CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

MY MARRIAGE HAS BROKEN DOWN, BUT NOT YET TERMINATED: HOW DO I FILE MY I-751?

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by

Cyrus D. Mehta[*]

A Conditional Permanent Resident (CPR) is one who has obtained his or her status through marriage to a United States Citizen spouse or to a Legal Permanent Resident (LPR) spouse within two years of the marriage.[1] ¤ 216 of the Immigration and Nationality Act (INA) imposes a two year period of conditional residency, and the CPR must file Form I-751 to remove his or her condition on residence. Generally, the CPR and the USC spouse jointly file an I-751 petition to remove the condition on permanent residence within a 90 day period prior to the second anniversary of the issuance of conditional residence.[2] However, pursuant to INA ¤216(c)(4) and 8 C.F.R. ¤ 216.5, if the CPR is unable to file jointly, he or she may request a waiver of the joint filing requirement if the CPR establishes that:

- Removal from the United States would result in extreme hardship;
- The CPR entered the marriage in good faith, but the marriage was terminated (other than through death); or
- The CPR entered the marriage in good faith, but the petitioning spouse or parent battered the CPR spouse or child.

A new *Memo* from Donald Neufeld dated April 3, 2009[3] provides much needed guidance on how a CPR files an I-751 who is legally separated or has initiated divorce or annulment proceedings but whose marriage has not been terminated. Until the Neufeld Memo, CPRs whose marriages had broken down

but had not terminated before the expiration of the conditional residence, were truly caught in a bind. This is because an earlier Memo from William Yates dated April 10, 2003[4] stated that CPRs could not file an I-751 waiver based on the fact that the marriage had terminated when in fact it had not yet terminated. The prior Yates Memo thus caused hardship to such CPRs because in many states including New York, which is a Tfault state,У[5] it is extremely difficult to obtain a divorce quickly.

Fortunately, the Neufeld Memo alleviates somewhat the situation caused by the earlier Yates Memo. The CPR whose marriage has broken down may still file the I-751 before the two year period and get an automatic one year extension of CPR status. This would allow the CPR to continue to be authorized to work. The Neufeld Memo instructs, however, TIf a Service Center Immigration Service Officer (ISO) encounters a waiver request on the basis of termination of marriage, but the CPR is currently legally separated or in pending divorce or annulment proceedings, the ISO issues a Request for Evidence (RFE) with a response period of 87 days.У

While this is good news for CPRs whose marriages have not been terminated before the expiration of the two year period, they need to watch out for the short time frame that is provided to submit evidence that the marriage has terminated. If the CPR is unable to terminate the marriage within the 87 days given to respond to the RFE, the Neufeld Memo instructs the ISO to deny the I-751 and terminate conditional residence status. Even worse, the Neufeld Memo directs that the CPR be placed in removal proceedings by instructing the ISO to refer the case for issuance of a Notice to Appear (NTA) before an Immigration Judge (IJ).

Although the CPR can establish the basis for an I-751 waiver before an IJ even while in removal proceedings, the Neufeld Memo, while ameliorating the situation for CPRs whose marriages have not terminated, does create some risk for a CPR who chooses to file an I-751 waiver before the marriage has terminated. If removal proceedings are instituted, and the CPR is unable to timely establish that the marriage has been terminated, as a ground for the I-751 waiver filing, the IJ may not always be inclined to indefinitely continue the removal hearing.[6]

Therefore, only CPRs who are in a position to quickly submit proof of

termination of their marriage after filing the I-751 petition, should take advantage of the new policy.

Otherwise, CPRs can still try to file the I-751 waiver based on the other two grounds, namely, that the petitioning spouse battered the CPR spouse[7] or that the CPRXs removal from the US would result in extreme hardship. If there are adequately strong grounds to file a waiver under these circumstances, it may be preferable to do so unless the marriage is reasonably expected to result in a termination shortly after the filing of the I-751 petition. If the marriage does subsequently terminate, the CPR can then file a new I-751 on this basis and perhaps withdraw the prior I-751 waiver.

