CHAPTER 11

IMMIGRATION ISSUES*

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Introduction ... 350

Source of Law ... 351

Determining Your Client's Status ... 351

Traditional Family-Based Immigration ... 352

Who May Petition? Who May Benefit from a Petition? ... 353

The Spousal Relationship ... 353

Derivative Status ... 354

The Process for Obtaining Lawful Permanent Residence ... 354

Step One—Filing the Petition ... 354

Step Two—Applying for the Visa ... 354

Fiancé/e Visas ... 355

Conditional Permanent Residence (CPR) ... 355

Widow and Widower Petitions ... 356

Juvenile Special Immigrants ... 356

Potential Problems for Low- and Moderate-Income Clients ... 356

Public Charge ... 356

Health Issues ... 357

Criminal Issues ... 357

Employment Authorization and Social Security Numbers ... 357

Immigration and the Courts ... 358

The Impact of Divorce ... 359

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Immigration and Domestic Violence 359
Removal of Conditional Status.. 360
Self-Petitioning Under the Violence Against Women Act (VAWA).... 360
Cancellation of Removal or Suspension of Deportation.................... 361
Political Asylum.. 362
U-Visas for Unmarried Partners or Spouses Who Are Not LPRs or U.S. Citizens.. 362
Removal of Abusive Spouses or Intimate Partners........................... 363

INTRODUCTION

Three-fifths of the people who immigrate to the United States each year do so by means of their relationship with a U.S. citizen or lawful permanent-resident family member—a spouse, parent, child, or sibling. According to Department of Homeland Security (DHS) statistics, 803,335 immigrants came to the United States under the sponsorship of family members in 2006. Massachusetts has the seventh highest lawful permanent resident population in the country, estimated at approximately 300,000, and an undocumented population estimated at 175,000 to 200,000. See the statistics section of the DHS Web site at http://www.dhs.gov for more statistical and other immigration information.

With such a significant immigrant population in the Commonwealth, immigration issues inevitably become intertwined with family-law issues. While a litigant's immigration status should rarely have an impact on a domestic relations case, the timing and outcome of a domestic relations case can have serious consequences for a noncitizen. A divorce that comes at the wrong time can result in the denial of a petition for lawful status or even the loss of lawful status that has already been granted. For low-income clients and victims of domestic violence, important decisions regarding child support, if and when to seek a restraining order, whether to bring criminal charges, and other issues may have to be made in the course of family law proceedings. These decisions may have an impact on the immigration status of the parties. Therefore, a basic knowledge of immigration law is more and more important for family practitioners.

Practice Note

This chapter is intended to provide a basic overview of some of the most common family-related issues that arise in immigration law, and to make a few suggestions for practitioners when presented with a domestic relations case involving immigration in order to ensure the best outcome for the client. Immigration law is complex and continuously changing. A great deal of irreparable damage can be done by well-meaning but inappropriate immigration advice. If a client appears to have an immigration issue, the family law practitioner should consult with an immigration specialist or have the client do so before he or she proceeds with any nonemergency action, especially a divorce. Never suggest that a client go straight to the Bureau of Citizenship and Immigration Services for assistance as the client could be detained or placed in proceedings to remove him or her from the United States.

Unlike other chapters of this manual, this chapter does not include sample forms. Because of the voluminous and complicated paperwork involved in almost any application for immigration benefits, it is impractical to provide truly useful samples here. For detailed technical information, see Austin T. Fragomen, Jr. et al., *Immigration Procedures Handbook*, published annually by West. *See also* Sarah Ignatius and Elizabeth Stickney, *Immigration Law and the Family* (Clark-Boardman).

SOURCE OF LAW

The Constitution allocates complete control over U.S. immigration policy to the federal government. State courts and agencies have no authority to determine immigration status or to grant or withhold it, although states can condition eligibility for benefits and programs on immigration status. A number of federal agencies are involved in regulating immigration into the country; these include

- the U.S. Department of Homeland Security, which is divided into three subagencies: the U.S. Citizenship and Immigration Services (USCIS), which is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities; the U.S. Immigration and Customs Enforcement (USICE), which enforces immigration and customs laws; and the U.S. Customs and Border Protection (USCBP), which detects and prevents the illegal entry of persons and goods into the United States;
- the Executive Office for Immigration Review (the EOIR, consisting of the Immigration Court and the Board of Immigration Appeals), also part of the Department of Justice; and
- the Department of State, through its consulates abroad that issue visas to aliens wishing to visit or immigrate to the United States.

Immigration is governed by the Immigration and Nationality Act (INA), codified at Title 8 of the U.S. Code. (The common practice is to cite to sections of the INA, not to the Code.) Regulations for the USCIS and the EOIR are at Title 8 of the Code of Federal Regulations; State Department regulations are at Title 22 and other related regulations are scattered throughout the Code of Federal Regulations. Published Board of Immigration Appeals decisions are binding on the USCIS and the immigration courts throughout the country. Depending on the type of case, BIA decisions can be appealed to the federal District Court or to the Circuit Court of Appeals.

DETERMINING YOUR CLIENT'S STATUS

People reside in the United States in a variety of immigration statuses. The first step in assisting a client is to determine his or her status.

A "U.S. citizen" was born in the United States, was born overseas to at least one U.S.-citizen parent, or was naturalized. U.S. citizens are the only people with an absolute right to enter and live in the United States. A citizen is not subject to the immigration law.

