

IMMIGRATION

By **Jill S. Bloom and Ronald M. Bookholder**

A client walks into a family law practitioner's office. She is seeking a divorce from her spouse. The attorney has her complete an intake form to gather basic information necessary to begin representation. Unfortunately, missing from the intake form are simple questions that could prevent serious errors in advising the client. Are you a citizen of the United States? If not, what status are you? Is your spouse a citizen of the United States? If not, what status is your spouse? Are your children citizens of the United States? If not, what status are your children? These questions may seem irrelevant, but the answers may raise immigration law issues that may seriously affect the client.

Immigration law is a specialized area of practice governed by its own regulations and court. An immigration practitioner cannot function as an island where no other issues of law affect immigration cases and where immigration law does not affect other cases. The truth is that immigration issues pervade many disciplines of law, including family law.

Important Immigration Terms

- ◆ Alien = Any person not a citizen or national of the U.S.¹
- ◆ Immigrant = An alien who does not show the intent to remain in the U.S. permanently.²
- ◆ Lawfully Admitted for Permanent Residence = An alien who has lawfully gained the privilege of residing and remaining permanently in the U.S. as an immigrant.³ Persons admitted permanently in such matter are called Lawful Permanent Residents or Permanent Residents.
- ◆ Nonimmigrant = An alien who is admitted temporarily and for a set amount of time based on type of status accorded.⁴
- ◆ Bureau of Citizenship and Immigration Services (BCIS) = Adjudication bureau for immigration and citizenship cases. Formerly called Immigration and Naturalization Service (INS).⁵

Marriage

The first step towards divorce is marriage. The basis of a marriage may make a difference in how an attorney approaches the divorce.

Scenario 1: Client gained permanent residency through marriage to a U.S. citizen

When a foreign national marries a U.S. citizen, that individual gains the right to apply for permanent residency as an immediate relative of the U.S. citizen spouse.⁶ If the couple has been married less than two years when the foreign national gains permanent residence, that permanent residence is deemed to be conditional.⁷ The requirement is intended to avoid fraudulent marriages that exist for the sole purpose of obtaining an immigration benefit. Two years after obtaining permanent residency, the married couple is required to file a petition to remove the condition showing that they are still married and that they are living as "husband and wife."

The family law attorney's problem arises if the client is a conditional permanent resident who has not yet been able to remove the condition. If either spouse chooses to seek a divorce before the conditional period has ended, the immigration laws provide a waiver whereby the foreign national can self-petition to remove the condition. Although the non-citizen spouse may do so, the standard is much higher and the burden is on the foreign national to provide evidence that, though the relationship is over, the marriage was entered in good faith and not to procure an immigration benefit. It is important to note, however, that in order to take advantage of the waiver the person must already be divorced. If the individual is in the middle of divorce proceedings, he/she is not eligible to jointly file as he/she no longer has the intent to remain with his/her spouse nor is eligible to utilize the waiver, as there is no final termination of the marriage.⁸ It is important that the family law lawyer be aware of this so that the client may act proactively to gather evidence of the relationship before it is too difficult to gather this evidence.

Scenario 2: Client is a U.S. citizen who is divorcing a permanent resident spouse that he sponsored for permanent residency

Even though the client may be a U.S. citizen, immigration issues still may affect the individual. When a U.S. citizen files on behalf of a foreign national spouse, she is sponsoring that individual for

FAST FACTS

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An immigrant is an alien who does not show the intent to remain in the U.S. permanently.

A nonimmigrant is an alien who is admitted temporarily and for a set amount of time.

Family Law

What every family law attorney needs to know about immigration law and its impact on divorce and related matters

permanent residency. The sponsor signs Form I-864, Affidavit of Support under Section 213A of the act, a document signed in the presence of a notary attesting that the U.S. citizen will financially support the immigrant. The form functions as a contract between the U.S. government and the sponsor. If the sponsored foreign national applies for mean-tested public benefits, the sponsored immigrant or any federal, state, local, or private entity that pays the benefit has the right to sue the sponsor for compensation. *The obligation does not terminate with divorce.* The obligation continues until the sponsored immigrant becomes a U.S. citizen or has worked or can be credited with 40 qualifying quarters of work.⁹

The contract with the government may affect issues of support in a divorce settlement. It is important for the family law attorney to obtain a copy of the Affidavit of Support and information on the sponsored immigrant to determine whether or not the client remains subject to the contract.

