Form I-751 or appear as requested for an interview.³⁸

Late and/or Multiple Filings and Removal Proceedings

USCIS may accept a late filed Form I-751 and agree to reschedule a missed interview for “good cause and extenuating circumstances.”³⁹ The agency recognizes that “[t]he law provides for broad discretion as to what constitutes good cause and extenuating circumstances.”⁴⁰ Examples include but are not limited to: hospitalization, long term illness, death of a family member, the recent birth of a child (particularly if there were complications), and a family member on active duty with the U.S. military.⁴¹ In a recently released interim policy memorandum, USCIS clarified that where an untimely *joint* Form I-751 lacks any written explanation to establish good cause and extenuating circumstances, the agency will issue an RFE affording the petitioner(s) an opportunity to comply with INA section 216(C)(1)(A).⁴²

³³ Information provided to the Ombudsman’s Office by USCIS (Apr. 25, 2012).

³⁴ See *supra* note 29.

³⁵ *Id.* If an interview is rescheduled at the request of the petitioners, USCIS is not required to conduct it within the 90-day period following the filing of the petition. Issuance of an RFE or NOID may extend the 90-day adjudication time frame. 8 C.F.R. § 216.4(b)(3).

³⁶ See *supra* note 18.

³⁷ 8 C.F.R. § 216.4(d)(2) and § 216.5(f).

³⁸ 8 C.F.R. § 216.4(a)(6) and (b)(3), respectively. USCIS has represented that, as a matter of policy and practice, it detects through system-generated reports CPRs who have failed to file I-751 petitions as required. “If there is no evidence that a Form I-751 has been filed, and there is nothing in the record of proceeding or in USCIS systems that precludes termination of CPR status, USCIS issues a termination notice and an NTA, to place the CPR in removal proceedings.” Information provided to the Ombudsman’s Office by USCIS (July 11, 2012).

³⁹ INA § 216(d)(2)(B).

⁴⁰ USCIS Memorandum, “Adjudication of Form I-751, Petition to Remove Conditions on Residence Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions” (Oct. 9, 2009) at p. 2.

⁴¹ *Id.*

⁴² USCIS Memorandum, “Revised Guidance Concerning Adjudication of Certain I-751 Petitions” (Dec. 23, 2012).

There is no limit on the number of Form I-751s a petitioner may file.⁴³ While late-filed joint petitions require written proof of good cause or extenuating circumstances, waiver petitions can be filed without such proof at any time prior to the entry of a final order.⁴⁴ Where the basis for seeking removal of CPR status changes prior to final adjudication of a pending petition, the petitioner may file a new I-751. USCIS may also amend a pending petition. For example, where the marriage forming the basis of a jointly filed I-751 ends, the service center after receiving a final divorce decree may amend the original filing and adjudicate it as a waiver case.⁴⁵ Any other basis for amending a pending petition must be referred to a district office, which may or may not require the petitioner to file a new I-751.⁴⁶

USCIS maintains original jurisdiction over all I-751 petitions, including those filed by respondents in removal proceedings.⁴⁷ Where a respondent in removal files a new joint or waiver petition with USCIS, the immigration judge must grant a continuance until the Form I-751 is adjudicated.⁴⁸ USCIS guidance instructs adjudicators to consider any additional or different evidence, or alternate ground for a waiver presented in new or multiple filings.⁴⁹ Thus, the role of the immigration judge is to review only those Form I-751 petitions that have been denied by USCIS; an immigration judge may not accept or adjudicate I-751 petitions in the first instance.⁵⁰ USCIS does not track the outcome of I-751 cases that result in initiation of removal proceedings.⁵¹

ANALYSIS

Since the enactment of INA section 216, the former INS and USCIS have issued more than a dozen guidance documents, including AFM updates, to clarify issues related to Form I-751 adjudications.⁵² Only two appear on the agency's public website under the topic "Policy and Procedural Memoranda on Conditional Residence."⁵³ The AFM, which is available via intranet to agency staff,⁵⁴ and in a redacted version to the public,⁵⁵ lacks comprehensive, up-to-date information on policies and procedures associated with Form I-751 adjudications. Petitioners and their representatives find it difficult to discern which I-751 guidance remains in effect and how to ensure its proper application. USCIS adjudicators, in turn, face considerable challenges understanding and applying the universe of I-751 policies and

⁴³ See *supra* note 40 at p. 3.

⁴⁴ 8 C.F.R. § 216.5(a)(2).⁴⁵ USCIS Memorandum, "I-751 Filed Prior to Termination of Marriage" (Apr. 3, 2009).

⁴⁵ USCIS Memorandum, "I-751 Filed Prior to Termination of Marriage" (Apr. 3, 2009).

⁴⁶ Information provided to the Ombudsman's Office by USCIS (Apr. 25, 2012).

⁴⁷ See *supra* note 40 at p. 3.

⁴⁸ *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999); *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994).

⁴⁹ See *supra* note 40 at p. 4.

⁵⁰ *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991).

