Divorce ≠ Deportation

By Catharine M. Venzon and William Z. Reich

Introduction

Matrimonial lawyers must know fundamental immigration law when representing Foreign Nationals (FN) in divorce proceedings. Non-immigrant visas allow FNs to enter the United States for a variety of reasons, such as business, education, or pleasure. A FN's family may accompany the principal applicant depending on the purpose and duration of the trip. The FN and accompanying dependents are issued a record of entry (Form I-94) at the United States Port of Entry.

The derivative status of a FN family member, particularly a FN spouse of the principal applicant, relies on the continued marital relationship. Simply speaking, in order to maintain derivative status, a FN spouse must remain married to the principal applicant.

A strategy must be in place during the divorce proceedings to protect the FN's United States immigration status. An approach that blends both immigration and matrimonial law is needed to provide the client with an opportunity to obtain alternative derivative status.

This article is intended to alert matrimonial lawyers of issues that may arise in protecting a FN's immigration status in an Action for Divorce. It is recommended that matrimonial practitioners work in conjunction with an immigration lawyer because this article will not outline all the statutory requirements for non-immigrant and immigrant options. This article illustrates examples and offers solutions on protecting a FN's immigration status in the event of divorce.

Record of Admission (Form I-94)

The matrimonial lawyer must begin by asking the FN for his or her Form I-94. The Form I-94 contains the client's specific non-immigrant status and authorized period of stay in the United States.

The FN seeking entry into the United States must have a valid visa issued by a Consulate or Embassy abroad (unless visa exempt). However, the visa is simply permission to apply for admission at a United States port of entry. United States Custom and Border Protection Officials (U.S. CBP) determine whether to admit the FN and if so, for what duration and status. This admission is documented by the issuance of Form I-94.

A sample Form I-94 indicating a FN's non-immigrant status—"TN" (see scenario 5 *infra*)—the authorized date of entry (March 4, 2010), and the expiration of authorized status (March 3, 2013), is attached for reference. Form I-94 can also be attached to Approval Notices issued to extend/change a FN's status.

New York State "No-Fault" Divorce Provision

On August 13, 2010, New York State Senate bill S3890A was signed into law amending the Domestic Relations Law by adding a "No-Fault" provision. This allows judgments of divorce to be granted without a finding of fault after the following ancillary issues are resolved: "the equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and expert fees and expenses, and custody and visitation with the infant children of the marriage."[1]

This "No Fault" provision is a useful tool to protect a FN client's derivative status. The language provides five ancillary issues that must be resolved before the divorce can be granted. It is suggested that derivative status is another major ancillary issue that must be addressed. It should be argued that deportation (i.e., in some cases, the involuntary separation of a parent from a child) is an important ancillary issue that cannot be ignored.

Custody and visitation are affected if the FN loses his or her derivative status after a divorce. DRL § 170 was amended in part requiring that "custody and visitation with the infant children of the marriage [to] have been resolved by the parties" before a divorce is granted. It should be argued that the court must consider the derivative parent's access to his or her child and the child's access to the parent. This ensures that the derivative status child and/or United States citizen child has a continuing parent/child relationship. In some cases, a derivative child could be in the United States for several years depending on the duration of the primary applicant's visa in the United States.

Strategies to Preserve or Change Status

The following examples illustrate how a FN could lose his or her derivative status in divorce. There is no one strategy that can be used for any particular situation; rather, the matrimonial lawyer in conjunction with an immigration attorney must decide what works best. Following are strategies to consider:

Scenario 1: Plans to Become a Lawful Permanent Resident (LPR)

One approach is for a FN to apply for a "green card" to become a Lawful Permanent Resident ("LPR"). Once the client is a LPR, he or she is no longer dependent on the status of his or her spouse.

There are two options for attaining LPR status: family-based and employment-based. Family-based options include applying through relatives of United States citizens or legal permanent residents. Employment-based

options include applicants who are individuals at the top of their field, international managers or executives, and those who obtained approved labor certifications. Thus, one option if the parties are agreeable would be to defer the divorce until after the FN client becomes a Lawful Permanent Resident.

Scenario 2: H-1B Professional Worker

Temporary foreign workers in specialty occupations may seek to be classified by their United States employer for H-1B status. A "specialty occupation" requires theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including, but not limited to: architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requires the attainment of a bachelor's degree or its equivalent at a minimum. H-1B status is accorded to the principal applicant, while H-4 status is accorded to the derivative spouse or child under age 21.

As an example: Alexander is an exceptional architect for a multinational corporation. His company obtained a contract with the City of Buffalo to restructure the waterfront, and his employer would like Alexander to design the buildings and oversee the construction. Alexander is a Russian citizen who requires the company to obtain an H-1B visa on his behalf. This will allow him to live and work in the United States. Alexander is married to Maria, who is also a Russian citizen and architect. Maria is eligible to accompany Alexander to the United States on an H-4 visa based on Alexander's H-1B visa.

The parties lawfully enter the United States and Alexander is issued an I-94 based on an H-1B visa. Maria is issued an I-94 based on an H-4 visa for three years. After two years, the parties separate and wish to file for divorce. Maria wants to remain in the United States.

