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Alienating Sham Marriages For Tougher Immigration Penalties: Congress Enacts The Marriage Fraud Act

The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to a participation of all our rights and privileges

—George Washington, 1783.

I. INTRODUCTION

A well known maxim cautions: you can choose your friends, but you cannot choose your family. It is a comforting reflection, however, for many would-be immigrants,¹ that “with a little assistance from Cupid and/or Mammon,”² you can choose your own American citizen spouse and thereby facilitate immigration to the United States.³

Historically and currently, the bosom of America has been open to receive the spouses of United States citizens in recognition of the fundamental right to marry,⁴ and the “sacrosanct right” of the married couple to be reunited in this country.⁵ This regard for the im-

1. Section 101 of the Immigration and Nationality Act [hereinafter INA] distinguishes immigrants from nonimmigrants according to the purpose of their visit to the United States. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982). Nonimmigrants are admitted to accomplish a specific task, such as study or a business transaction. The conditions attached to and the longevity of their visas are necessarily dictated by the purpose of the visit. *Id.* In contrast, immigrants are usually coming to the United States to establish permanent residence, Patel's Immigr. L. Dig. (Law. Co-op. & Bancroft-Whitney) Pt. 1, § 1:3 (1986), and therefore their entry is subject to more stringent controls both quantitatively and qualitatively. See, e.g., INA §§ 201(a), 203, 204, 214, 8 U.S.C. §§ 1151(a), 1153-1154, 1184.

2. *McLat v. Longo*, 412 F. Supp. 1021, 1023 (D. St. Croix 1976).

3. The immigration laws facilitate entry into the United States by providing numerous benefits and waivers of otherwise enforceable requirements to the spouse of an American citizen. See INA §§ 201(b), 212(b), (g)-(i), 241(f), 8 U.S.C. §§ 1151(b), 1182(b), (g)-(i), 1251(f). See also *infra* notes 32-34, 41-46 and accompanying text.

4. See *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing marriage as a fundamental right); *Maynard v. Hill*, 125 U.S. 190 (1888) (extolling marriage as the most important relationship in life); *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973) (stating that marriage is a right fundamental to man's existence and is protected by the first, fifth, ninth, and fourteenth amendments of the Constitution); see also Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 663 n.1 (1976).

5. This “sacrosanct right” was actually used to refer to the right of American citizens to live with their nuclear families, including spouses. T. ALEINIKOFF & D. MAR-

portance of marriage has played a crucial role in shaping the immigration laws of this country.⁶ As early as 1945, for example, Congress enacted the War Brides Act,⁷ carving out exceptions to the immigration laws to facilitate the speedy reunification of American war veterans in the United States with their alien spouses.⁸

This laudable policy provision was certainly not “intend[ed] to provide aliens with an easy means of circumventing [immigration laws] by fake marriages in which neither of the parties ever intended to enter into the marital relationship”⁹ However, against a backdrop of growing intolerance for uncontrolled immigration to this country, marriage to a United States citizen¹⁰ has become such a special and weighty equity,¹¹ that it has proved an “irresistible” route to obtaining permanent residency.¹² Moreover, it has spawned a thriving “cottage industry in the underground economy”¹³ which profits by arranging so-called “sham marriages”¹⁴ between aliens and willing American citizens who marry the aliens for a fee and then petition for their immigration.¹⁵

The magnitude of the marriage fraud problem has deservedly aroused the attention of the Immigration and Naturalization Service¹⁶ (INS), the media,¹⁷ the United States Supreme Court,¹⁸ and ul-

TIN, IMMIGRATION PROCESS AND POLICY 113 (1985) [hereinafter ALEINIKOFF] (quoting *The Preference System: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 170 (1981) (statement of Rev. Joseph A. Cogo)).

6. *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Immigration Status: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3 (1985) [hereinafter *SCIRP*] (statement of Nelson, Commissioner, The Immigration and Naturalization Service).

