

SEEKING CITIZENSHIP IN THE SHADOW OF DOMESTIC
VIOLENCE: THE DOUBLE BIND OF PROVING "GOOD MORAL
CHARACTER"

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INTRODUCTION

Maria is a Mexican national and resides in the United States on a Trade NAFTA ("TN") work visa.¹ She falls in love with Bob, a U.S. citizen, and after a brief courtship, they marry. They immediately file a joint petition with the U.S. Citizenship and Immigration Service ("USCIS") for issuance to Maria of a Conditional Residence ("CR") Card, the transitional status that acts as prelude to Permanent Residence. Maria and Bob have joint bank accounts. However, Bob controls the household finances manifested

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1. A TN visa is a temporary professional work visa that is issued to those from Mexico or Canada. This is just one of the many legal ways that immigrants can come into the United States. See Immigration and Nationality Act ("INA") § 203, 8 U.S.C. § 1153 (2012). Workers can also come into the country illegally. See Cynthia Blum, Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform, 21

costly, executed in hostile domestic environments, and must often surmount state laws that apply restrictive constraints on noncitizens. And divorce action must also satisfy federal standards that the marriage was not initially entered into with fraudulent intent.⁹

Additional general citizenship requirements include demonstration of good moral character. In practice, one of the most conspicuous manifestations of this is compliance with tax laws. In Maria's case, her filing of a joint return may be viewed favorably by immigration authorities as proof of a good faith marriage. On the other hand, Bob's underreporting of his income may well constitute a fraudulent tax return,¹⁰ which (if discovered) could expose Maria to liability for the subsequent delinquent tax and damage her position as an upstanding citizenship candidate. The conditions (both personal and legal) that contribute to these "double bind" situations are examined more fully in the subsequent discussions.

I. REQUIREMENTS OF CITIZENSHIP FOR FOREIGN SPOUSES

Initially the U.S. immigration laws did not recognize women's autonomy.¹¹ Only husbands could file a petition for their foreign wives or accompany

8. David S. Mitchell, Comment, An Unhappy Union: Married Taxpayers Filing Separately and the Affordable Care Act Premium Tax Credit, 69 TAX LAW. 453, 463 (2016) ("[M]any state divorce statutes include waiting periods, appeals processes, and litigation deadlines that create a legal maze that is impossible to navigate, especially for low-income individuals who cannot afford an attorney or face other well-documented impediments to legal access, like low literacy, disability, or limited English proficiency. There is also the fear that one spouse will be left financially worse off as a result of divorce).

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them to the immigration office.¹² Conversely, wives could lose their U.S. citizenship if they married foreigners.¹³ It was not until 1952, with the passage of the Immigration and Nationality Act (“INA”) that the immigration laws were made gender neutral.¹⁴ Then in 1986, Congress passed the Immigration Marriage Fraud Amendments (“IMFA”), the purpose of which was to prevent fraudulent marriages of noncitizens to U.S. citizens.¹⁵ The IMFA created a presumption that such marriages were fraudulent until proven to be valid and in good faith.¹⁶ Under the current INA rules,¹⁷ foreign spouses applying for citizenship status in the United States must: (1) be a legal permanent resident (Green Card holder) for at least three years;¹⁸ (2) be eighteen or more years old, (3) meet both a continuous residence and physical presence requirement; (4) “[b]e able to read, write, and speak English and have knowledge and an understanding of U.S. history and government (also known as civics);”¹⁹ (5) be of good moral character during the required residence period and up to the time of admission.²⁰

To be a legal permanent resident, the foreign spouse must not be here illegally.¹⁹ Maria is here on a work visa, and she is a documented worker. Thus, she is here legally. Since Maria has been married for less than two years she is issued the aforementioned CR card in order to advance to permanent (Green

12. Immigration Act of 1924, Pub. L. No. 139, Ch. 190, § 2(a), 43 Stat. 153, 153.

13. In re Watson, 57 Fed. Cl. 254 (1923), 130 F.2d 483 (E.D. Pa. 1942), 135 F.2d 101 (A.D. 1942); 14(22(-1S14.7(1-00.46. 0 45 T2c2