Scenario 3: Client gained permanent residency as a dependent by marrying an individual before that individual gained permanent residency

Immigration law allows dependents of permanent residency applicants to join in the process and gain permanent residence as the spouse gains permanent residence.¹⁰ Interesting to note is the legal loophole that is advantageous to individuals who marry right before gaining permanent residency. For purposes of divorce, it is irrelevant if the client gained permanent residency by marrying an individual before the individual became a permanent resident. The immigration laws do not provide for a conditional residency period in this circumstance. Due to this inconsistency in the law, U.S. citizens and their spouses are held to a higher standard by having to endure the conditional residency status and removal of that condition. There is nothing in place in the regulations to prevent a potentially fraudulent marriage to occur when a person marries another before the primary foreign national gains permanent residency and the dependent joins in gaining permanent residency as well.

Scenario 4: Client is a nonimmigrant and is not a permanent resident of the United States

The family law attorney will have a problem if the client is a nonimmigrant whose status is wholly dependent on his marriage to his spouse. Part of a family law lawyer's job is to determine whether or not a divorce is right for the client and counsel the client accordingly. In some circumstances, the couple may reconcile. It is particularly important to ascertain whether or not the client and the spouse have any possibility of reconciliation, because if the individual is a nonimmigrant whose status exists as a result of the spouse's status, he will lose all status in the U.S. by divorcing the spouse.¹¹ If the reconciliation of the relationship is not possible, it is important that the family law practitioner advises the client of the possible immigration consequences of divorce and advises the client to seek immigration assistance in attempting to obtain a legal status in the U.S. independent of the spouse if the client wishes to remain in the U.S.

The Abused and the Abusive

Many family law attorneys have clients who are involved in both mentally and physically abusive relationships.