7. War Brides Act, Pub. L. No. 79-271, 59 Stat. 659 (1945).

8. An alien spouse is one whose permanent resident status is predicated on marriage to a United States citizen or permanent resident alien. INA §§ 201(b), 203(a)(2), 8 U.S.C. §§ 1151(b), 1153(a)(2).

9. *Lutwak v. United States*, 344 U.S. 604, 611 (1953).

10. In the interest of brevity, reference to a marriage to a United States citizen should be understood to include marriage to a lawful permanent resident also, except where otherwise distinguished.

11. Marriage to an American citizen facilitates obtaining a green card and ultimately, United States citizenship. See *infra* notes 32-42 and accompanying text.

12. *SCIRP*, *supra* note 6, at 6 (statement of Nelson).

13. *Id.* at 4.

14. A sham marriage is defined as one “entered into by the parties only for the purpose of obtaining immigration benefits without any intention to live together as husband and wife.” C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.18a(6) (1984).

15. See *infra* notes 74-77 and accompanying text.

16. See, e.g., Danilov & Nerheim, *Marriage, Divorce, the Alien, and Washington Law*, 19 GONZ. L. REV. 303, 305 (1983-1984) (stating that immigration derived through marriage attracts INS attention because of the potential for abuse).

17. See, e.g., L.A. Daily J., Aug. 18, 1986, at 4, col. 3 (reporting that the number of sham marriages has soared and is the most popular ploy used to beat the immigration

timately Congress, which assembled the Subcommittee on Immigration and Refugee Policy on July 26, 1985. The Subcommittee's report, based on the frank testimony of unwitting participants in sham marriages and the statements of high-ranking INS officials, characterized the problem as "perhaps one of the most prevalent forms of fraud."¹⁹ The Subcommittee's concern focused not only on the sheer number of perpetrators of marriage fraud, but also on the victims of the crime.²⁰ In particular, the hearings highlighted the plight of innocent American citizen spouses who are duped into what is termed "one-sided marriage fraud."²¹

The Subcommittee concluded by urging Congress to enact tough, prophylactic measures to combat the abuse.²² Congress responded a year later with the Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act).²³

The thrust of the new legislation is to withhold permanent residence status from an alien who has married a United States citizen for two years.²⁴ Furthermore, in its bid to uphold the integrity of the immigration laws, Congress established severe criminal penalties for anyone who attempts to secure permanent resident status through fraud.²⁵

This comment examines the dedication of immigration laws to the principle of family reunification, particularly the provisions for husband and wife unity and the attendant abuse of these benefits. Part

system); L.A. Daily J., Oct. 1, 1982, at 4, col. 4 (discussing whether marriage fraud is really a viable way to immigrate).

18. *Lutwak v. United States*, 344 U.S. 604 (1953).

19. *SCIRP*, *supra* note 6, at 23 (statement of Penner, Deputy Assistant Secretary of State for Visa Services).

20. *See generally id.*

21. Two forms of marriage fraud have been commonly identified. "Two-sided marriage fraud" occurs when both parties agree to enter the marriage primarily to circumvent immigration laws. "One-sided" or "unilateral fraud" occurs when an alien dupes a citizen into marriage without revealing that immigration is a motivating factor behind the marriage. Typically, once the alien beneficiary has secured the "green card" on the basis of the marriage, he or she jumps ship, deserting the citizen spouse. *Id.* at 14 (statement of Nelson).

The Subcommittee sympathized with the abandoned citizen spouse who might emerge from the experience "hurt financially, or destroyed psychologically." *Id.* at 17.

22. *See, e.g., id.* at 90 (statement of Senator Simpson, Chairman of the Subcommittee).

23. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 [hereinafter Marriage Fraud Act] (to be codified as amended in scattered sections of 8 U.S.C.).

24. *See infra* notes 82-84 and accompanying text.

25. *See infra* notes 100-102 and accompanying text.

II considers the nature and extent of the of the sham marriage problem. Part III examines the Marriage Fraud Act and its likely efficacy in deterring marriage fraud, focusing primarily on the debate over whether to adopt a viability standard in reviewing spousal relationships. Part IV suggests alternative solutions for dealing with the problem of marriage fraud.