⁵¹ Stakeholders have reported to the Ombudsman's Office their perception that immigration judges frequently find in favor of respondents and permit them to remain LPRs.

⁵² See Appendix A listing related INS and USCIS memoranda.

⁵³ The two USCIS memoranda provided are "I-751 Filed Prior to Termination of Marriage" and "Delegation of Authority to Service Center Directors to Adjudicate Form I-829, Petition by Entrepreneur to Remove Conditions; Adjudication of Form N-400, Application for Naturalization when a Form I-829 is Still Pending; AFM Update: Chapter 25.2." See

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=1d2f51b4b1af3110VgnVCM1000004718190aRCRD&vgnnextchannel=1d2f51b4b1af3110VgnVCM1000004718190aRCRD> (accessed Jan. 24, 2013).

⁵⁴ Information provided to the Ombudsman's Office by USCIS staff in January 2011 and March 2012 suggests that many adjudicators find AFM Chapter 25.1 confusing and difficult to apply.

⁵⁵ The public version of the AFM is accessible at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=a2e29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=a2e29c7755cb9010VgnVCM10000045f3d6a1RCRD>. For the purpose of this discussion, the Ombudsman's Office refers to this public document, not the intranet version.

procedures. When such guidance is misapplied, spouses and children seeking immigration benefits and services may encounter a range of undue burdens, including placement into removal proceedings.

Ineffective Notice and Barriers to Securing Information, including Proof of Status

While USCIS typically provides initial notice as required when granting CPR status, the agency seldom issues any second notification.⁵⁶ This is contrary to USCIS's written policy and otherwise results in missed opportunities for USCIS. A second notice about the conditional nature of this status is an important reminder to CPRs and may alleviate termination of status and issuance of NTAs for failure to file Form I-751. It also creates a means for USCIS to provide information about I-751 joint and waiver filing requirements, fees, and procedures.

During discussions with the Ombudsman's Office, some USCIS staff expressed support for a second notice. One USCIS officer observed that, "[A] denial without [second] notice is very harsh." She further pointed out that, where an applicant files with the wrong fee, the filing becomes untimely, and an NTA is often issued. If a petitioner has been married for over two years and is a victim of domestic violence, they may not realize they could be eligible for a waiver. She suggested, "[T]here should be a non-threatening letter listing exemptions that are available."⁵⁷

In terms of securing proof of status, many CPRs with expired or nearly expired documents encounter difficulty when requesting issuance of a temporary I-551 stamp at local USCIS offices. The AFM at Chapter 25.1 does not mention or link to the numerous directives on this topic. It recognizes that, "[A] 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,"⁵⁸ but omits any reference to foundational guidance adopting and explaining this legal conclusion.⁵⁹

Case example:

The Ombudsman's Office received a request for assistance from an individual in removal proceedings who was seeking proof of status after USCIS denied her jointly-filed Form I-751. She first appeared at a district office in April 2012 to obtain an I-551 stamp in her passport so she could work while in proceedings. Following her attorney's advice, she brought to the INFOPASS appointment copies of relevant agency guidance, including the August 6, 1996 INS Memorandum. The USCIS officer refused to issue proof of status despite the guidance. Repeated contacts with the district by the Ombudsman's Office eventually resulted in issuance of the I-551 stamp in December 2012.

The Form I-797, which extends status during the pendency of an I-751, includes a receipt number much like any other notice of proper filing with USCIS. The Ombudsman's Office understands that due to limitations in USCIS technology, CPRs are unable to check the status of their case online, or in any other way, with the I-797 receipt number. Only after receiving an Application Support Center (ASC) appointment letter with a different receipt number may CPRs check case status online at www.uscis.gov.

⁵⁶ Information provided to the Ombudsman's Office by USCIS (Sept. 2011 and Mar. 2012) and by stakeholders (2010-2012).

⁵⁷ Information provided to the Ombudsman's Office by USCIS (Jan. 2011).

⁵⁸ AFM Chapter 25.1(h)(2).

⁵⁹ INS Memorandum, "Legal Opinion: Status of a conditional permanent resident after denial of the I-751 during pendency of review by EOIR," (Aug. 6, 1996), and "Status of Conditional Residence in Proceedings," (Oct. 9, 1997).

Some individuals appearing on behalf of petitioners report not receiving I-751 notices, including copies of the Form I-797, RFEs or other important documents despite having properly filed a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative* with USCIS. At times, only one receipt notice is sent to either the petitioner or his or her attorney.⁶⁰ USCIS has clarified that in cases where a petitioner or attorney of record does not receive a receipt or approval notice, they should contact the NCSC and request a duplicate notice from the service center having jurisdiction over the I-751 petition.⁶¹

Inefficient Processes and Inconsistent Adjudications

At several points following the filing of Form I-751, USCIS has the opportunity to ensure consistent actions in the adjudication of the case. The agency, however, sometimes fails to detect that the marriage at issue was more than two years old, meaning the foreign-born petitioner should have received LPR as opposed to CPR status. In those cases, the burden rests with the petitioner(s) to correct these errors, which causes delays and additional expenses.