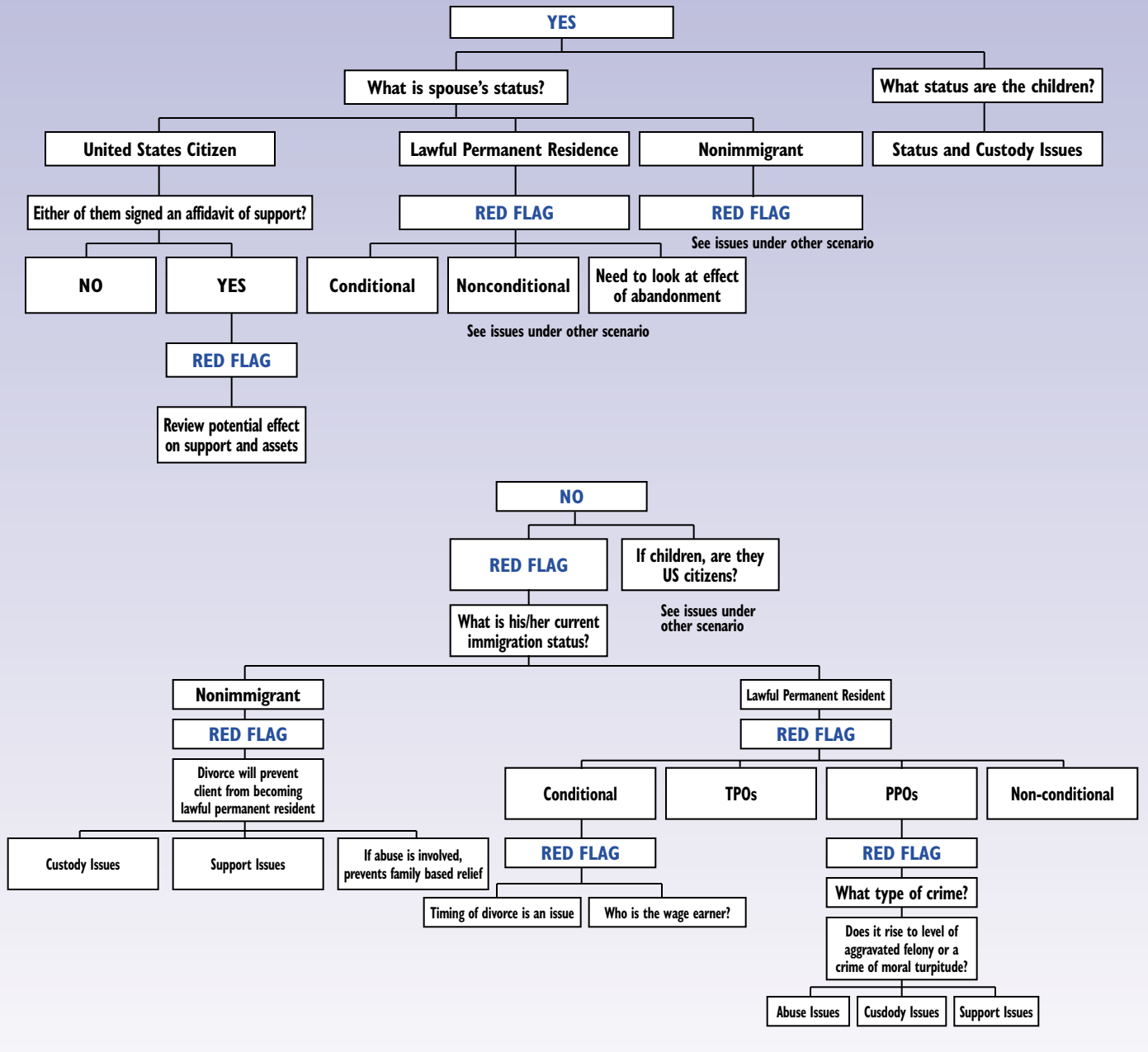
Scenario 1: Non-citizen client claims she is being abused and wants to get a divorce. She is married to a U.S. citizen but is not a permanent resident of the U.S.

The primary concern of the attorney is to protect her client from the abusive spouse. However, by divorcing that spouse, the client may lose the right to remain in the U.S.

A U.S. citizen or lawful permanent resident generally applies for an immigrant visa for a spouse. The U.S. citizen or lawful permanent resident is the petitioner and the petitioner controls when the filing occurs. The foreign national spouse is the beneficiary. Usually, the beneficiary has no right to file the petition for permanent residency.

Congress recognized that there was a need to create a law to protect battered individuals and to allow them to remain in the U.S. In 1994, Congress implemented the Violence Against Women Act

Is Your Client a United States Citizen?



(VAWA).¹² Though the title includes women only, the act does allow for abused men to file under this provision. VAWA provides certain battered individuals with the right to self-petition for immigration benefits without the abuser's assistance or knowledge so that the abused may seek independence and safety from the abuser.¹³

VAWA allows four classes of individuals to apply: abused spouse of a U.S. citizen or Lawful Permanent Resident; parent of a child abused by a U.S. citizen or Lawful Permanent Resident; child abused by U.S. citizen or Lawful Permanent Resident; and abused spouse living abroad with an abusive spouse that is an employee of the U.S. government or a member of the uniformed services of the U.S. or if the abuser has subjected the spouse or child to abuse in the U.S.

In order to qualify under this provision, one must meet certain requirements. Some of these requirements include: (1) the abused must have been married to a U.S. citizen or Lawful Permanent Resident; (2) the marriage must have been entered into in good faith and not to procure an immigration benefit; (3) the abused must have been subjected or subject to extreme cruelty, emotional or physical, during the marriage; and (4) the abused must show that the abused is of good moral character.¹⁴ Unfortunately, the abusive spouse's past may affect the abused spouse's qualification for self-petitioning. If the abusive spouse gained permanent residency or U.S. citizenship through marriage to a U.S. citizen or permanent resident within five years prior to the abusive marriage in question, the abused may not take advantage of VAWA without a

showing that the original marriage of the abusive spouse was entered into in good faith and not to gain an immigration benefit.