II. THE NATURE AND EXTENT OF THE SHAM MARRIAGE PHENOMENON

Currently, federal law limits the number of individuals who may permanently migrate to the United States by restricting the issuance of immigrant visas in a given year to 270,000,²⁶ allocated among six so-called preference categories.²⁷ Eighty percent of this quota is reserved for aliens who are variously related either to American citizens²⁸ or permanent resident aliens.²⁹ This approach is consistent with Congress' policy of protecting nuclear families from separation.³⁰ In contrast, only twenty percent of the visas are allotted to labor-related immigration.³¹ Within the preference categories, visas are allocated on a first-come, first-served basis, according to the chronological order in which the applications were filed.

The preference system is only part of the picture of legal immigration, however. "The value placed on marriage and the unity of the nuclear family is underscored by *entirely exempting* the immediate relatives of U.S. citizens . . . from the[se] numerical restrictions . . ."³² An alien's marriage to a United States citizen qualifies him or her to classification as an immediate relative.³³ Similarly, mar-

26. GORDON & ROSENFELD, *supra* note 14, at § 2.5a (Supp. 1987). However, these numerical ceilings are routinely exceeded because of legislation authorizing certain groups, such as political refugees, to be exempt from the ceiling. M.D. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 49 (1985).

27. INA § 203(a)(1)-(6), 8 U.S.C. § 1153(a)(1)-(6). *See infra* notes 28, 29, 31. A seventh category is often included in a list of preference categories, but this is actually a misnomer since it authorizes visas to nonpreference immigrants. *Id.* § 203(a)(7), 8 U.S.C. § 1153(a)(7).

28. Relationships recognized in this section are a citizen's (1) unmarried sons and daughters, *id.* § 203(a)(1), 8 U.S.C. § 1153(a)(1); (2) married sons or daughters, *id.* § 203(a)(4), 8 U.S.C. § 1153(a)(4); and (3) brothers and sisters, *id.* § 203(a)(5), 8 U.S.C. § 1153(a)(5).

29. Relationships recognized in this section are spouses and the unmarried sons and daughters of a permanent resident alien. *Id.* § 203(a)(2), 8 U.S.C. § 1153(a)(2).

30. *See INS v. Errico*, 385 U.S. 214, 220 (1966).

31. INA § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6). (These sections provide for the immigration of professional persons and skilled or unskilled workers respectively).

32. *SCIRP*, *supra* note 6, at 4 (statement of Nelson) (emphasis added).

33. The other immediate relatives are defined to include parents (where the petitioning individual is over 21 years of age), and unmarried minor children. INA § 201(b), 8 U.S.C. § 1151(b).

To enable the alien to adjust his or her status to that of a permanent resident, the citizen spouse must file a petition (form I-130), requesting that the alien beneficiary be

rying a permanent resident confers second preference status on the beneficiary spouse. This means that, although subject to the quota system, the alien spouse can usually secure an immigrant visa within sixteen months.³⁴

The advantage of such priority treatment at the hands of the INS should not be underestimated. Worldwide political oppression and economic hopelessness act as a powerful catalyst for immigration to the United States,³⁵ resulting in an unparalleled tide of immigrants.³⁶ This factor, in conjunction with the budgetary³⁷ and staffing³⁸ shortcomings of the INS, has created an almost legendary backlog of visa applications.³⁹ The effect of marrying an American citizen is to catapult the alien to the top of the INS files, legitimately queue-jumping everyone in the preference categories. The highly prized "green card"⁴⁰ is then normally approved within a matter of months.⁴¹

classified as having spousal status for immigration purposes. The alien spouse usually simultaneously files for an adjustment of status (form I-485), and is required to submit to a medical examination. [2 Immigr. & Naturalization Process] Immigr. L. Serv. (Law. Co-op. & Bancroft-Whitney) §§ 20.28, 20.33, 20.35 (June 1986). The applications are adjudicated jointly at the ensuing INS interview. The Marriage Fraud Act has imposed a lapse between the time of submitting the forms and their final adjudication. See *infra* notes 82-94 and accompanying text for discussion of the revised procedures.