Case example:

The Ombudsman's Office received a request for assistance from an individual who was improperly issued CPR status. When she began the immigration process to join her husband in the United States, the couple had been married for less than two years. By the time she entered the United States, they had been married for slightly over two years. Nevertheless, she was improperly issued a conditional LPR card by USCIS, based on a determination made by U.S. Customs and Border Protection. She later filed a waiver of the joint petition to remove the conditions of residence based on abuse. The service center sent an RFE for additional information and then relocated the petition for interview at a district office. Four months after the interview, she received a letter from USCIS stating that she should have been issued a 10-year LPR card instead of a conditional card and she should file Form I-90 to correct this error (fee waived). The individual filed Form I-90, Application to Replace Permanent Resident Card, in April 2010, and it was denied four months later. The denial stated that the I-90 could not be approved because the I-751 waiver was still pending. There appeared to be misinformation in the electronic systems. The individual, through her attorney, tried to inform USCIS of these errors by contacting the National Customer Service Center (NCSC) and by attending INFOPASS appointments. She also filed a Motion to Reopen the I-90. During this time, she was unable to obtain an I-551 stamp in her passport. Following intervention by the Ombudsman's Office, USCIS approved the Form I-90 in April 2011.

When asked to explain what measures are in place to ensure CPR status is conferred properly upon admission to the United States, USCIS stressed that, in consular processing cases, U.S. Customs and Border Protection is responsible “for ensuring...correct classification.” Where an individual receives a permanent resident card with the wrong classification, USCIS indicated that the recipient “can request a card with the correct classification by filing Form I-90 (fee-waived).”⁶²

⁶⁰ Information provided to the Ombudsman's Office by stakeholders (Apr. 25, 2012).

⁶¹ Information provided to the Ombudsman's Office by USCIS (July 11, 2012).

⁶² Information provided to the Ombudsman's Office by USCIS (July 11, 2012). USCIS further advised that it, “reviews all I-751 petitions at the adjudications level to determine if the individual was properly classified as a CPR. If they were not, and CBP should have admitted the CPR as an LPR because the marriage was more than two years old at the time of admission, the service center requests a corrected LPR card with 10-year validity and the proper immigrant classification, administratively closes the I-751 petition, and processes a fee refund.”

Another area where inconsistent processing may affect I-751 petitions occurs at service centers when determining to transfer cases for interview. Although USCIS has issued guidance indicating when an I-751 should be forwarded to a district office for interview, uncertainty remains regarding, “when it is okay to approve [a case] without an interview.”⁶³ Service center staff told the Ombudsman’s Office that they typically recommend referral to a district office whenever they feel unable to render a decision based on information provided by the petitioner and their own independent research.⁶⁴ This approach does not align with agency directives or the AFM. In addition, district office staff finds that referred cases seldom include clear notes regarding outstanding areas of concern.⁶⁵ These issues may contribute to the inconsistent application of guidance and inefficient adjudication reported by stakeholders.

Another manifestation of this situation is variation in the issuance of RFEs. Some stakeholders believe the CSC issues RFEs and transfers for interview most if not all cases involving a marriage without children.⁶⁶ On the other hand, these same stakeholders report that I-751s with children of the marriage (whether joint or waiver filings) seem to be approved without question. Others report receiving RFEs on a case-by-case basis for information already submitted to USCIS.⁶⁷ This is not unlike the experience of applicants across form types who lament the issuance of “boilerplate” RFEs.

Case example:

The Ombudsman’s Office received a case from a married couple who filed a joint petition to remove the conditions on the husband’s residence in May 2011. The service center processing the petition sent an RFE for evidence already submitted. Confused by this request and unsure what was lacking in the original filing, the couple responded by submitting again all of the same information. The case was pending longer than posted processing times, and the delay affected adversely the family’s ability to relocate to allow the husband to begin graduate school. The Form I-751 was eventually approved in August 2012 after a district office interview.

Interviews

Problems reported to the Ombudsman’s Office in relation to I-751 interviews include allegations of USCIS officers making inappropriate remarks, displaying unprofessional behavior, and demonstrating obvious skepticism about petitioners and their attorneys or accredited representatives.⁶⁸ In select

⁶³ Information provided to the Ombudsman’s Office by USCIS (March 2012).

⁶⁴ *Id.* These same adjudicators stated that they no longer apply the AFM language regarding assignment of fraud levels to I-751 petitions.

⁶⁵ Information provided to the Ombudsman’s Office by USCIS (Mar. 2012 and Sept. 2012). In the case of separation or divorce, USCIS guidance instructs service centers when referring I-751s to the district to place a memorandum in the file stating, “[T]he co-petitioners are separated or have initiated divorce or annulment proceedings, and the evidence of record does not sufficiently demonstrate that the marriage was bona fide.” See *supra* note 45 at p. 3.

⁶⁶ Information provided to the Ombudsman’s Office by stakeholders (May 2011). In information provided to the Ombudsman’s Office by USCIS (Feb. 2013), the agency notes that RFEs are issued on a case-by-case basis.