Card) status, the law requires a joint petition to be filed ninety days before the expiration of two years from which Maria first gained her legal status. The immigrant party can request a waiver of the requirement to file a joint petition after the two-year period, but [will] face[] a high burden of proof to show the marriage was genuine.²²

At the two-year mark of the relationship, the marriage is reviewed by immigration to determine if the couple is still together and has a good marriage.²³ To obtain unconditional legal permanent resident status and remove the conditions, Maria must also file Form I-751 (Petition to Remove Conditions on Residence).²⁴ Essentially, the alien spouse must prove three things: (1) that the marriage was a legal marriage in the state where the wedding took place—and that it was not dissolved by divorce or annulment,²⁵

evidence.²⁸ The principal question is whether Maria and Bob intended at the time of the marriage to establish a life together. The marriage needs only to be viable at the inception and not entered into solely for immigration purposes.²⁹ The issues to be resolved are the bona fides of the marriage, not its probability of lasting for any length of time.³⁰ To meet this standard, primary evidence is used, such as proof of joint ownership of property, birth certificates of children in common, a lease showing joint tenancy, and/or affidavits from third parties attesting to the bona fides of the marriage.³¹ Joint tax returns are also an important indicator of togetherness.³²

In addition to the requirements necessary to earn legal permanent residency, full naturalization requires both a continuous residence and physical presence requirement.³³ An applicant must be a continuous resident for five years after obtaining legal permanent resident status and continuously reside in the United States from the date of filing the application.³⁴ The residence test can be flunked in several ways, such as in the case that noncitizen spouses neglect to file the application to remove the conditional tag from their residency status. Foreign

presence, the foreign spouse becomes subject to a three-year bar to reentry.³⁵ If the period of unlawful presence exceeds one year, the offending party is subject

Under tax procedural rules, the taxpayers can go back three years⁵¹ and refile and amend their return to accurate dimensions. However, the filing of an amended income tax return may not⁵² be used to establish a new basis for a

well as physical battery.⁶⁰ According to the National Coalition Against Domestic Violence, nearly one in four women in the United States will suffer domestic violence in her lifetime.⁶¹ Due to a variety of contributing factors, immigrant spouses are more at risk of experiencing domestic abuse than their counterparts in the general population.⁶² Between one-third to one-half of immigrant women in the United States are estimated to have experienced domestic violence first-hand.⁶³ These numbers are even higher amongst women who are married to other immigrant partners.⁶⁴ One study of Latina and Filipina immigrants found that nearly half of the subjects reported an increase in domestic violence after arriving in the United States,⁶⁵ and better than one-fifth of the battered respondents remained in an abusive relationship for fear of being reported to immigration officials if they complained.⁶⁶ A study conducted by the National Institute of Justice showed that nearly two-thirds of the women surveyed said that their abusers threatened them with deportation following their arrival to the United States.⁶⁷ These risks are known even by policymakers in the halls of government. Witness this statement from two U.S. senators: "Women who are separated from their spouses have the highest rate of domestic abuse victimization: four times higher than that of divorced women and eight

Beginning in 1990, U.S. immigration policy was ~~used~~ to acknowledge the victims of domestic violence. The Immigration Act of 1990, for example, created a battered spouse waiver, which allowed the spouse who had already obtained a conditional resident status to gain legally permanent status without relying on her spouse's joint petition.⁶⁹ However, such a spouse could not become a conditional resident without her spouse's initial sponsorship.⁷⁰ The Violence Against Women Act ("VAWA") of 1994 addressed this problem by allowing a battered spouse to 'self-petition' and waive the joint petition filing requirement.⁷¹ Others could file as well, such as husbands and abused

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affidavits by persons with personal knowledge of the relationship of the couple could be used. The credible relevant evidence standard⁷⁷ is a more lenient evidentiary standard than that required in farmed petitions because the abuser may control (or even destroy) documents, and the abused may be forced to flee without them.