Can Maria change her status and remain in the United States after a divorce?

Maria can apply for a job in her specialty occupation because she entered the United States lawfully on an H-4 derivative status visa, and her H-4 has not expired. Her employer can petition for her as an H-1B. The H-4 derivative, however, is subject to the same requirements of any other H-1B applicant. Thus, an applicant still needs to satisfy the same qualifications by having: (1) the requisite education; (2) a profession that qualifies as a specialty occupation; (3) a company willing to sponsor employment; and, (4) file an application to change nonimmigrant status.

A word of caution: H-1B visas are only issued by United States Consulates. The approval notice for the change of status in this case will likely include an I-94, extending Maria's status throughout the H-1B approval period. This would allow Maria to lawfully remain in the U.S. However, should Maria wish to leave the United States for a brief trip, she would need to apply (and obtain) an H-1B visa from a United States Consulate in Russia before being allowed to return to the United States. Canadian and otherwise visa-exempt citizens are an exception to this requirement as long as the trip outside of the United States is less than 30 days. The I-94 from the approval notice is not sufficient to allow reentry into the United States.

Scenario 3: F-1 Student

An F-1 Visa may be issued to foreign national students "temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States."

Example: Ilham is a Turkish citizen who has been accepted for enrollment at a prominent university in Ithaca, New York to pursue a Master's degree in public administration. She is 24 years old and has been married for three years to her Turkish-citizen husband, Mahir. Ilham believes that an American degree will qualify her for a high-level Turkish government administrative job.

The parties lawfully enter the United States and Mahir receives an F-2 visa, the derivative of Ilham's F-1 visa. However, the marriage deteriorates, and a divorce is sought. Mahir wants to remain in the United States.

Can Mahir change his status and remain in the United States after a divorce?

Mahir can apply for his own F-1 student or work visa because he lawfully entered the United States on a derivative F-1 visa. The F-1 derivative is subject to the same requirements of any other F-1 applicant. Thus, if a person enters the United States with a spouse on a derivative visa (e.g., H-4, L-2, F-2, TD) and already has a Bachelor's degree, he or she could consider attaining a Master's degree. The attainment of a Master's degree will extend the applicant's time in the United States. After graduation, the applicant may qualify for an additional year in optional practical training which will allow him or her to work and gain experience in their chosen field. Also, by continuing his or her education, opportunities may be available for future employment-based temporary and permanent visa opportunities. The applicant may also consider applying for an H-1B visa if he or she meet the credentials for employment.

Scenario 4: L-1: Intra Company Transferee Overview

An employee with an L-1 visa may work the United States as a manager/executive or as a staff member with specialized knowledge. A FN may receive L-1 status within three years preceding his application for admission providing he has been employed abroad continuously for one year by a parent, branch, affiliate, or subsidiary of the

United States-based petitioning company. The applicant must enter the United States to continue providing services for this same employer, affiliate, or subsidiary. Family members may be accorded L-2 derivative status.

Example: MegaCorp is an international accounting firm headquartered in Hamburg, Germany. MegaCorp has opened a branch in Syracuse, New York. Hans has been working as a senior manager in the Hamburg, Germany office for the past eight years and has been asked to work in the United States office. The United State office is only in the developmental stage. MegaCorp believes that Hans' unique managerial style will allow the United States office to be successful.

Hans, his wife Gertrude and three children lawfully enter the United States. Hans receives an L-1 visa, and his family is issued L-2 derivative visas. The marriage deteriorates and a divorce is sought. The wife and children want to remain in the United States.

Can Gertrude change her status and remain in the United States after a divorce?

Gertrude may lawfully remain in the United States if she qualifies for another visa. In this scenario we do not know if she has the necessary education or professional experience to qualify for an H-1B visa as an employee in a "specialty occupation." In any event, if she got accepted and attended an American university she would then be eligible for an F-1 student visa.

Scenario 5: TN Status: Trade NAFTA Professional

Canadian and Mexican professionals may apply for TN status. This category is similar to an H-1B visa except there is no statutory limitation on stay, and covers the numerous positions listed in 8 CFR § 214.6. For a list of qualifying professions, please see NAFTA TN Lawyer at http://www.naftanlawyer.com/nafta-tn-status-visa-regulati/.

Example: Rafel is a Mexican citizen and graphic design artist. He graduated from a major university in Mexico City, Mexico with a bachelor's degree in graphic design and computer science. He is married to Mia, who is also a Mexican citizen with a bachelor's degree in biology.

E-tron Arts, with offices located in Hollywood, California, was impressed by Rafel's creativity in graphic design for video games and offered him a position in the United States, which Rafel accepted. The parties lawfully entered the United States and Rafel was issued a TN Trade NAFTA professional visa and his wife received TD status, which allowed her to join him. The marriage deteriorates and they wish to separate.

Can Mia change her status and remain in the United States after a legal separation?