⁶⁷ Information provided to the Ombudsman’s Office by stakeholders (2011-2012).

⁶⁸ *Id.* USCIS reports that it is developing standardized policies and procedures for customers to submit complaints. This policy has not yet been finalized, but will be included in the new online policy manual. In the meantime, applicants and their representatives can submit complaints about inappropriate or unprofessional behavior in-person by asking to speak with a supervisor.

locations, “officers appear unprepared, utilize poor listening skills, interrupt repeatedly and fail to apply proper legal standards.”⁶⁹

USCIS recognizes the need for professionalism and sensitivity when interviewing applicants and petitioners, especially where the facts and circumstances involve allegations of domestic violence.⁷⁰ The agency stated that revisions to a *draft* National I-751 Standard Operating Procedure *require* adjudicators to “undergo training for sensitivity, safe address and confidentiality, and consistency.”⁷¹ Such training is not yet mandatory. Even if it were, the topics indicated would not address the full range of challenges associated with I-751 adjudications, whether at the service center or district level. For example, USCIS district staff consistently reported to the Ombudsman’s Office feeling ill-equipped to handle waivers based on battering or extreme cruelty.⁷² Some admitted “not knowing how to deny these cases for cause.”⁷³ Others expressed uncertainty as to “what is acceptable to ask or how to determine if someone suffered abuse.”⁷⁴

Case example:

The Ombudsman’s Office observed one district office adjudicator evaluating a waiver for battery and extreme cruelty filed pro se by a young man. The adjudicator asked the petitioner to relate information about the bona fides of the marriage; she wanted to know about the couple’s courtship and living arrangements. When he began discussing circumstances involving abuse, the adjudicator stopped him, said she would get to that topic later, and noted that evidence in the file in the form of a letter from his estranged spouse contradicted his story. The petitioner followed her instruction and described his living arrangements during the marriage. The adjudicator then asked about why he filed for a waiver. She allowed him to explain the deterioration of the relationship and concomitant abuse. The adjudicator then reviewed the evidence submitted and issued an RFE for a certified transcript of his tax return. In a discussion with the Ombudsman’s Office after the interview, the officer did not question the bona fides of the marriage, but stated that she did not believe the petitioner was eligible for a waiver based on battery and extreme cruelty. Without indicating how an RFE for a certified transcript of the petitioner’s tax return related to battery or extreme cruelty, the adjudicator said she intended to deny the case. The Ombudsman Office was concerned not only about the seemingly unnecessary RFE, but also the adjudicator’s reference to a letter submitted by the petitioner’s USC spouse that the petitioner had no opportunity to view or challenge.

Waivers

As suggested earlier, service center and district office staff report different levels of preparedness to adjudicate I-751 cases. The VSC VAWA unit offers consistent, in-depth training on battery and extreme cruelty across form types. While the VAWA Unit does not adjudicate I-751 petitions, the VAWA Unit’s

⁶⁹ Information provided to the Ombudsman’s Office by stakeholders (Mar. 2011).

⁷⁰ Information provided to the Ombudsman’s Office by USCIS (July 11, 2012).

⁷¹ *Id.* It is not clear when this *draft* manual will become final or available to the public. USCIS announced on January 7, 2013 the creation of a central on-line USCIS Policy Manual that will ultimately replace the AFM. To date, USCIS has released the first of 12 volumes titled, *Citizenship and Naturalization*.

⁷² Information provided to the Ombudsman’s Office by USCIS (2011-2012).

⁷³ Information provided to the Ombudsman’s Office by USCIS (Mar. 2012). One adjudicator commented that, “I-751s are considered low priority in district offices, but they are time intense and require more resources than management thinks they do.”

⁷⁴ *Id.* A lack of training on domestic violence and extreme cruelty was cited repeatedly as one reason for this uncertainty.

presence at the VSC serves as a valuable resource for adjudicators. Staff and stakeholders see this as impacting positively the adjudication of I-751 waivers in that setting.⁷⁵ On the other hand, some CSC staff acknowledges feeling ill-equipped to evaluate claims involving battery and extreme cruelty.⁷⁶ Stakeholders who perceive a qualitative difference in adjudications between the two centers echo this sentiment.⁷⁷ Each service center also observes safe address procedures in battered spouse cases. However, USCIS field office staff noted that interviews are scheduled by contractors who are not trained in VAWA confidentiality or safe address rules.⁷⁸

For waivers based on the termination of a marriage, USCIS has not updated the AFM to reflect information in its April 2009 memo on this topic.⁷⁹ Instead, the AFM contains outdated information and scenarios. The April 2009 memo provides:

- If a CPR files a *waiver* petition based on termination of marriage, but the CPR is legally separated or in pending divorce or annulment proceedings, USCIS shall issue an RFE requesting documents terminating the marriage. If the CPR provides within the allotted 87 days responsive information, the service center shall adjudicate the petition on the merits. Otherwise, the I-751 will be denied.
- If a CPR files a *joint* petition but is legally separated or in divorce or annulment proceedings, USCIS shall issue an RFE requesting a copy of termination documents and a statement as to whether the CPR would like the joint petition to be treated as a waiver. If the CPR provides such documents with an affirmative reply, USCIS will amend the joint petition and adjudicate it as a waiver. Otherwise, USCIS may continue to adjudicate the petition to assess the *bona fides* of the marriage and approve or refer the petition for an interview. In the latter scenario, the adjudicator handling the petition is instructed to include a memorandum in the file summarizing issues in need of further examination by the district office.⁸⁰

While offering instruction on two discrete scenarios, the April 2009 memo does not address other situations that can and do arise in I-751 adjudications. For example, where a CPR requesting a waiver is unable to secure a final divorce or annulment decree within the 87 day RFE response period, no protocol exists to extend such period. Hence, USCIS policy dictates denying the Form I-751 and issuing an NTA. Also unaddressed in the AFM is the impact of a petitioning spouse's death on a pending Form I-751.⁸¹

A Need for Enhanced Processes Concerning Late and/or Multiple Filings and Referral for Removal

USCIS, in response to an information request from the Ombudsman's Office, affirmed that it, "allows for late-filed I-751s if the petitioner establishes to the satisfaction of the director, in writing, that there was good cause for the failure to file Form I-751 within the required time period."⁸² Limited guidance exists as to what constitutes "good cause" and, as is typically linked to this requirement, "extenuating circumstances." The October 2009 memo provides certain examples,⁸³ but the memo is not featured in the AFM. While USCIS's recent interim policy memorandum directs adjudicators to issue RFEs to

⁷⁵ Information provided to the Ombudsman's Office by USCIS (Sept. 2011) and stakeholders (2011-2012).

⁷⁶ Information was provided to the Ombudsman's Office by USCIS (Mar. 2012).

⁷⁷ Information provided to the Ombudsman's Office by stakeholders (2011-2012).

⁷⁸ Information provided to the Ombudsman's Office by USCIS (Mar. 2012).

⁷⁹ See *supra* note 45.

⁸⁰ See *supra* note 45.

⁸¹ In this regard, a focus on *Matter of Lynette S. Rose, Respondent*, 25 I&N Dec. 181 (BIA 2010) would be valuable. This case holds that a CPR seeking to remove the conditional basis of his or her status who has timely filed the petition and appeared for an interview required under INA § 216(c)(1), does not need a separate section 216(c)(4) hardship waiver if the petitioning spouse died during the two-year conditional period.

⁸² Information provided to the Ombudsman's Office by USCIS (Apr. 25, 2012).

⁸³ See *supra* note 40.

afford petitioners the opportunity to comply with INA section 216(C)(1)(A),⁸⁴ it repeats but does not further explain what constitutes good cause or extenuating circumstances or how to demonstrate the same.

In the absence of a reliable protocol for second notice under 8 C.F.R. § 216.2(b), or clear information as to the definition of good cause, petitioners may fail to realize their obligation to file the Form I-751, and what is needed to support a late filing. Hence they risk automatic termination of their CPR status. USCIS has represented that, as a matter of policy and practice, it detects through system-generated reports those in CPR status who have failed to file the Form I-751 as required. USCIS stated to the Ombudsman's Office that "[i]f there is no evidence that a Form I-751 has been filed, and there is nothing in the record of proceeding or in USCIS systems that precludes termination of CPR status, USCIS issues a termination notice and a Notice to Appear to place the CPR in removal proceedings."⁸⁵ This creates ancillary problems and the need for jurisdictional coordination where the petitioner subsequently files and USCIS accepts a late Form I-751. Consistent and effective notice under 8 C.F.R. § 216.2(b) would potentially decrease untimely filings and avoid the initiation of unnecessary or improvident removal proceedings.

Finally, USCIS's overall processing of I-751 cases is constrained and complicated by its use of the Marriage Fraud Amendment System (MFAS). MFAS is an electronic system that supports the processing and control of petitions to remove CPR status.⁸⁶ Stakeholders and USCIS users freely recognize that:

- MFAS does not capture more than one I-751 at a time for a given case. If a CPR files a second or multiple I-751s, all but the most recently filed I-751 record is erased from MFAS.
- MFAS does not fully interface with other USCIS databases such as the Central Index System (CIS) and Computer Linked Application Information Management System (CLAIMS). Because MFAS is not a CLAIMS-based system, petitioners cannot use their I-751 receipt number to ascertain case status online.
- MFAS records are managed and controlled by the service centers. If a case is transferred to a district office for interview and the adjudicator discovers information in MFAS is missing or inaccurate, he or she cannot fix it. Instead, the case must be returned to the service center with an indication of what MFAS information should be changed.
- MFAS cannot generate approval notices that list the ground for removal of CPR status. This is especially significant in battered spouse cases where a petitioner demonstrates eligibility for more than one waiver ground. Lack of clarity as to why LPR status was accorded can affect adversely an I-751 petitioner's ability to naturalize in three rather than five years under INA section 319(a).⁸⁷

⁸⁴ See *supra* note 42.