The complex issues around credibility and domestic violence are illustrated by LopezUmanzor v. Gonzala⁷⁸ Here, the Ninth Circuit reviewed the depor.5(e)-1t

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or local criminal law and have occurred in the United States or its territories and possessions,¹⁹⁸ (3) the applicant must have been helpful (0.8(l)5.3(p3(sse)-2.2(Tj ET EMC BT /P93 0

each spouse the responsibility for the accuracy and completeness of the return and for the payment of the tax.¹¹ Thus, the IRS can pursue either or both of the taxpayers for any deficiency (including any penalties or interest due). If the foreign spouse is not able to establish grounds of innocence and is not in compliance with tax laws, then she may fail the good moral character requirement of the immigration laws.

It is estimated that 50,000 individuals a year face income tax liability attached to their marital status.¹² A majority of those in 5(f)-1.6(u(s)-2.4(R 24 >>8(a)12T(a)d>BDC

cases. Revenue Procedure 2013-13 sets forth three safe harbor factors.¹²⁴ If the claimant can prove all three, she will obtain equitable relief: (1) the claimant is legally separated or divorced at the time of relief; (2) the claimant had no knowledge or reason to know that the requesting spouse did not pay the liability; and (3) the claimant would suffer economic hardship if required to pay the tax.¹²⁵ Maria is separated from Bob, but she might have reason to know that he is not paying his taxes. She may be afraid to confront him as he is controlling

had no reason to know, this factor will weigh against relief.¹²¹ On the other hand, if the spouse cannot prove abuse, she still can get relief, but her odds of success are substantially diminished.¹²² In over two-thirds (66.7%) of the cases in which abuse was alleged, the judge found that there was no abuse.¹²³ Of these, barely a quarter (27.5%) of petition spouses were granted relief.¹²⁴ Conversely, in 90% of the cases in which the alleged abuse was confirmed, the claimant ultimately granted equitable relief.¹²⁵ Clarke concludes that the courts have not developed consistent interpretation of the various facts and circumstances.¹²⁶

Of note are the inconsistencies in the financial control cases. In one case, *Bishop v. Commissioner of Internal Revenue*,¹²⁷ the claimant spouse had a high school education, but the court held there was evidence of financial control.¹²⁸

specificity.”¹⁴² Even in *Acoba v. Commissioner of Internal Revenue*,¹⁴³ the court was unmoved by issuance of restrictions placed on an abusive spouse, stating that “there is no evidence to indicate whether the restraining order was the result of historical abuse or was a prophylactic measure taken by the court as an outcome of the divorce.”¹⁴³

For Maria, physical violence is helpful for her innocent spouse claim but not ultimately determinative. Financial control is a stronger argument, but it is

Administration's stated devotion to an immigration policy model that emphasizes detention and deportation of mass numbers of undocumented residents. A related and residual concern is that the rate of reporting domestic violence events will be reduced as a result of the overarching fear of deportation by law enforcement personnel. A recent *Los Angeles Times* article reports that reporting rates of sexual assault and domestic violence made by this city Latino residents have plummeted this year amid concerns that immigrants in the country illegally could risk deportation by interacting with police or testifying in court.¹⁵³ The article indicates that the reporting of domestic violence by Latino residents has dropped ten percent.

Within the scope of those represented in this article, the central concern with the new political order in Washington is that law enforcement officials, guided by the renewed federal emphasis on enforcement of immigration statutes, will work to prosecute foreign-

initiative theme.¹⁵⁷ Interestingly, at the State Department's annual International Women of Courage award ceremonies, two of the recipients of the award went to women who would be banned from entering the United States under the President's aforementioned Executive Order, by virtue of hailing from nations featured in his immigration restrictions.¹⁵⁸ This visible, but officially unacknowledged dichotomy of values exhibited within the Trump family, is illustrative of the disjointed nature of policy approaches to immigration matters generally, and the low priority given the plight of women in vulnerable situations around the globe, specifically. Perhaps the First Lady, herself an immigrant citizen of our country, can inspire a reappraisal of our official policies toward a

