9 FAM 40.1 Notes

(TL:VISA-185; 02-26-1999)

9 FAM 40.1 N1 Validity of "Marriage" for Immigration Purposes

9 FAM 40.1 N1.1 Marriage/Spouse Defined

(TL:VISA-162; 2-24-97)

Sec. 7 of the Defense of Marriage Act (Pub. L. 104-199) states: "The word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." While the term "marriage" is not defined in the INA, it can be extrapolated from the language found in the definition of spouse, INA 101(a)(35). A marriage, in order to be valid for immigration purposes, must be celebrated in the presence of both parties, unless the marriage has been consummated. The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls. If the law is complied with, and the marriage is recognized, and the termination of a prior marriage, if any, is recognized, then the marriage is deemed to be valid for immigration purposes.

9 FAM 40.1 N1.2 Cohabitation

(TL:VISA-41; 1-15-91)

A common law marriage or cohabitation is considered to be a "valid marriage" for purposes of administering the U.S. immigration law, provided such cohabitation is recognized by local laws as being fully equivalent in every respect to a traditional legal marriage, i.e., it bestows all of the same legal rights and duties. An official verification or a marriage certificate, if available, or, in the absence of such documentation, a legal brief verifying full marital rights, including inheritance rights, is also acceptable.

9 FAM 40.1 N1.3 Proxy Marriage

9 FAM 40.1 N1.3-1 Consummated

(TL:VISA-128; 10-20-95)

For the purpose of bestowing immigrant visa status on a "spouse", a proxy marriage which has been consummated is deemed to have been valid as of the date of the proxy ceremony.

9 FAM 40.1 N1.3-2 Unconsummated

(TL:VISA-128; 10-20-95)

A proxy marriage, if not subsequently consummated, does not create or confer the status of “spouse” for immigration purposes pursuant to INA 101(a)(35). Therefore, a party to an unconsummated proxy marriage may be processed as a nonimmigrant fiance(e). A proxy marriage celebrated in a jurisdiction recognizing such marriage is generally considered to be valid, thus, an actual marriage in the United States is not necessary if such alien is admitted to the United States under INA provisions other than as a spouse.

9 FAM 40.1 N1.4 Japanese or Korean Marriages

(TL:VISA-41; 1-15-91)

An alien is a "spouse" within the meaning of INA 101(a)(35) if the marriage was lawfully entered into pursuant to the laws of Japan or the Republic of Korea through the filing of the required notification with the Ward Registrar and the parties:

(1) Were physically present together at the time of such filing, or

(2) Consummated the marriage after such filing, or

(3) Had previously participated in a religious or private marriage ceremony and thereafter cohabited as man and wife.

9 FAM 40.1 N1.5 Uncle-Niece and First-Cousin Marriages

(TL:VISA-128; 10-20-95)

a. The determination of the status of a "spouse" in an uncle-niece or first-cousin marriage involves three variables:

(1) Laws of the place where the marriage took place,

(2) Laws of the state of proposed residence in the United States, and

(3) Facts which vary in individual cases.

b. Where the consular officer is faced with determining the validity of such a marriage for consular approval of a petition, the case must be considered “not clearly approvable” [see 9 FAM 42.41 N2.4] and submitted for to INS for approval.

c. In cases where the INS has approved a petition involving such a marriage, and the consular officer questions its validity, but does not believe it necessary to return the petition directly to INS pursuant to 22 CFR 42.43, then, the consular officer shall refer any questions concerning the validity of the petition to CA/VO/L/A for an advisory opinion.

9 FAM 40.1 N1.6 Legal Separation Versus Marriage Termination

(TL:VISA-128; 8-20-95)

a. An alien is deemed a "spouse" for immigration purposes, even though the parties to the marriage have ceased cohabiting, as long as such marriage was not contracted solely to qualify for immigration benefits. If the parties, however, are legally separated, i.e., by written agreement recognized by a court, or by court order, the alien no longer qualifies as a “spouse” for immigration purposes even through the couple has not obtained a final divorce [See *Matter of McKee 17 I&N 332* and *Matter of Zenning 17 I&N 2816*.]

b. Conversely, in a case where the parties’ prior marriage has been terminated by a legal separation which is not recognized by the state in which they reside, such parties must first obtain a divorce from the prior spouse in order to qualify for an immigrant visa.