Lastly, the Neufeld Memo affirms based on established case law,[8] that a joint I-751 should not be denied solely because the spouses are separate or have initiated divorce or annulment proceedings. Therefore, if the spouses are still cooperating, but have separated or have initiated divorce proceedings, there is nothing to prevent the CPR from still filing a joint I-751 petition with the USC spouse. However, the Neufeld Memo cautions that Tlegal separation nor initiation of divorce or annulment proceedings may suggest that the CPR entered into the marriage for the sole purpose of procuring permanent resident status.У

The Neufeld Memo also allows a CPR who has filed a joint I-751 petition under such circumstances to provide evidence of the termination of the marriage even though the I-751 petition was filed jointly. Thus, the new policy allows such an applicant to change course mid-stream, even after filing a joint I-751, by converting that joint I-751 into a waiver.[9] However, if the I-751 was filed jointly, even while the marriage had broken down, there should be no compulsion to submit a divorce, if requested, if it has not come through within the response time of the RFE. The parties may still assert that even though the marriage has broken down, it was still entered into for bona fide purposes. Indeed, the Neufeld Memo instructs the ISO to make the following determination:

- The marriage was legal where it took place;
- The marriage has not been terminated;
- The marriage was not entered into for the purpose of procuring permanent resident status; and

- No fee (other than to an attorney for filing assistance) was paid for the filing of the underlying 1-130 or I-129F.

If the above criteria have been met, and even if the marriage has broken down, a jointly filed I-751 can still be approved without the need for the CPR to submit evidence of termination of the marriage[10].

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* **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. He is also an Adjunct Associate Professor of Law at Brooklyn Law School where he will teach a course on Immigration and Work. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International Who's Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration related topics.**

[1] This article will only refer to a CPR who is married to a USC. Those married to an LPR will theoretically not get CPR status because the wait for visa availability under the Family-Based 2A preference is in excess of 2 years. They are granted permanent residency without any condition.

[2] 8 C.F.R. ¤ 216.4(a)(1).

[3] Memo, Donald Neufeld, Acting Associate Director, *I-751 Filed Prior to Termination of Marriage*, April 3, 2009, posted on AILA InfoNet at Document No. 09072166 (posted on July 21, 2009) (TNeufeld MemoУ).

[4] Memo, William Yates, *TFiling a Waiver of the Joint Filing Requirement Prior to Final Termination of the Marriage,У*(Apr. 10, 2003), *posted on* AILA InfoNet at Document No. 03050643 (May 6, 2003) (Yates Memo). The Yates Memo rescinded an earlier policy that allowed a CPR to file a I-751 waiver even though there was no marriage termination, and allow the CPR to submit the waiver at

the time of the interview. Since it took many months and at times upwards of a year for the former INS to schedule an interview, the CPR had sufficient time to submit evidence of termination at the time of the interview. *See* Letter, Weining, Deputy Asst. Comm., Adjudications, CO 216-C (Sept. 27, 1989), *reprinted in 66 Interpreter Releases* 1277-79 (Nov. 13, 1989). For a cogent criticism of the Yates Memo, *See* Cyrus D. Mehta, *Filing An I-751 Petition For A Client In Divorce Or Annulment Proceedings*, Conference Handbook of Sixth Annual AILA New York Chapter Immigration Law Symposium (Ed. Steven Klapisch), AILA; also available at http://cyrusmehta.com/perseus/News.aspx?MainIdx=ocyrus200591724845&Month=&Source=Zoom&Page=1&Year=All&From=Menu&SubIdx=906.

[5] Under New York Domestic Relations Law (DRL) ¤170, a party needs to establish a Tfault¥ ground such as cruel or inhuman treatment, abandonment for a period of one or more years, confinement of the defendant in prison for a period of three or more consecutive years, adultery, or that the husband and wife have lived apart pursuant to a decree or judgment of separation or pursuant to a written agreement of separation for a period of one year.

[6] A respondent in removal may be entitled to continuance for good cause and for a reasonable period of time. 8 C.F.R. ¤¤ 1003.29,1240.6. While a discussion of continuances is beyond the scope of this article, readers should be aware that the grant of a continuance is discretionary and each IJ may have a different attitude towards continuances.

[7] Under the Power and Control Wheel, describing non-physical forms of domestic violence, one example used is the failure of the citizen spouse to file papers to legalize immigration status, or withdrawing or threatening to withdraw papers filed for residency.

[8] *See E.g. Matter of McKee*, 17 I&N Dec. 332 (BIA 1980)(marriage was not sham solely because the parties to the marriage were no longer living together); *Bark v. INS*, 551 F.2d 1200 (9th Cir. 1975.) (as long as the party had a bona fide intent to enter into a marriage, subsequent conduct after the marriage, no matter how unconventional, does not prove lack of marital intent).

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