⁸⁵ Information provided to the Ombudsman's Office by USCIS (July 11, 2012).

⁸⁶ During interactions with the Ombudsman's Office in 2010-2012, USCIS staff repeatedly described MFAS as antiquated, difficult to use and a source of inefficiency related to I-751 adjudications.

⁸⁷ Individuals who obtain LPR status by reason of an approved waiver of the joint filing requirement under INA § 216(c)(4)(C) are eligible to apply for naturalization under INA § 319(a). See USCIS Memorandum, "Clarification of Classes of Applicants Eligible for Naturalization under Section 319(a) of the Immigration and Nationality Act (INA), as amended by the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. 106-386" (Jan. 27, 2005). An additional problem noted by stakeholders is that agency guidance does not address whether dependent children included on an approved parent's waiver filing may naturalize in three years along with their parent.

RECOMMENDATIONS

The adjudication of I-751 petitions can be complicated, time-consuming and very challenging. It is not surprising that new, as well as seasoned, adjudicators encounter problems handling this line of cases. To address difficulties associated with Form I-751 adjudications, the Ombudsman's Office recommends that USCIS:

1) Provide Timely, Effective and Accurate Notice to Petitioner(s) and Their Attorneys or Accredited Representatives on I-751 Receipt, Processing and Adjudication Requirements and Decisions.

A. Proper Notice

At the time USCIS confers conditional permanent resident status under INA section 216, and then again approximately 90 days before the second anniversary of that date, immigration law and USCIS policy require notice to petitioners of the conditional basis of their status, and the Form I-751 filing requirement. However, USCIS seldom provides a second notice. This increases the risk to petitioners of automatic termination of CPR status, and placement in removal proceedings. To address this situation, USCIS should create a system to ensure CPR status was properly conferred and indicate when a second notice is appropriate. If CPR status was improperly conferred, USCIS should generate a notice to inform the petitioner(s) and attorney or accredited representative to file Form I-90 (fee waived) so that a new 10-year LPR card can be created. If the CPR status was properly conferred, USCIS should generate the second notice of CPR status to both the petitioner(s) and attorney or accredited representative and include filing requirements related to waivers under INA section 216(c)(4).

B. Processing Information

In addition, USCIS should ensure that the receipt number provided to petitioners on their initial I-797 can be used to access case status and/or processing information online or in any other way normally available to its customers. Also, specifying on the initial I-797 receipt notice the names of any dependent children included in the filing would help derivatives demonstrate the existence of a petition pending on their behalf and secure temporary proof of their CPR status.

C. Adjudication Requirements and Decisions

USCIS has not clarified either on its public website or in written guidance what constitutes proof of good cause or extenuating circumstances in late-filed cases. In the context of providing initial and second notices to I-751 petitioners, USCIS should incorporate explanatory language on this point. USCIS should also capture in one place, whether in the AFM, a dedicated memorandum or on its public website, the factors in general that warrant referral of a Form I-751 petition to a district office for interview. When issuing RFEs and interview notices, the agency should be more specific as to outstanding areas of concern or documentary deficiencies. For I-751 cases referred to district offices, USCIS should further require service center staff to include a written summary for district staff as to why an interview is necessary.

Finally, unless MFAS can be improved to overcome its limitations, USCIS should explore and implement an alternative electronic system capable of enhancing I-751 processing. System improvements would include preserving data on more than one I-751 filing for any given case, interacting with other USCIS databases, enabling access to and manipulation of data by service center as well as district staff, and inclusion in final approval notices of applicable and ultimately approved waiver grounds. Until MFAS is updated or replaced, USCIS should develop an interim protocol to track and share with petitioners the basis for approval of waiver requests.

2) Ensure AFM Chapter 25 is Updated, Accurate and Complete, or Create a Superseding Source of Consolidated Information for I-751 Adjudications.

As reflected in the number and nature of guidance documents issued by the former INS and USCIS on I-751 processes and procedures, this area is marked by confusion and presents a range of challenges for all interested parties. Despite repeated instruction on the same topics, most notably the issuance of I-551 stamps and interview criteria, I-751 petitions and related requests for information or services are handled differently across USCIS. To increase understanding of important legal and procedural concepts and, therefore, consistency in adjudications, USCIS should ensure that AFM Chapter 25 is updated, accurate and complete. Another potentially remedial approach to address ongoing communication and operational gaps is to create a new, superseding source of consolidated information for I-751 adjudications. USCIS recently released the first chapter of its new online policy manual, and a chapter or section on I-751 adjudications could be a consolidated source of information on this area. In the meantime, USCIS should make available and highlight – for the public and USCIS adjudicators – all valid guidance.

3) Train USCIS Staff to Apply the Updated AFM or Superseding Guidance with an Emphasis on Waiver Standards and Procedures.