A "lawful permanent resident" has a green card, or immigrant visa, which gives him or her the right to live and work in the United States and travel to and from the United States as long as no laws are violated. Generally, a lawful permanent resident (LPR) can only be deported or removed if he or she is convicted of a crime, although he or she can be denied admission to the United States under certain circumstances if he or she leaves and tries to reenter. Most LPRs are eligible to apply for citizenship after five years of LPR status. If LPR status was obtained through marriage to a U.S. citizen, the wait is only three years. In some cases, LPR status is conditional.

A "refugee" or "asylee" must be found to have a well-founded fear of persecution on account of his or her race, religion, national origin, or membership in a particular social group, or because he or she holds a particular political opinion. After one year of refugee or asylee status, he or she may apply for LPR status.

A "nonimmigrant" can hold one of a wide variety of nonimmigrant visas. By definition, a nonimmigrant has demonstrated to a consulate abroad that he or she intends to return to his or her home country after a temporary stay in the United States to visit, work, or study. Nonimmigrant visas are lettered, beginning with "A" and going all the way to "S." The most common are "B" tourist or visitor visas and "F" and "J" student visas. See INA § 101, 8 U.S.C. § 1101, for a complete list. The visa letter is usually followed by a number; "1" is the principal visa holder and "2," "3," and "4" are dependents and sometimes household employees of the principal visa holder. For example, a graduate student would generally have a "J-1" visa. Her husband and children would have "J-2" visas.

A nonimmigrant is not authorized to work in the United States unless specifically given permission to do so, either because he or she has a nonimmigrant work visa, such as an "H" visa, or because he or she has applied for and

received employment authorization. Working without authorization is a violation of the terms of the visa; the visa holder then becomes "out of status," and may be deported. Any other violation of the terms of the visa, such as attending a different school or working for a different employer, also causes the visa holder to become "out of status." This is true even if the visa is still facially valid and USCIS does not know about the violation.

A nonimmigrant visa is a multicolored stamp or a machine-readable sticker placed in the passport. It may be good for a year or indefinitely; it may authorize just one entry or it may allow multiple entries. The visa only authorizes the holder to present himself or herself at the border and request entry; it does *not* determine how long the holder is authorized to remain in the United States. When a nonimmigrant enters the United States, he or she is given a I-94 card that states the authorized length of the visit. The standard authorized visit is six months. If the I-94 card has expired, the visa holder has "overstayed" and is removable. Some students get I-94s with the notation "D/S" on them. This stands for "duration of status" and allows the student to remain until he or she finishes school.

A "parolee" is a person who has been allowed to physically enter the United States, usually for humanitarian reasons, but has not legally made an entry. A parolee will generally have an I-94 card with the date parole status expires.

An "undocumented person," commonly referred to as an "illegal alien," has no legal status in the United States, either because he or she entered without inspection (i.e., crossed the border illegally) or, more commonly, because he or she entered on a nonimmigrant visa (e.g., a tourist visa) and stayed longer than authorized or otherwise violated the terms of the visa.

Practice Note

Determining a noncitizen's exact immigration status can be complicated and involves a careful examination of documents. If you or your client have any questions about the client's status, consult an immigration practitioner.

In immigration law, "child" includes a stepchild if the parents married before the child turned eighteen, and an adopted child under certain circumstances. There is a distinction between a "child" and a "son" or "daughter," who is, by definition, over the age of twenty-one. There are some complicated rules regarding when a child born out of wedlock, whether or not legitimized, qualifies as a child or son or daughter. See INA § 101 for definitions of these and other terms. Any child born on U.S. soil is a U.S. citizen, regardless of the status of the parents. However, in order to petition for a parent, a U.S.-citizen child must be twenty-one or older.

Practice Note

Note that the courts have held that a U.S.-citizen child does not have a constitutional right to live with his or her parents in the United States. The mere fact that deporting the child's parent would cause the child either to be separated from his or her parents or to be expatriated is not enough to prevent deportation.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) changed some important terms in immigration law. The traditional words "deportable" and "excludable" correspond more or less with the new terms "removable" and "inadmissable" and the grounds for each are roughly the same, with a few important changes. See INA §§ 237 and 212, 8 U.S.C. §§ 1227 and 1182, respectively, for a full list of the grounds for each.

An "A-number" is an eight-digit number prefaced by the letter "A." Any alien who has had contact with the USCIS, other than as a nonimmigrant, will have an A or file number. In any correspondence with USCIS or the Immigration Court regarding the matter, it is crucial to use the A-number; most likely, USCIS will not be able to locate the case without it.

TRADITIONAL FAMILY-BASED IMMIGRATION

Family reunification has always been a primary goal of U.S. immigration policy. Although thousands of people immigrate based on petitions filed by employers or with refugee/asylee status each year, the majority of immigrants immigrate based on a family relationship with a person who already has status in the United States.

Who May Petition? Who May Benefit from a Petition?

The person with status (the "petitioner") may file a visa petition for his or her relative (the "beneficiary"). The system is divided into two main types of relationships, each with a number of subcategories. *See* INA §§ 201, 203. Each year, U.S. citizens may petition for an unlimited number of immediate relatives, defined as

- parents if the citizen is over twenty-one,
- spouses, and
- unmarried children under the age of twenty-one.