34. 24 Immigr. L. Advisory, (Law. Co-op. & Bancroft-Whitney) 13 (Dec. 1986) (showing that in December, 1986, the INS was issuing permanent resident visas to immigrants who had filed their application under the second preference in August, 1985—a delay of 16 months).

35. Danilov & Nerheim, *Marriage, Divorce, Legal Separation and the Alien*, 18 INT'L LAW. 675, 676 (1984).

36. More than 600,000 individuals lawfully immigrate to this country every year. The figures for illegal immigration, however, may be ten times greater. The statistics indicate that the United States accepts "twice as many immigrants as do all the other countries of the world combined." RICHARD D. LAMM & GARY IMHOFF, *THE IMMIGRATION TIME BOMB* 1 (1985). See also Simpson, *Immigration Reform and Control*, 34 LAB. L.J. 195 (1983).

37. The total investment in immigration law enforcement is estimated as only 0.53% of the federal budget. D. NORTH, CENTER FOR LABOR & MIGRATION STUDIES, *ENFORCING THE IMMIGRATION LAW: A REVIEW OF THE OPTIONS*, iii (1980); see also MORRIS, *supra* note 26, at 132 (tabulating the increasing differential between the INS budget requests and the congressional appropriations between 1969 and 1984 and stating that "inadequate funding is unquestionably a major impediment to the improvement of INS administration").

38. Chiswick, *Guidelines for the Reform of Immigration Policy*, 36 U. MIAMI L. REV. 893, 895 (1982) (stating that the number of permanent positions in the INS has not kept pace with the increased influx of immigrants).

39. Immigr. L. Advisory, *supra* note 34, at 16 (charting the availability of immigrant visas and indicating the classes which are oversubscribed); see also L.A. Daily J., Dec. 1, 1981, at 4, col. 1 (quoting one commentator's characterization of the INS as an "embarrassing bureaucratic mess" as its backlog of unprocessed forms totaled 30 million at that time).

40. The green card, or alien registration card, identifies the alien as one author-

This is not the only benefit that inures to the alien spouse. Marrying a citizen of the United States also expedites the naturalization process, reducing the residency requirement from the usual five years, to three,⁴² and entitles the alien to a potential waiver for grounds which might have otherwise resulted in exclusion⁴³ or deportation.⁴⁴ In addition, the spousal relationship affords the alien an unparalleled opportunity to enter the United States workplace: he or she is exempt from the requirement of obtaining a labor certificate before accepting work,⁴⁵ and is excused any prior or continuing periods of unauthorized employment.⁴⁶

The “[t]remendous draw factors and few deterrents” of feigning a legitimate kinship tie with a United States citizen have not eluded

ized to live in the United States and governs the alien’s activities while in the country. It is a criminal offense for the alien to fail to carry this card. Patel’s *Immigr. L. Dig.*, *supra* note 1, at Pt. 1, § 1:1.

41. Fragomen, Del Rey & Bernsen, *The Immigration Reform & Control Act of 1986*, 1987 *IMMIGR. & NATIONALITY L. REV.* 3, 14 [hereinafter Fragomen]. In comparison to the preferred categories, this represents a significant savings in time: statistics released from the INS in 1986 show, for example, that if a United States citizen petitioned on behalf of a Hong Kong-born brother, he would have to wait more than a decade before an immigrant visa would become available. *Immigr. L. Advisory*, *supra* note 34, at 16.

42. INA § 319(a), 8 U.S.C. § 1430(a) (1982). Congress justifies the discrepancy in the residency requirements between an individual who is married to a United States citizen, and one who is not, apparently by supposing that the alien, as if by osmosis, is able to absorb the basic concepts of United States citizenship as a result of living with a citizen. See *In re Kostas*, 169 F. Supp. 77, 78 (D. Del. 1958).