If the BCIS makes a prima facie determination that the battered immigrant is qualified, the individual will qualify to seek eligibility for certain public benefits¹⁵ and is eligible to apply for temporary work authorization.¹⁶ If the client does not meet the requirements, the client has other options to remain in the U.S., but the methods are far more difficult. It is imperative that if a battered client comes to a family law practitioner, the attorney contacts an immigration specialist immediately to see if the client has any recourse to remain in the United States independent of the abusive spouse.

Scenario 2: Client is abused by lawful permanent resident spouse and attorney wants to report incidents to the police and to obtain a personal protection order or temporary protection order

One of the first steps an attorney takes with a client who claims to be abused is to request the court to issue a personal protection order or temporary protection order. However, this may have serious immigration implications and cause a difficult predicament for the attorney and the client.

A person who is a lawful permanent resident is allowed to live in the U.S. with certain restrictions and is not accorded the full rights of a U.S. citizen. Certain actions and activities will allow the U.S. government to deport the individual. Crimes of domestic violence, stalking, or violation of protection orders are all grounds for removal of a lawful permanent resident from the U.S.¹⁷ Under immigration law, the term "crime of domestic violence" means any crime of violence against a person committed by a current or former spouse, by a person with whom that individual shares a child in common, or by a person cohabiting or who has cohabited with the victim. The term protection order in immigration means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence.¹⁸

The family law attorney must weigh the pros and cons of filing a protection order or reporting the abusive spouse to the police. By reporting the crime, the attorney protects the client. However, the attorney may cause the abusive spouse to be removed from the U.S., making it extremely difficult to collect spousal and child support. It is crucial that the attorney act proactively in this circumstance and that the client understands all the ramifications of these actions.

International Child Custody Issue

There are many other issues that the family law attorney may encounter when dealing with a case that involves foreign nationals. One such issue is international child custody and international child abduction.

Scenario 1: Client wants to remain in the U.S. and has a spouse that has indicated that he wishes to return to home country. The client is concerned that the spouse will take the children to another country.

International child custody and international child abduction is complex. It is necessary for one to review the Hague Convention on

the Civil Aspects of International Child Abductions for protection of the client's children. One action that a family law attorney may attempt to prevent the spouse from taking the children out of the United States is to request that the court hold the children's passports until a custody determination has been made. Some countries only issue passports to the parents and include the children in the adult passport. The court may still take the passports and the spouse would get a new passport that does not include the children. No rights or freedoms are compromised and there is less chance that the spouse can take the children abroad without the client's knowledge. Certainly, this procedure cannot prevent international child abduction, but it should help. However, some courts may refuse to hold the passports.

A client's immigration status in this country may have serious ramifications on the strategy and approach of a family law lawyer. It is important for the family law attorney to identify these issues when they arise to determine if it is necessary for the client to seek the assistance of immigration counsel. ♦



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Footnotes

1. Immigration and Nationality Act (INA) Section 101(a)(3).
2. INA Section 101(a)(15).
3. INA Section 101(a)(20).
4. INA Section 214.
5. Homeland Security Act of 2002 (H.R. 5710).
6. INA Section 245.
7. INA Section 216(g)(1)(C).
8. Memorandum from William R. Yates, Acting Associate Director, Operations of BCIS, April 10, 2003; INA Section 216(c)(4)(B).
9. INA Section 213A and Form I-864, Affidavit of Support under Section 213A of the act.
10. INA.
11. INA.
12. INA Section 204; 8 Code of Federal Regulations (CFR) Section 204.2(c).
13. <http://www.ins.gov>.
14. INA Section 204.
15. Illegal Immigrant Responsibility and Immigration Reform Act (IIRIRA) Section 501.
16. 8 CFR 274a.12(c)(14).
17. INA Section 237(a)(2)(E)(i) and (ii).
18. Id.