An additional limited number of visas are distributed each year in the following categories, known as preferences:

- first preference—unmarried son or daughter of U.S. citizen (remember that a son or daughter is by definition over twenty-one);
- second preference—spouse and unmarried children under the age of twenty-one of LPR; unmarried son or daughter of LPR;
- third preference—married son or daughter of U.S. citizen regardless of age;
- fourth preference—sibling of U.S. citizen.

Only these family relationships qualify. Aunts, uncles, cousins, grandparents, and other family members cannot petition for each other.

The Spousal Relationship

The mere fact that a marriage is legal under the laws of the jurisdiction in which it took place is not sufficient for immigration purposes. In general, clients who want to petition for a spouse should be aware that the USCIS and the consulate will look closely at the relationship, especially if there is anything unconventional about it. The couple may be asked to produce evidence that the marriage was entered into in good faith—i.e., not solely to obtain immigration benefits. With the exceptions for victims of domestic violence discussed below, a person wishing to immigrate based on a spousal relationship must be married to the petitioner throughout the process, until the immigrant visa or green card is actually issued. Throughout the process, the petitioner will retain total control over the petition. The petitioner will decide whether and when to file the petition and, until the visa is actually issued, can withdraw it without explanation.

In order to prove a valid marital relationship for immigration purposes, any party to the marriage who has been previously married will have to submit documentation proving that the prior marriage was legally terminated by death or divorce. Many complications can arise regarding foreign divorces; in some cases, you may need to assist a client who is seeking to immigrate or have a visa petition approved obtain a declaratory judgment from the Probate and Family Court recognizing the divorce.

A proxy marriage that has not been consummated is not a marriage for immigration purposes, nor is a polygamous or incestuous marriage.

Congress and the USCIS have put significant effort into discouraging sham marriages—i.e., marriages entered into simply for immigration purposes. The Immigration Marriage Fraud Act of 1986 created a previously unknown status called "conditional permanent residence," intended to root out sham marriages and deter marriage fraud. See "Conditional Permanent Residence," below. Knowingly entering into a marriage for the purpose of circumventing immigration laws is a federal crime, punishable by up to five years in prison and $250,000 in fines. Knowing involvement in a fraudulent marriage also makes the immigrant spouse permanently ineligible to immigrate and makes a lawful permanent-resident spouse removable. An immigrant who obtains LPR status through marriage and then divorces, remarries, and seeks to petition for the new spouse within five years of immigrating will be scrutinized and will be required to prove by clear, convincing, and unequivocal evidence that the original marriage was entered into in good faith.

Derivative Status

The spouses and children of preference beneficiaries get derivative status and can be included in the petition. However, a separate petition must be filed for each immediate relative of a U.S. citizen.

Example
Jose is a naturalized U.S. citizen who wants to bring his wife and children to live with him in the United States. One child is seventeen, and the other is twenty-two and married with children of his own. Jose would file immediate relative petitions for his wife and the seventeen-year-old. He would file a third preference petition for the twenty-two–year-old, which would include his daughter-in-law and grandchildren, even though he could not file for them directly. If the seventeen-year-old has a child, Jose will not be able to petition for that child because a grandchild is not an immediate relative. He will have two options: he can wait for the seventeen-year-old to turn twenty-one and file a first preference petition which will include the child as a derivative, or he can petition for the seventeen-year-old, who can then file a second preference petition for the child once she gets LPR status. Either way, the family is going to be separated for a number of years before everyone obtains LPR status.

Example
Francoise is an LPR who goes back to her home country of France for a visit. While there, she falls in love and marries. She then files a second preference petition for her husband. If he has children, they can be included in the petition as long as they were under eighteen when Francoise and their father married. However, they will have to wait a number of years before a visa becomes available.

The Process for Obtaining Lawful Permanent Residence

Obtaining lawful permanent residence for a relative is a two-step process. *See* INA §§ 204, 245.

Step One—Filing the Petition

First, the petitioner must file a petition with the USCIS. This relatively simple step consists in most cases of the following:

- a form called an I-130;
- proof of the petitioner's status (his or her birth or naturalization certificate or a copy of his or her green card);
- proof of the requisite relationship (a marriage or birth certificate);
- for a spouse petition, if either spouse has been married before, proof that the previous marriage was properly terminated by death, annulment, or divorce;
- for a spouse petition, an additional form and one photograph of each spouse; and
- the fee.

When USCIS approves the petition, the agency will forward it to the State Department for further processing.

The mere fact that a visa petition has been approved does not bestow any lawful status on the beneficiary. A beneficiary illegally present in the United States remains illegally present and can be deported if caught, with potentially serious consequences to any future ability to immigrate. A beneficiary overseas will have to remain overseas until the visa is issued.

Step Two—Applying for the Visa

The beneficiary must then apply for the visa. When this happens depends on the category of the petition. Since there are an unlimited number of immediate relative visas available, there is no wait for a visa. As soon as the petition is approved, the beneficiary can apply for the visa; sometimes the two steps can be done simultaneously. In the preference categories, however, there may be a long wait, since there are a limited number of visas for each country per year in each category. The wait ranges from a few months for first preference to as long as fifteen years for

fourth preference. Beneficiaries are placed on the waiting list based on the "priority date," the date the petition was filed, regardless of when it was ultimately approved. To find out where someone is on the waiting list, you can call the State Department at (202) 663-1541 or check under "visa bulletin" on the State Department's Web site at http://travel.state.gov.