Derivative status can be protected in the event of a legal separation. Also, if the parties sign a Separation Agreement and do not convert it into a divorce, they may be legally separated indefinitely. In this arrangement, as long as the divorce is not finalized, either party may move out of the house and move on with their lives. A Property Settlement Agreement signed by both parties will allow the spouse to maintain derivative status. In this scenario, Mia would retain her status.

However, Mia may change her status and apply for a TN visa, as a biologist, or she may file for an H-1B Visa if she meets the requirements.

Scenario 6: Marriage to a United States Citizen (USC)

The scenarios to this point have discussed options that allow a person to remain in the United States in temporary status if that temporary status is threatened by divorce or separation. Marriage to a USC can lead to lawful permanent residence in the United States and eventually United States citizenship.

If a person's derivative status is lost because of divorce, that person will be residing in the United States "out of status" until he or she marries a USC. Living in the United States while being "out of status" is a hardship and not recommended. However, as long as this person remains unnoticed and under the radar of the Department of Homeland Security, a marriage will put him or her back on track toward lawful status.

Scenario 7: EB-5 Immigrant Investor

A high net-worth individual may remain in the United States permanently by becoming an EB-5 immigrant investor. To become an immigrant investor you must establish: (1) that you have or are in the process of investing the required amount of capital ($1,000,000 USD or $500,000 USD) to a USCIS designated Regional Center (A Regional Center is a private enterprise or corporation or a regional governmental agency with a targeted investment program within a defined geographic region), or Targeted Employment Area; (2) the funds have been lawfully acquired; (3) the investment will directly (or indirectly, if using Regional Center) create or save ten (10) full-time jobs in the United States; (4) he or she will have at least a policy making role in the enterprise (not required for Regional Centers); and (5) he or she was a participant in creating the enterprise (not required for Regional Centers).

Scenario 8: Violence Against Woman Act (VAWA)

VAWA provides protection for women who obtained their lawful status through engagement or marriage. Many FN battered spouses remained in abusive relationships because they feared losing their immigration status. Today, the Violence Against Women Act (VAWA) allows a battered spouse to leave a relationship and independently pursue immigration options.

VAWA Example 1:

A fiancée enters the United States on a K visa (a fiancée's visa) to marry a USC. However, after the marriage the USC spouse abuses his wife and refuses to file the appropriate paperwork for her to maintain legal status. In this case, the battered spouse may self-petition for adjustment of status by filing a Form I-360 demonstrating that she: (1) resided with the USC spouse, and (2) was battered or subject to extreme cruelty during the marriage. In this scenario the abused spouse is a female but a battered male spouse is also eligible for the same relief.

VAWA Example 2:

Again, a fiancée enters the United States on a K visa (a fiancée's visa) to marry a USC. However, after the marriage the USC spouse abuses his wife and refuses to file the appropriate paperwork for her to maintain legal status. This battered spouse falls "out of status" by exceeding the period of time allotted under her non-immigrant visa. Immigration becomes aware of the situation and places her in removal proceedings.

The battered spouse has two options to adjust her status once in removal proceedings. In the first option, the battered spouse may self-petition for adjustment of status under VAWA. The battered spouse may self-petition for cancellation under VAWA by filing Form I-360 with USCIS and then, upon approval of Form I-360, apply for adjustment of status before an Immigration Judge. In the event that the requirements of VAWA cannot be met, a battered spouse may seek cancellation under option two.

In the second option, the abused wife may seek under a special rule cancellation of removal for battered spouses. Option two requires the following: (i) a person to have been battered or subjected to extreme cruelty by a spouse who is or was a citizen or landed permanent resident, (ii) that the person has been physically residing in the United States for a continuous period of not less than 3 years immediately preceding the date of the application; (iii) the person is of good moral character during those three years; (iv) the person is not inadmissible, deportable, or has been convicted of an aggravated felony, and (v) the removal would result in extreme hardship. Special rule cancellation of removal is also available to battered children. In this scenario we stated the abused spouse was female but a battered male spouse is also eligible for the same relief.

VAWA Example 3:

A FN marries a USC abroad and then completes the immigrant visa process through a United States Consulate within one year of marriage. The immigrating spouse is granted conditional residency upon entering the United States. Conditional residency is a 2-year probationary period to ensure that the marriage is bona fide. The next step in the process is unconditional lawful permanent residency (LPR), but this status cannot be granted until conditional residency is lifted. To lift the conditional residency the citizen or landed permanent resident spouse must file a Form I-751. The marriage is abusive and the USC spouse refuses to file Form I-751 for his wife to maintain status. Under VAWA, the conditional/resident/battered spouse can file Form I-751 on her own, requesting a waiver of the joint filing requirement based upon spousal abuse. Again, in this scenario we stated the abused spouse was female but a battered male spouse is eligible for the same relief.

Conclusion

New York State's Domestic Relations Law no fault provision provides some protection for FNs because, arguably, derivative status must be dealt with prior to the issuance of divorce. Derivative status is a major ancillary issue and cannot be ignored. The disruption of the family unit affects the future of the dependent spouse and children's derivative status.

The matrimonial lawyer, working in tandem with an immigration professional, must assist the FN to identify another status to lawfully remain in the United States.

Endnote

1. DRL § 170.

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