43. The INA provides that aliens are ineligible to receive visas or be admitted to the United States for certain reasons. INA § 212(a), 8 U.S.C. § 1182(a). The following reasons for exclusion are waived or waivable in the case of an alien spouse: (1) inability to understand some language if the alien is physically capable of reading, *id.* § 212(b), 8 U.S.C. § 1182(b); (2) grounds of mental retardation, insanity attacks, or tuberculosis, *id.* § 212(g), 8 U.S.C. § 1182(g); (3) criminal convictions involving moral turpitude, or conviction of two or more offenses for which the aggregate sentences of confinement imposed were five years or more, or conviction of an offense of possession of thirty grams or less of marijuana, or of having engaged in prostitution or procuring prostitutes, *id.* § 212(h), 8 U.S.C. § 1182(h); (4) procurement or seeking to procure a visa or entry to the United States by fraud or committing perjury in connection with the same, *id.* § 212(i), 8 U.S.C. § 1182(i).

The *SCIRP* report suggested that many aliens actually resort to marriage fraud to cure an existing illegality, such as narcotics violations or periods of unauthorized work, which would otherwise render them ineligible for an immigrant visa. An FBI investigation of Sikhs suspected of terrorism, for example, discovered that a number of them intended to overcome their ineligibility for visas by acquiring permanent residence through spurious marriages. *SCIRP*, *supra* note 6, at 17 (statement of Nelson).

44. The INA provides that aliens may be deported from the United States on certain specified grounds. INA § 241(a), 8 U.S.C. § 1251(a). The following reasons for deportation are waivable by an alien spouse: (1) excludable at the time of entry for procuring or seeking to procure a visa or entry to the United States through fraud, *id.* § 241(f)(1)(A), 8 U.S.C. § 1251(f)(1)(A); (2) convicted of a single offense of possession of thirty grams or less of marijuana, *id.* § 241(f)(2), 8 U.S.C. § 1251(f)(2).

45. *Id.* § 245(c), 8 U.S.C. § 1255(c).

46. *Id.*

many would-be immigrants.⁴⁷ These individuals have deduced that, of the three relationships which qualify for the preferential "immediate relative" status—parental, filial, and spousal—the latter is the easiest to fraudulently engineer: it is largely self-created and can be accomplished with a minimum of traditional, civil, or religious trappings.⁴⁸ In fact, at first blush, the idea of a spurious parent-child relationship seems to defy credulity. However, myriad forms of fraud have come to the attention of the INS.⁴⁹

Predictably, there has been an exponential increase in the number of marriages between aliens and United States citizens. Between 1978 and 1984, total immigration to the United States fell 9.6%, whereas, during the same period, the number of immigrants who acquired permanent resident status on the basis of a marriage to an American citizen rose 59%.⁵⁰ Of course, not all of these marriages are fake, but there is no way to ascertain the exact extent of the problem. The INS itself suspects almost one-third of these spousal relationships are shams.⁵¹ One immigration lawyer, however, be-

47. *SCIRP*, *supra* note 6, at 3 (statement of Nelson).

48. *See generally* Glendon, *supra* note 4, at 680-82.

49. Sham marriages are not the only relationships contrived by immigrants to circumvent immigration restrictions and, in fact, the INS has prosecuted many kinds of fraud. The decisions of the Board of Immigration Appeals (BIA) are replete with cases where individuals assert a parent-child bond which is later determined to be fraudulent. This determination is usually made through blood testing, which can be used to show that individuals' blood types are incompatible and, therefore, the alleged relationship is impossible. *See, e.g., In re L- F- F-*, 5 I. & N. Dec. 149 (BIA 1953) (alien asserted right to citizenship, fraudulently claiming to be the son of a United States citizen); *In re C- Y- L-*, 9 I. & N. Dec. 286 (BIA 1961).

Another suspect relationship is the adoptive parent-child arrangement, in which the child seeks immigration benefits as a result of the citizenship of the adoptive parents. In *Repuyan*, the beneficiary children had made periodic visits to the adoptive parents' home but had not lived with them. To prevent ad hoc adoptions, the immigration judge ruled that such minimal contact did not connote a familial relationship of the kind contemplated by Congress in enacting the adoption provisions. *In re Repuyan*, I. & N. Interim Dec. 2971 (BIA 1984). *See also In re Yuen*, 14 I. & N. Dec. 71 (BIA 1972) (refusing to find a valid parent-child relationship where the adopted child did not become a member of the petitioners' household after the date of adoption).