When the State Department reaches the beneficiary's "priority date" on the waiting list, the visa becomes "current" or available. The beneficiary can then apply for it and have an interview at a U.S. consulate overseas, usually the one closest to his or her home. If the application is approved, the visa will be issued and the beneficiary will be allowed to immigrate to the United States as a lawful permanent resident. Some people who are already in the United States when their visa becomes current can go through a process called "adjustment of status" here in the United States instead of traveling overseas for consular processing.

Caution

IIRAIRA placed drastic restrictions on eligibility for both adjustment-of-status and consular processing, especially for people who have ever been in the United States illegally (called "unlawful presence"). Even if a client's approved visa petition has become current and he or she has been scheduled for an interview at a consulate, he or she should consult with an immigration specialist prior to departing the United States. Once the client has left the United States, he or she will not be able to return legally without the visa, so an error could result in permanent separation from family members if the client's application is denied.

Fiancé/e Visas

A U.S. citizen who wishes to bring an alien to the United States to marry may petition for a fiancé/e visa. A fiancé/e visa is a nonimmigrant "K" visa. *See* INA § 101(A)(15)(K). The parties must prove the following:

- that both parties are legally free to marry; and
- in most cases, that they have met in person at least once in the preceding two years.

Once the visa has been issued, the fiancé/e may travel to the United States and the couple must marry within ninety days. The beneficiary must then apply for an adjustment of status in the United States. Any minor children of the fiancé/e may be included as derivative beneficiaries.

Conditional Permanent Residence (CPR)

In most cases, once a beneficiary successfully adjusts status or completes the consular process and receives an immigrant visa, he or she is all set. However, the permanent residence granted to some beneficiaries is only conditional and requires a further procedure to become truly permanent.

If an alien receives permanent residence through marriage to a U.S. citizen and the marriage is less than two years old on the day that the alien spouse enters the United States with an immigrant visa or adjusts status, the alien spouse will receive conditional permanent resident (CPR) status. Any derivative children will also get conditional status. *See* INA § 216. Although the law theoretically applies equally to the spouses of U.S. citizens and LPRs, the wait for a visa is so long for the spouse of an LPR that the marriage is invariably more than two years old by the time the visa becomes available.

Practice Note

A client who has a green card with an expiration date two years after entry is a CPR and has to file a joint petition within three months before the expiration date of the card. If the card is good for ten years or indefinitely, then the client has full LPR status and need do nothing further.

Two years after the alien spouse receives CPR status, the couple must go through another procedure, called "removal of conditional status." The only issue in a removal of conditional status case is whether the marriage is bona fide. The couple submits a joint petition to remove the conditions along with supporting documentation demonstrating the good faith of the marriage, such as birth certificates of children, evidence of shared finances and shared residence, affidavits of friends and family, etc. The petition will usually be decided based on the papers

submitted, although sometimes the couple will be called in for an interview. If all goes well, the conditions will be removed and the alien spouse will receive full LPR status; if the application is denied, the alien spouse will be placed in removal proceedings and will have an opportunity to present the case to an immigration judge. It is crucial that the petition to remove conditions on status is filed on time; if it is not, the alien spouse's CPR status will expire and he or she will become undocumented and removable.

Despite the recent emphasis on preventing marriage fraud, noncitizens are not expected to have better relationships than citizens. If a marriage entered into in good faith does not work out and the couple breaks up before the two-year anniversary date for removal of conditions on status, the alien spouse can request a waiver of the joint petition. See "Immigration and Domestic Violence," below, for more on waivers of the joint petition.

Widow and Widower Petitions

If a U.S. citizen dies before filing a visa petition for an alien spouse, the spouse can file the petition for himself of herself, within two years of the U.S. citizen spouse's death, if

- the marriage was at least two-years old when the U.S.-citizen spouse died; and
- the alien spouse does not remarry before receiving the visa.

See INA § 201(b)(2)(A)(i).

Juvenile Special Immigrants

An undocumented child who has lost his or her parents through death or abandonment, and who is in state custody or has had a legal guardian appointed by a court can obtain permanent residence by filing a juvenile special immigrant petition. The petition must be accompanied by an order from the appropriate probate or juvenile court stating the following:

- that the child is dependent on the court or has been placed by the court into the custody of a state agency or an individual;
- that the court has determined that the child is eligible for long-term foster care—i.e., that the court has determined that family reunification is not a viable option for the child; and
- that the court has determined that it is not in the best interest of the child to be returned to his or her home country or the home country of his or her parents.

See INA § 101(a)(27)(J).

POTENTIAL PROBLEMS FOR LOW- AND MODERATE-INCOME CLIENTS

Public Charge

Since the earliest days of immigration regulation, would-be immigrants have been required to convince the visa-issuing authority that they are not likely to become a public charge if they are allowed to immigrate to the United States. Prior to the 1996, this judgment was based on an examination of the totality of the family's circumstances.

Under current law, the petitioner must demonstrate an income equivalent to 125 percent of the poverty level for a family unit, which includes everyone dependent on the petitioner plus all beneficiaries. This means that many low-income people will not be able to petition for their family members even if they have never received welfare or other benefits.