To promote consistent adjudication under the law, regulations, and prevailing policies and procedures, USCIS should conduct comprehensive training in service center and district offices and adopt other quality assurance measures to monitor progress and problems associated with I-751 adjudications. In meetings with the Ombudsman's Office, USCIS adjudicators repeatedly cited a lack of training in this area. They further observed that because I-751 cases at times involve allegations of fraud or domestic violence, training is necessary and would be extremely helpful. They particularly expressed a desire for training on the "any credible evidence" standard for battered spouse waivers.⁸⁸ USCIS should also ensure that proper safe address protections are implemented even when processing occurs through contract staff.

The VSC VAWA Unit is recognized for its expertise in providing training and information related to challenging issues. While the VAWA Unit does not adjudicate I-751 petitions, the VAWA Unit's presence at the VSC serves as a valuable resource for adjudicators reviewing I-751 waivers based on battery and extreme cruelty filed at the VSC. It is also likely that an adjudicator reviewing an I-751 at the VSC has undergone some form of domestic violence training through the VSC's regular and continuous training of its staff. This specialized resource is lacking at the CSC and in most district offices. District office adjudicators handling I-751 cases are likely to engage in direct contact with victims, yet they are not trained in how to discern battery or extreme cruelty.⁸⁹ Whether by enlisting VSC VAWA staff or otherwise securing subject matter experts, USCIS should better prepare through training and consultation district office staff to adjudicate I-751 cases. Until such support is in place across district offices, USCIS might consider assigning I-751 waiver adjudications to senior or designated district office adjudicators who have received appropriate training and demonstrated the ability and sensitivity to conduct effective interviews.

Additional quality assurance measures USCIS should consider include:

- Initial review, as part of an adjudicator's checklist, of the I-751 petition to determine whether CPR status was properly conferred;
- Supervisory or secondary review of all outgoing RFEs to ensure they do not request extraneous information or documentation already submitted by the petitioner(s);

⁸⁸ In this regard, the Department of Homeland Security has created an internal training, "VAWA: Confidentiality and Immigration Remedies."

⁸⁹ AFM Chapter 25.1 specifically states, "Only under the rarest of circumstances should the interview requirement be waived in the case of an alien seeking a waiver of the filing requirement under section 216 (c)(4) of the Act."

- Addition of “credible evidence” language and examples in RFE templates;
- Creation of a model template for use by service center staff to explain why a transferred case requires an interview; and
- An initial review process whereby district offices determine whether transferred I-751s require interviews and alert service centers when transferred cases were approvable without interview. This suggested initial review is already undertaken by some USCIS district offices to best use local resources for scheduling interviews. As part of this review, the district office may report back to the service center any issues with the I-751 such as the need for more information in a transfer document or whether the filing was approved without interview. This important feedback loop may help minimize the number of cases improperly forwarded to district offices for interview.

CONCLUSION

INA section 216 imposes an initial two-year period of conditional residence on certain spouses and dependent children who obtain permanent resident status based on a marriage to a USC or LPR. This provision was designed to detect and deter marriage-based immigration fraud. Myriad difficulties associated with achieving this important goal are apparent in the former INS and USCIS having issued more than a dozen guidance documents to address recurring problems associated with I-751 adjudications. Most of these directives are not included in the AFM, or reinforced through regular or targeted training. When guidance is misapplied, spouses and children may erroneously be placed into removal proceedings. Stakeholders, along with USCIS employees in service centers and district offices, have called for remedial agency action. The Ombudsman’s Office hopes that the analysis and recommendations included in this review will result in meaningful change and improved I-751 adjudications.