Yet another phenomenon encountered is a "sham divorce," in which the spouses have legally dissolved the marriage but continue to reside together. *See Haynes, Sham Divorce*, IMMIGR. J. 32 (Jan.-June 1984). By virtue of the divorce, the alien son or daughter of a United States citizen intends to qualify for a priority preference classification, usually moving from the fourth (married sons or daughters) to the first preference (unmarried sons or daughters). INA § 203(a)(4), (a)(1), 8 U.S.C. 1153. Such a ploy has been held to be invalid for immigration purposes. *In re Aldecoaotalora*, 18 I. & N. Dec. 430 (BIA 1983).

50. S. REP. NO. 491, 99th Cong., 2d Sess. 2 (1986).

51. H.R. REP. NO. 906, 99th Cong., 2d Sess. 6 (1986).

lieves this statistic underestimates the problem and is "convinced the actual proportion is as high as ninety or ninety-five percent."⁵² Still another veritable commentator argues that the INS figures are purely speculative, and that probably no more than one or two percent of cases involve fraud.⁵³ Even though the statistics are uncertain, parties to sham marriages seem to mutually agree that theirs was not a unique experience.⁵⁴

The INS has always been extraordinarily skeptical of citizen-alien marriages. Under authority delegated by the Attorney General, the INS retains discretion to prescribe criteria and procedures to determine the bona fides of a qualifying marriage.⁵⁵

Essentially, a sham marriage is one in which "the bride and groom did not intend to establish a life together at the time they were married."⁵⁶ Of course, there is no litmus test to determine the parties' subjective state of mind at the time of their marriage. Consequently, the INS has developed a panoply of strategies to distinguish genuine from sham marriages.⁵⁷ One of the most common tactics, in this respect, has been to interview the husband and wife separately to elicit testimony evidencing their intent at the time of marriage.⁵⁸ Typically, an INS officer poses a series of questions to each spouse during the interview ranging from, for example, what vacations they have

52. ALEINIKOFF, *supra* note 5, at 149-50.

53. SCIRP, *supra* note 6, at 78 (statement of Coven, president of American Immigration Lawyers' Association).

54. *See id.* at 48 (testimony of Ms. Beshara). Ms. Beshara was tricked into a sham marriage. She testified that while the Simpson-Mazzoli bill was pending, an Egyptian friend confided that a number of his friends expected to get amnesty under the Act and to be able to stay in the United States. Later, when the bill did not pass, Ms. Beshara spoke to this same man and he said: "[I]t's alright; everybody's married." *Id.*

55. Diver, *The Precision of Optimal Administrative Rules*, 93 YALE L.J. 65, 93 (1983).

56. *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975).

57. Essentially, the INS relies on two approaches: the marriage fraud interview and post marital supervision of the couple. The latter commonly involves meetings with apartment managers and neighbors to verify that the couple holds itself out to be married. Danilov & Nerheim, *supra* note 35, at 680.

The INS may rely on circumstantial evidence of the couple's intent to establish a life together including proof that the alien's name appears on the citizen spouse's "insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding citizenship, wedding ceremony, shared residence, and experiences." *In re Laureano, I. & N. Interim Dec. No. 2951* (BIA 1983), *reprinted in* Patel's *Immigr. L. Dig.*, *supra* note 1, at Pt. 10, § 32:3.

It is also rumored that the INS harbors an unwritten profile of a conventional married couple: spouses have substantially similar cultural, racial, and educational backgrounds and are approximately the same age. L.A. Daily J., Oct. 1, 1982, at 4, col. 4. (If this profile is used, the incongruous McLat couple must have caused the INS much consternation: Mr. McLat was a 69 year old, Spanish speaking, monolingual citizen; his "wife" was a 19 year old, English speaking, monolingual alien. *McLat v. Longo*, 412 F. Supp. 1021 (D. St. Croix 1976)).