> **Example**
> Vladimir is a U.S. citizen with two children from his first marriage who live with him. He marries Ludmila and wants to petition for her and her child. Vladimir will have to show income equal to 125 percent of the poverty level for five people: himself, Ludmila, and three children.

In addition, an affidavit of support is now required from the petitioner (and others if needed to help the petitioner reach the 125 percent requirement). The affidavit is legally enforceable against the beneficiary or the government agency who provides benefits to the beneficiary for as long as ten years after immigration. *See* INA §§ 212(a)(4), 213A.

Health Issues

A number of "diseases of public health significance" can make a would-be immigrant ineligible to receive a visa. These diseases include

- a number of venereal diseases that are easily cured;
- tuberculosis, which can often be treated;
- leprosy, which is very rare; and
- most problematically, HIV infection and AIDS.

A waiver of these grounds of inadmissibility is available to the family members of U.S. citizens and permanent residents. *See* INA § 212(g). The real problem is again the public-charge provision. Because the public-charge provision cannot be waived, a person infected with HIV will be unable to immigrate unless he or she can obtain private health insurance, since without such insurance, it is highly likely that the immigrant will eventually need treatment at government expense and is therefore likely to become a public charge.

IIRAIRA also created a vaccination provision that requires proof that the beneficiary has had a series of vaccines. *See* INA § 212(a)(1)(ii). These vaccinations may be prohibitively expensive, unavailable, or even unsafe in some countries.

Criminal Issues

The petitioner's criminal record is generally not an issue, but the beneficiary who has been convicted of certain crimes may be denied a visa. In addition, a beneficiary may be denied a visa if a USCIS or consular official has reason to believe he or she has been involved in drug trafficking, even if he or she has never been charged with or convicted of a crime. If the beneficiary is a drug abuser or addict, his or her visa can be denied even if no crime is involved. See INA § 212(a)(2) for a complete list of the crimes that make an immigrant inadmissible.

Practice Note

While the grounds for inadmissibility do not list crimes of domestic violence or violations of a restraining order specifically, domestic assault has been found to be a crime of moral turpitude and thus a conviction might make the person inadmissible. Also, conviction of a crime of domestic violence, stalking, child abuse, or violation of a restraining order will make a noncitizen removable. *See* INA § 237(a)(2). See also "Removal of Abusive Spouses or Intimate Partners," below.

Employment Authorization and Social Security Numbers

Until 1986, there was no sanction on employers who hired undocumented aliens. However, in 1986, Congress passed the Immigration Reform and Control Act (IRCA). The best-known aspect of IRCA was the amnesty or legalization program, which enable millions of previously undocumented long-term residents of the United States to obtain lawful permanent-resident status. The quid pro quo for this amnesty was a new employer-sanctions provision that made it illegal to hire an alien not authorized to work in the United States. For the first time in U.S. history, employers were required to check the identity and immigration status of every new person hired. One result of this is that undocumented immigrants, especially the unskilled, are even more vulnerable to abuse and exploitation by those employers willing to hire them. It may also be difficult, if not impossible, for a noncustodial parent who has no employment authorization to comply with a court-ordered job search or child-support order in a divorce or paternity case; conversely, the custodial parent would be even more dependent on whatever child support he or she can obtain if he or she lacks a work permit.

Employment authorization can be issued upon application for a number of other types of immigration relief or soon thereafter. For example, a self-petitioner can get employment authorization when his or her petition is approved even if she must wait several years for the actual visa. An applicant for adjustment of status can get employment authorization when he or she files the application. An applicant for political asylum can get employment authorization if the application remains undecided after six months. There have also been a number of programs for specific nationalities, usually called "deferred enforced departure" or "temporary protected status," which involve temporary permission to live and work in the United States.

IIRAIRA made people who work unlawfully in the United States ineligible to adjust their status, so immigrant clients must be advised to avoid working without permission if possible, and must be made aware of the potential consequences if they do so. Again, a consultation with an immigration specialist may be appropriate.

Everyone applying for a Social Security number must show proof of immigration status. Immigrants who are authorized to work, but are not lawful permanent residents, receive a card that states on the front of the card that the bearer is authorized to work only with permission from the USCIS. Many undocumented immigrants use legitimate numbers issued to other people or made-up numbers with or without an actual card. This kind of fraud has serious consequences and should be discouraged.

Practice Note

Where financial statements and other forms request a Social Security number, the form should be left blank unless the person is using a genuine number actually issued to him or her. If a probation officer (also known as a family service officer) asks for a number (sometimes requested as part of a CORI check), the officer should be told that the client does not have one. Any further inquiry should be gently deflected as irrelevant and possibly intimidating to the client.

IMMIGRATION AND THE COURTS

In general, the immigration status of the parties to a proceeding in Probate and Family Court is irrelevant. Immigrants, even undocumented immigrants, are entitled to the protection of the courts and the benefit of the laws just like everyone else. Nevertheless, many immigrants, even those with LPR status, have to be reassured that the court is not interested in their immigration status and will not report them to the U.S. Immigration and Customs Enforcement (USICE) if they try to get divorced, adopt a child, or get a restraining order.

Unfortunately, despite the fact that judges and other court personnel rarely ask about immigration status, an advocate cannot assure a fearful undocumented immigrant that Immigration will not find out about him or her. It is not unusual, especially in cases involving domestic violence, for the spouse who is lawfully in the United States to use the threat of removal against the unlawfully present spouse. If USICE receives a tip that someone is present in the United States illegally, they may act on it regardless of the motivation of the reporter.

