

PERMANENT RESIDENCY BASED ON MARRIAGE TO A U.S. CITIZEN | FAQ

1. I am a United States citizen and have married a foreign born national. Can we go to USCIS and get my spouse a green card?

Yes, but the legal process is not that simple. As a United States citizen, you are entitled to file an immigrant visa petition (Form I-130) for your spouse. If approved, your spouse is entitled to immigrate to the U.S. either through adjustment of status, if currently in the U.S. in valid status, or if your spouse is currently living abroad, s/he will immigrate through consular processing at a U.S. Consulate/Embassy abroad.

2. Can the process take place in the U.S. while my spouse is here?

Yes, under most circumstances. The process is known as "adjustment of status". To file for this benefit, USCIS requires numerous documents to be submitted together with the application forms. For most cases, both the immigrant visa petition (I-130) and the application for adjustment of status (I-485) can be submitted simultaneously to the USCIS.

3. What if my spouse is still abroad?

In this case, you will need to file the I-130 immigrant petition with the USCIS first while your spouse is still out of the country. Once proof of the I-130 is received (i.e. the receipt notice), you will be able to submit a petition to the USCIS for a K-3 visa for your spouse. When the K-3 petition is approved the USCIS will notify the U.S. Consulate or Embassy abroad where the marriage took place and your spouse will be advised to complete a medical exam and appear at the Consulate for visa issuance. Note: if you are not yet married, a fiancé petition known as a K-1 is the first step and will allow your fiancé to enter the U.S. to be married to you. Once your spouse is admitted to the U.S., the marriage must take place within 90 days, after which the immigrant visa petition (I-130) and adjustment of status application (I-485) may be submitted to USCIS simultaneously.

4. How long does the process take?

All adjustment of status applications based on marriage to a U.S. citizen are first submitted to the USCIS Chicago "lockbox" address, regardless of residential address of you or your spouse. Processing of the application has been consolidated at one USCIS office. All adjustment of status applications based on marriage will also require an interview and the case will be transferred to a local USCIS office for scheduling of the interview. Processing times vary depending on the workload of the local USCIS office where the interview will be scheduled.

5. What is my spouse's immigration status while the application for adjustment of status is pending?

Your spouse is an "intending immigrant" and is permitted to remain legally in the U.S.

6. Can my spouse's children from a prior relationship also immigrate?

Yes, under most circumstances. The child must be unmarried and under age 21. You must present proof of relationship to the birth parent (i.e., your spouse) and a separate visa petition is required for each dependent child. This will also have an impact on the financial responsibilities that you have as the petitioner. See answer below under discussion of affidavit of support.

7. Can my spouse work during the time the application is pending?

Yes. Your spouse is entitled to apply for an Employment Authorization Document (EAD) card permitting employment in increments of one year in duration. The EAD requires the filing of a Form I-765 and can be extended in one year increments as necessary.

8. Can my spouse travel outside the U.S. during the time the application is pending?

Yes. In most circumstances, s/he can apply for a document entitled "Advance Parole" (AP). This document permits travel and return to the country while the application is pending. The AP requires the filing of a Form I-131.

CAVEAT: If your spouse has accrued over 180 days of unlawful presence in the U.S. prior to submitting the application for adjustment of status, s/he should NOT request Advance Parole and should NOT travel outside the U.S. for any reason until the application is approved. Unlawful presence includes persons who entered the U.S. illegally (i.e., without inspection by U.S. Customs and Border Protection) or have overstayed the time permitted to be in the U.S. legally (i.e., I-94 card has expired). This is a very significant legal issue that must be assessed on a case-by-case basis.

9. Why do I have to prove that I can support my spouse?

The law requires that all immigrants prove that it is unlikely they will become a “public charge” in the U.S. A public charge is any person who seeks and/or receives any form of government sponsored support benefits, such as, but not limited to, general assistance, SSI, food stamps and/or public housing. This does not include unemployment or disability insurance claims. For spousal cases, the law requires that the petitioning citizen’s spouse submit an Affidavit of Support (Form I-864) on behalf of his/her spouse. This affidavit must show that the citizen spouse’s income is at or above the federal poverty guidelines. The combined income of you and your spouse can be used when necessary and requires the completion of a Form I-864A Affidavit of Support Contract Between Sponsor and Household Member. The required supporting documents include complete copies of IRS tax returns (Form 1040) with W-2 forms for the past three tax years and current employment verification letter(s). This can be a complicated issue and must be evaluated on a case-by-case basis.

10. What if I am going to school and/or am not employed at the present time? How can I prove my spouse won’t become a public charge?

The affidavit of support can be submitted by other family members residing in the same household and/or by other relatives. Evidence that the immigrating spouse is gainfully employed is also helpful in this regard. In addition, the combined income of you and your spouse can be used when necessary and requires the completion of a Form I-864A Affidavit of Support Contract Between Sponsor and Household Member. Again, this is a case-by-case issue and your attorney and/or paralegal will provide guidance on how to proceed.

11. Is there anything else of which we should be aware?

Yes. You should note that the primary concern of the U.S. government in issuing your spouse an immigrant visa is whether or not you have entered into your marriage in “good faith”. The USCIS and/or the U.S. Consular official must be convinced that you and your spouse married primarily for love and affection and not merely as a means of securing a Green Card. Thus, the USCIS will require evidence of the bona-fides of your marriage and will ask questions of you and your spouse during an interview to determine if you have entered into a good-faith marriage. In order for our office to represent you and your spouse in proceeding with an immediate-relative case, we require that you and your spouse sign a statement confirming the bona-fides of your marriage.

In addition, there are certain legal bars (i.e., a reason for denial of an immigrant visa) which may arise in any case. Amongst others, such bars include criminal convictions, prior misrepresentations to gain an immigration benefit, prior deportation from the U.S., voluntary membership in the Communist and/or Nazi Party, certain health-related and certain security-related grounds. Under specific circumstances, a waiver of the bar may be available. This issue needs to be explored with your attorney if you believe your spouse may be barred from obtaining immigrant status.

12. What is “conditional” permanent residency?

The Immigration and Marriage Fraud Amendments of 1986 mandate that a foreign born spouse of a U.S. citizen granted immigration status based on a marriage less than two years old, at the time of approval, must receive a conditional Green Card valid for two years. The conditional status can be removed during the 90-day window preceding the expiration of the two-year conditional status. You and your spouse must file a joint petition to remove the conditional basis of the green card. There is no exception to this requirement, even in the event of the death of the petitioning spouse.

Further, in the event of a separation or divorce, the law requires that the immigrant spouse file a waiver of the joint petition requirement. The conditional Green Card is valid for employment and travel and in all other respects, including accrual of time to qualify for citizenship, is like any other Green Card. After the conditional status is removed, another card will be issued valid for a ten-year period of time.

13. When can my spouse apply for citizenship?

The law requires that a person who immigrates through marriage to a U.S. citizen wait three years after the adjustment of status is approved or immigrant visa is issued to apply for naturalization as a citizen. How long before an interview and a final oath taking ceremony are scheduled depends on where you reside at the time you file the application for citizenship.

14. Will my spouse lose his/her green card if we decide to travel, live and/or work abroad for a long time?

No. Absences from the U.S. of six months or less in duration normally do not affect green card status. Longer absences may have an impact and we encourage a consultation with an experienced immigration lawyer prior to any lengthy departures from the U.S. Our office will provide you with another list of FAQ's regarding Permanent Residence status at the time USCIS approves the conditional residence application.