58. Comment, *Regulating Administrative Discretion: Immigration and Marriage*, 4 YALE L. & POL'Y REV. 479, 492 n.56 (1986).

taken together to the color of the walls in their home,⁵⁹ and even more intimate aspects of the marital relationship.⁶⁰ This screening is designed to evoke corroborating responses from couples legitimately cohabiting as husband and wife, and discrepancies in the answers of couples merely holding themselves out as such. Immigration status will be denied to the alien spouse in the latter case.⁶¹

This procedure, however, has proved largely ineffective at ferreting out sham marriages.⁶² INS officials are ill-equipped to conduct this sort of inquiry;⁶³ they work under rigorous time constraints which encourage "rubber stamp" evaluations;⁶⁴ and must exercise a certain amount of leniency for inconsistent responses that may be due to mere oversight,⁶⁵ anxiety,⁶⁶ or embarrassment.⁶⁷ In fact, one commentator suggests that unless one of the couples outrightly confesses that the marriage is a sham, or the circumstances of the relationship are outrageous (such as the husband failing to learn his "wife's" name),⁶⁸ the INS will never detect the fraud.⁶⁹

59. A. WERNICK, *THE GUIDE TO IMMIGRATION COUNSELING: A STEP BY STEP LEGAL HANDBOOK* §§ 3-11 (1985).

60. See Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238 (1986). Although the INS is cautioned not to do so, it frequently probes into highly personal areas, such as the type of birth control the couple uses or their sexual activity before marriage. *Id.* at 1242-43.

61. Comment, *supra* note 58, at 492 & n.56.

62. See *infra* text accompanying notes 122-23.

63. See ALEINIKOFF, *supra* note 5, at 141 (observing that immigration officers responsible for conducting these inquiries are not psychologists or sociologists, and that many lack a full four-year college degree).

64. See SCIRP, *supra* note 6, at 70 (stating that the average interview with the INS lasts only 10 to 15 minutes, which is hardly sufficient time to make an informed evaluation of the bona fides of the marriage); see also LAMM & IMHOFF, *supra* note 36, at 211 (commenting that INS employees are encouraged to "turn [the citizen and alien spouses] out at five-minute intervals or [their] performance rating will suffer).

65. See Comment, *supra* note 58, at 492 & n.56 (suggesting that the INS typically denies a petition where it discovers more than three or four inconsistent answers out of a total of forty or fifty questions).

66. See, e.g., Note, *supra* note 60, at 1250 (suggesting that "highly offensive and humiliating questioning" may create the kind of coercive atmosphere that gives rise to confused or erroneous responses.") (citation omitted).

67. In one marriage fraud interview, the husband seemed to avoid giving a specific answer when questioned about the last gift he had received from his wife. In her prior separate interview, the wife had stated that she had given him a pair of underwear. Apparently, the husband risked jeopardizing his own case because he was too embarrassed to mention such intimate apparel in front of strangers. ALEINIKOFF, *supra* note 5, at 149.

68. Such carelessness is not uncommon in immigration cases. In *In re C. Y. L.*, the alleged father of the respondent alien destroyed his credibility at an INS hearing when he could not recall even the most rudimentary details of his own wedding: whether there had been 2, 50, or 100 guests, whether any members of his family had

The task of the INS is often exacerbated when couples have been forewarned of the interview procedure, either by immigration lawyers, marriage fraud arrangers, or other individuals who were themselves interrogated by the Service.⁷⁰ These couples may have been coached through a "dry run" of the interview, and rehearsed conforming responses to predictable areas of questioning.⁷¹ In the most sophisticated cases, they will have accumulated tangible evidence of the bona fides of the relationship such as opening a joint bank account,⁷² or pasting together a "wedding album".⁷³