Practice Note

Family law practitioners have experimented with requests that district and probate and family courts order a party not to contact Immigration as part of a restraining order, divorce, or other proceeding, but Immigration takes the position that they are not bound by such orders.

Immigration status may be a legitimate consideration in some cases where custody or child support is at issue. For example, if the custodial parent is undocumented, he or she may be unable to support the children because he or she cannot work legally in the United States. Conversely, the parent from whom child support is sought may be unable to pay because he or she cannot work. If one parent is to be deported, it may raise serious removal problems regarding the children; a custodial parent being deported may be unable to get permission to take the children with him or her, since doing so would mean cutting off visitation for the other parent, or since the other parent may successfully argue that it is not in the child's best interest to live in another country with the custodial parent. LPR parents who have had their green card for less than five years are generally not eligible for most welfare, food-stamp, and other benefits, making collection of child support from the noncustodial parent even more important.

Practice Note

If you work with an immigrant who is not receiving sufficient child support to support himself or herself, refer the person to someone who specializes in government benefits, such as your local legal services provider. The rules on immigrant eligibility for government benefits are complex and are often wrongly applied by the agencies that administer the benefits.

THE IMPACT OF DIVORCE

Depending on its timing, a divorce may have a devastating effect on an alien's efforts to obtain lawful permanent status or other status allowing him or her to remain in the United States.

If both spouses are either U.S. citizens or lawful permanent residents, they can divorce without any negative consequences to either spouse's status.

If one spouse is a citizen or LPR who has filed for the other spouse, but the visa has not yet been issued, the alien spouse will not be able to obtain the visa once the divorce has been granted. If the couple has physically separated but remained legally married, the proper question at the time of the adjustment or consular interview is whether the parties entered into the marriage in good faith, not whether the marriage is viable at the time of the interview.

Practice Note

It may take intensive advocacy to get the USCIS or consulate to apply the law correctly and the fact that the couple has separated is certainly something that they may consider in determining whether the marriage was entered into in good faith.

If one spouse is in valid nonimmigrant status and the other spouse's status is derivative—for example, a J-1 husband and J-2 wife—the derivative spouse will lose status upon divorce, since he or she is entitled to status only due to his or her relationship with the principal visa holder. The derivative spouse will then become removable if he or she has no other way of obtaining status. The same problem arises if one spouse has applied for political asylum and the other spouse is included. Unless the included spouse can show independent eligibility and file his or her own application, he or she will lose the opportunity to obtain status if the couple gets divorced.

If both spouses are undocumented, there is obviously no effect on the immigration status of either spouse if they divorce. If one spouse obtains lawful status after the divorce, the other will not benefit, although undocumented children should be able to benefit from future changes in the status of either parent.

Practice Note

In some cases it may be necessary to delay a divorce until a client's immigration status is resolved. In some cases, probate judges have been willing to grant a continuance of as long as a year to allow time for paperwork to be processed by the USCIS. Cooperation in the process could also be a factor in settlement negotiations. In order to avoid fraud problems, be sure that the couple does not represent to the USCIS that they are happily married if they are not.

IMMIGRATION AND DOMESTIC VIOLENCE

Immigration issues often arise in cases involving domestic violence. Depending on the immigration status of the parties, or lack thereof, these issues can play a significant role in the outcome of the case. For example, an undocumented battered woman may be extremely reluctant to pursue relief from the courts because she fears that she will end up being deported and separated from her children, or because she fears that an undocumented batterer may be deported, denying a significant source of support for the children. On the other side, in some cases, the threat of deportation may help get a batterer's behavior under control; in other cases, the actual deportation of a batterer may offer extra protection to the victim.

A variety of ways of obtaining LPR status may be available to a battered woman who is not a U.S. citizen, depending on her marital status, current immigration status, and other factors. The statute, of course, is gender-

neutral, but this chapter refers to the battered alien as female because the vast majority of these cases involve battered women.

Removal of Conditional Status

As discussed in "Conditional Permanent Residence," above, some people who immigrate through marriage to a U.S. citizen get a special form of permanent residence called conditional permanent residence. Normally, the conditions on the status must be removed two years after the CPR status is granted by filing a joint petition in which both parties to the marriage document that the marriage was entered into in good faith. If there has been domestic violence in the marriage (or if the marriage simply did not work out and has been terminated by divorce, or if the U.S. citizen spouse has died), the CPR spouse can request a waiver of the joint-petition requirement and get the conditions on her status removed without involving the U.S.-citizen spouse/batterer. *See* INA § 216. There are three bases for a waiver. The CPR spouse must show that she entered into the marriage in good faith *and*

- that the marriage has been terminated;
- that the CPR spouse was subjected to battering or extreme cruelty by the U.S.-citizen spouse during the marriage; or
- that deportation would result in extreme hardship to the CPR spouse or her children.

The CPR spouse can request one or all of these waivers. If a waiver of the joint petition is granted, the CPR spouse will be granted lawful permanent resident status. If it is denied or if the CPR spouse fails to file the request for a waiver, her CPR status will be terminated and she can be placed in removal proceedings.

If there is no domestic violence involved and the alien spouse is seeking a waiver based solely on the termination of the marriage, the marriage must actually be terminated.