APPENDIX A

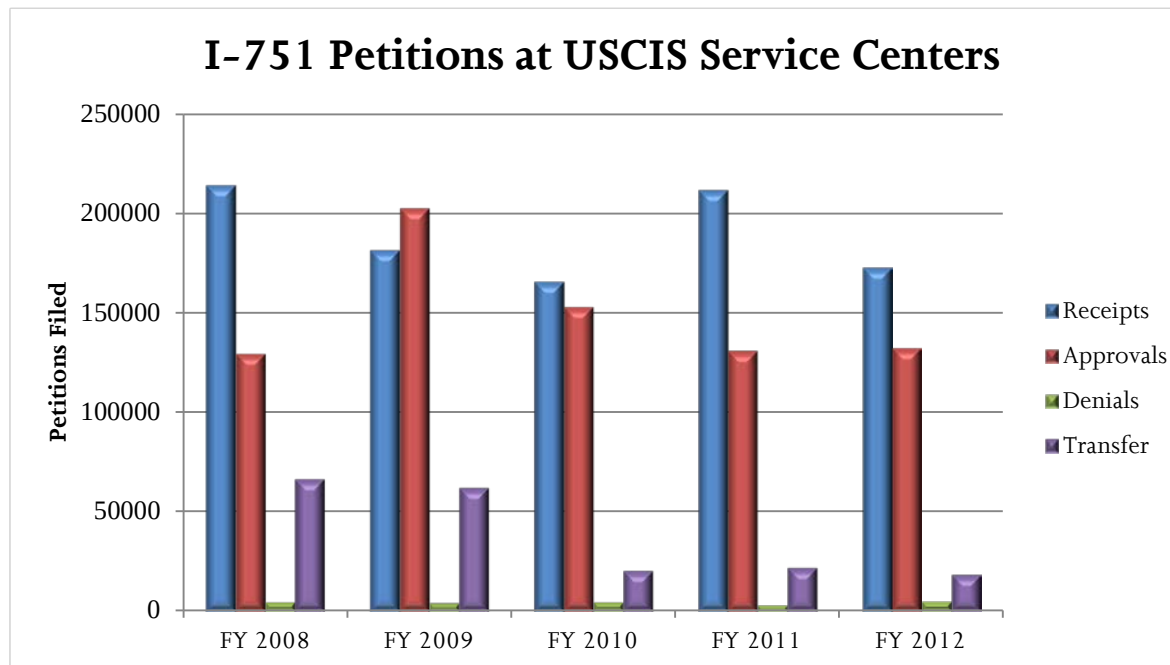
DATA RELATED TO FORM I-751

In conducting this review, the Ombudsman's Office requested data from USCIS pertaining to conditional residence processing. This appendix includes a discussion of the data USCIS provided.

Receipts, Approvals, Denials, and Cases Interviewed. USCIS provided the number of Form I-751 receipts, approvals, and denials for joint and waiver petitions at each service center. Presented below is a chart that shows the total number, for all service centers, of receipts, approvals, denials, and transfers of petitions to a field office for interview.

From 2008 through 2012, USCIS received 946,293 Form I-751 petitions, of which 879,011 were jointly filed cases, and 67,282 were waiver cases. USCIS service centers granted 749,287 Form I-751 petitions, of which 724,660 were jointly filed cases, and 24,627 were waiver cases. Service centers denied 19,513 cases, of which 16,115 were jointly filed cases, and 3,398 were waiver cases. Service centers transferred 188,498 cases to field offices for interviews, of which 163,730 were jointly filed cases and 24,768 were waiver cases.

USCIS stated that it does not track data for each waiver ground. USCIS did not provide data on the number of RFEs issued or on the number of cases approved after being interviewed at USCIS field offices.



Source: Information provided by USCIS to the Ombudsman's Office (Feb. 19, 2013).

Notices to Appear. USCIS issued 2,196 Notices to Appear (NTAs) in I-751 cases from February 2012 to December 2012. According to USCIS, the agency started tracking such data in February 2012. USCIS did not provide the number of NTAs issued for failure to timely file Form I-751. USCIS stated that the agency does not track the disposition of cases, where an NTA was issued, by the Immigration Court and Board of Immigration Appeals, under the Department of Justice's Executive Office for Immigration Review.

APPENDIX B

USCIS GUIDANCE RELATED TO FORM I-751

1. Genco Opinion 90-3, Puleo, “Interpreting the definition of son/daughter and qualifying marriage under the Immigration Marriage Fraud Amendments” (May 23, 1989)*
2. Genco Opinion 89-67, McDermott, “Marriage Fraud: Termination of Conditional Permanent Resident Status without Notice to Alien” (Oct. 19, 1989)*
3. Genco Opinion, Cook (Jan. 9, 1990)*
4. Genco Opinion 90-7, O’Reilly, “Relating to Conditional Residents Pursuing 245A Applications” (Feb. 15, 1990)
5. Genco Opinion, Cook CO 216-P (June 21, 1990)*
6. Genco Opinion 91-7, Schroeder, “Whether Present Viability of a Marriage is a Factor in Adjudicating an I-751” (Jan. 25, 1991)*
7. Genco Opinion 91-76, Puleo, “Effect of Amendments to Waivers of the Section 216(c) Joint Petition Requirement” (Nov. 29, 1991)*
8. Genco Opinion, Rees CO-216 (Dec. 3, 1991)*
9. Genco Opinion 95-8, Weinig, “Common Law Marriage and Conditional Permanent Residence” (Aug. 26, 1995)*
10. INS Memorandum, “Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses of Children of U.S. Citizens or Lawful Permanent Residents” (Apr. 16, 1996)*
11. INS Memorandum, “Legal Opinion: Status of a conditional permanent resident after denial of the I-751 during pendency of review by EOIR” (Aug. 6, 1996)*
12. Genco Opinion 96-14, Martin, “Effect of State Court Judgment on Section 216(c)(4) ‘good faith’ waiver applications” (Nov. 29, 1996)*
13. INS Memorandum, “Status of Conditional Residence in Proceedings” (Oct. 9, 1997)*
14. INS Memorandum, “‘Extreme Hardship’ and Documentary Requirements Involving Battered Spouses and Children” (HQ 90/15-P; HQ 70/8-P) (Oct. 16, 1998)*
15. INS Memorandum, “Removal of Conditional Resident Status if Conditional Resident is the Spouse of an Individual Serving Abroad in the U.S. Armed Forces as Part of Operation Enduring Freedom” (Jan. 7, 2002); http://www.uscis.gov/files/pressrelease/ConStatPub_011702.pdf (accessed Feb. 19, 2013).
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