Practice Note

In these cases, the family law practitioner may want to speed up the divorce process, although USCIS might grant a request to hold their decision on the waiver until the judgment of divorce has issued.

In a case involving a domestic violence waiver, documentation of the violence will be important. The family law practitioner can help create that documentation by helping the woman get a restraining order and by collecting police reports and hospital records and making sure that she gets appropriate services from a battered women's shelter.

It is always advisable to request all waivers for which the client qualifies. However, if a CPR spouse who is a victim of domestic violence is reluctant to go forward with a divorce for whatever reason, that decision obviously should be left to her. USCIS should not question her credibility just because she has not chosen to divorce, although it does not hurt to explain why no divorce has been filed.

Self-Petitioning Under the Violence Against Women Act (VAWA)

Many immigrant women are married to U.S.-citizen or LPR spouses who are abusive, and, as part of that abuse, their spouses have never filed a petition for them or never followed through with all the steps required for the women to obtain LPR status. For an abuser, control over an undocumented spouse's ability to obtain lawful immigration status is a powerful weapon, used to keep her dependent upon him and in fear. Fortunately, under the Violence Against Women Act (VAWA), an undocumented woman married to a U.S.-citizen or LPR who is abusive can "self-petition"; she no longer has to rely on the batterer to do it for her. In order to self-petition, the woman must show the following:

- that the abuser is or was a U.S. citizen or LPR (with some exceptions);
- that she is (or was) the spouse of a U.S. citizen or an LPR, or the parent of a child who was abused by the self-petitioner's LPR or U.S. citizen spouse;
- that the LPR or U.S. citizen abused the self-petitioner or subjected her to extreme cruelty during their marriage;
- that she entered into the marriage in good faith;

- that she is currently residing in the United States (with some exceptions);
- that she resided with the abuser at some point; and
- that she is a person of good moral character.

See INA § 204.

Note that the USCIS's definition of abuse is broader than the definition of abuse under the Abuse Prevention Act, G.L. c. 209A, § 1. Family law practitioners should err on the side of referring clients to immigration specialists if the client reveals any form of mistreatment by the spouse, including controlling and insulting behavior.

The self-petition takes the place of only the first step in the visa petition process. It is designed to obviate the need for involvement by the batterer, who would normally be the petitioner. Unlike the first step in the regular process, a self-petition is a complicated one, involving a lengthy affidavit from the self-petitioner and extensive documentation of the factors listed above. An approved self-petition comes with a priority date just like a regular family petition and, if the batterer is an LPR, the self-petitioner will still have to wait years for the actual visa. However, unlike a regular beneficiary, a second preference self-petitioner will be granted employment authorization so that she can support herself and her children while waiting for the visa.

Once a self-petition is filed, the self-petitioner can go ahead with a divorce. However, when the time comes for her to adjust status to actual permanent residence, she will have the same burden as other immigrants of proving that she is admissible. Thus, the health, criminal, and other grounds of inadmissibility apply to the self-petitioner just as they do to any other immigrant. However, there are various waivers available for self-petitioners. In addition, some requirements are changed. The legally binding affidavit of support from the spouse is not required and the likelihood that the immigrant will become a public charge will be evaluated in a way that takes into account the problems resulting from domestic violence. Public benefits she received because of her status as an abused immigrant cannot be used by USCIS to deem her a public charge. There are also some public benefits that are not considered by USCIS when determining if someone will become a public charge, such as Medicaid, food stamps, housing assistance, energy assistance, child care services, etc. Nevertheless, the public charge provision does apply. Anything the family law practitioner can do to enable the self-petitioning immigrant to achieve financial independence will be crucial.

Practice Note

If an undocumented client married to a U.S.-citizen or LPR batterer is already in divorce proceedings, the proceedings may need to be delayed, since the marriage must be intact when the petition is filed. However, the undocumented client can self-petition if she divorced within two years of filing her self-petition and the divorce was due to the abuse. The safest route is to make sure there is no final divorce prior to filing the self petition.

Cancellation of Removal or Suspension of Deportation

These are two different names for another form of relief available to battered immigrant women who are in removal or deportation proceedings in the Immigration Court. The requirements are similar to those for self-petitioners, as discussed in "Self-Petitioning Under the Violence Against Women Act," above. An applicant for VAWA cancellation of removal must establish that he or she

- has been battered or subjected to extreme cruelty by a U.S.-citizen or LPR spouse;
- has been physically present in the United States for three years before applying;
- would suffer extreme hardship, or that her child or parent would suffer extreme hardship, if the applicant were removed;
- has been a person of good moral character during the period of physical presence;
- is not inadmissible for crimes, security and terrorism grounds, or deportable for marriage fraud, crimes, failure to register and falsification of documents, or security and terrorism grounds; and
- has not been convicted of an aggravated felony as defined under INA § 101(a)(43).

See INA § 240A.

A grant of cancellation of suspension by an immigration judge results in lawful permanent residence, but only a judge can grant it; a denial results in deportation or removal. The public-charge and other grounds for inadmissibility do not apply in a cancellation or suspension case. An eligible immigrant who is in removal proceedings should be referred to an immigration attorney, since these are difficult cases to present and win in immigration court.

Political Asylum

An undocumented woman who is not married to her batterer or whose battering spouse is not a US citizen or LPR may still be able to obtain legal status by showing that she merits political asylum. She will have to show, among other things, that a reasonable person in her position would fear that she would be subjected to persecution by the batterer in her home country, and that the authorities would not protect her there. If she is granted asylum, she will be eligible to apply for lawful permanent residence after one year.

The laws governing gender-based asylum are very much in flux. Therefore, it is imperative that the client be referred to an immigration specialist.

U-Visas for Unmarried Partners or Spouses Who Are Not LPRs or U.S. Citizens

There are many immigrant victims of domestic violence who are married to an abuser, but their abuser is not a U.S. citizen or an LPR. In addition, many women are not married to their abuser, so that even if he has status, he could not petition for her. These women do not qualify to self-petition but they may qualify for the U-Visa.

The U-Visa was created by Congress in 2000 for the purpose of protecting victims of serious crime who report the crime and assist in its investigation and prosecution. In fact, the U-Visa is not limited to victims of domestic violence, so a family law practitioner may want to screen all non-LPR or U.S.-citizen clients and refer them as appropriate.

As of this writing, the Immigration Service has yet to promulgate regulations, but persons who appear eligible may be allowed to remain in the United States and receive permission to work under interim relief measures pending the issuance of the regulations.

To qualify for a U-Visa, the applicant must

- have suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity; and
- posses information concerning the criminal activity and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution; and
- have a certification from a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating criminal activity, verifying her helpfulness in the investigation or prosecution of the criminal activity.

The criminal activity must be one of a series of crimes specifically mentioned in the law or similar activity. It includes rape, incest, domestic violence, sexual assault, abusive sexual contact, hostage-taking, kidnapping, and unlawful criminal restraint, among numerous other crimes. The criminal activity must have occurred in the United States or its territories or possessions or have violated the laws of the United States.

A U-Visa nonimmigrant may adjust her status to LPR if she meets the following requirements:

- she has been present physically in the United States for a continuous period of at least three years since the date of admission as a U nonimmigrant;
- she did not unreasonably refuse to provide assistance in a criminal investigation or prosecution;
- her continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and
- the applicant has not engaged in genocide or Nazi persecutions.

Upon approval of adjustment of status, the Immigration Service may adjust the status of the principal's spouse or child if the adjustment is necessary to avoid extreme hardship.

Removal of Abusive Spouses or Intimate Partners

All non-U.S.-citizen aliens—including those who have legal permanent resident status—are subject to being removed from the United States on a number of bases, which are listed in INA § 237. If he or she is undocumented, that in and of itself is sufficient. Besides removal due to lack of documentation, the statute also provides for removal due to marriage fraud and failure to remove conditions on status. The criminal provisions are most likely to have an impact in cases involving domestic violence. These include the following:

- conviction of one crime of moral turpitude within five years of immigration (or ten years in some cases) if a sentence of one year or longer may be imposed;
- conviction of two crimes of moral turpitude at any time after admission;
- conviction of an aggravated felony (the term "aggravated felony" is defined in Section 101(a)(43) of the INA; the list of crimes considered aggravated felonies has been greatly expanded in recent years and now includes almost all felonies);
- conviction of any controlled-substances violation except a single offense of simple possession of 30 grams or less of marijuana;
- being a drug abuser or addict, regardless of whether ever convicted of a crime;
- conviction of almost any firearms offense;
- conviction of a crime of domestic violence, stalking, violation of a restraining order, or child abuse, neglect, or abandonment;
- being found to have violated a restraining order; and
- miscellaneous crimes such as sabotage, espionage, etc.

Practice Note

Immigration law defines the terms "conviction" and "aggravated felony" in a more inclusive way than state law does. For example, a "continued without a finding," which is not a conviction in Massachusetts, is a conviction for immigration purposes. This area of the law is complex and errors can and have resulted in legal permanent residents who have lived in the United States almost their entire lives being deported to their home countries with no chance of legally reentering the United States.

The domestic-violence and restraining-order provisions were added by IIRAIRA and are generally well known and sometimes misconstrued in the immigrant community. Obtaining a restraining order against a non–U.S. citizen does not, by itself, subject someone to deportation. Even though a conviction for a domestic violence crime should, in theory, subject a defendant to being placed in proceedings, in many district courts around the Commonwealth immigrants who plead guilty or who are found guilty of crimes of domestic violence are not referred to Immigration for removal. However, if an immigrant with a conviction has further involvement with the criminal justice system or leaves the country, then he or she may be placed into proceedings. It is also true that contact with the criminal justice system increases an immigrant's chances of being placed in removal proceedings. For example, the U.S. Immigration and Customs Enforcement division sends agents to local jails to interview prisoners and determine if any are eligible for removal.

If you work with someone who is not a U.S. citizen and who is charged with a crime, it is essential that they contact an immigration attorney for advice.

The overall effect of these well-intended changes in immigration law may have been to increase the reluctance on the part of victims to enforce restraining orders or bring criminal charges if the outcome will be not only criminal punishment in the United States but also deportation. Removal from the United States may have consequences unforeseen by lawmakers, such as the end of a parental relationship between the batterer and the children, and the loss of child support or other income to the victim as well as to her family back home. As a result of all of these possible consequences, the victim must be the one to make the decision about whether to proceed with criminal charges, after weighing all of the pros and cons of doing so.