The problems of marriage fraud do not end there. An entire underground business empire has developed, capitalizing on the obvious success of the subterfuge.⁷⁴ It offers a host of services from a simple match-making between the alien and an eligible citizen, to a fully choreographed wedding,⁷⁵ including ministerial and legal services⁷⁶ for the couple's "Big Days" both at the church, and at the INS personal interview thereafter. The fees will range from \$3,000 to \$20,000 depending on the extent of the service.⁷⁷

III. THE MARRIAGE FRAUD ACT

A. *The Changes*

The realization that previous "protections against marriage fraud [were] totally inadequate"⁷⁸ led to the enactment of the Marriage Fraud Act just hours before the adjournment of the ninety-ninth

been at the ceremony, or even the location of the church. *In re C- Y- L-*, 9 I. & N. Dec. 286, 291 (BIA 1961).

69. ALEINIKOFF, *supra* note 5, at 150.

70. SCIRP, *supra* note 6, at 13 (statement of Nelson).

71. *Id.*

72. *Id.*

73. *See infra* note 75.

74. *See SCIRP*, *supra* note 6, at 2 (statement of Senator Grassley).

75. *Id.* at 29 (statement of Penner) (referring to a Caribbean embassy report saying that fraud rings had been discovered which supplied everything from "happy looking witnesses at bogus marriage ceremonies to reusable cardboard and paste wedding cakes that appear in wedding photo after wedding photo.")

76. Ministers and attorneys alike have been indicted for their participation in these profitable fraud enterprises. *See, e.g., SCIRP*, *supra* note 6, at 16 (a minister was arrested in Florida for his participation in a fraud ring involving Haitians who had paid up to \$10,000 for their green cards); *see also* L.A. Daily J., Nov. 29, 1986, at 4, col. 1 (California lawyer was convicted of arranging 50 sham marriages involving Filipinos. The aliens paid an average of \$1,500 for these services, of which \$1,000 was retained by the attorney, while the American spouse received a kickback of \$500).

There is no requirement that the alien be represented by counsel at the INS interview. However, the lawyer provides a sense of security and acts as a "sort of implied character witness," since no lawyer would not want to become known as one who represents individuals involved in sham marriages. ALEINIKOFF, *supra* note 5, at 149.

77. SCIRP, *supra* note 6, at 13. In addition to, or in lieu of, a straight fee, the consideration given might take the form of narcotics or foreign trinkets. *Id.*

78. H.R. REP. NO. 906, 99th Cong., 2d Sess. 9 (1986).

Congress, and it was signed into law by President Reagan on November 10, 1986.⁷⁹ The provisions of the Act are designed to combat marriage fraud in two ways: first, by fashioning tough, new procedural measures that will make marriage-related immigration a more cumbersome and risky prospect;⁸⁰ and second, by creating aggressive criminal penalties for participating or conspiring to engage in a fraudulent marriage.⁸¹

The *pièce de résistance* of the newly enacted section 216 is that it confers only temporary immigrant status on the alien beneficiary.⁸² Formerly, the citizen spouses could submit an I-130 petition for an adjustment of status for their alien spouses at any stage after the marriage. The Attorney General, upon "determin[ing] that the facts stated in the petition [were] true," would approve it at that time.⁸³ The new promulgations, however, withhold permanent resident status for two years and also threaten that an alien's conditional residence status may be terminated by the Attorney General at any time during those two years.⁸⁴

The new law requires the couple to jointly submit an additional petition to the Attorney General and appear for a personal interview before an INS official within ninety days of the second anniversary of the alien being granted conditional residence status.⁸⁵ The petition must attest and the interview confirm that:

(i) the qualifying marriage—

(I) was entered into in accordance with the laws of the place where the marriage took place,

79. Fragomen, *supra* note 41, at 14. The bill was sponsored by Senator Paul Simon (D. Ill.) and Representative Bill McCollum (R. Fla.).

80. See *infra* notes 82-87 and accompanying text.

81. See *infra* notes 100-102 and accompanying text.

82. Marriage Fraud Act, Pub. L. No. 99-639, SEC. 2, § 216(a)(1), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186). The conditional status applies equally to any individual who becomes admissible for permanent residence by virtue of being the son or daughter of an individual who qualified for permanent residence on the basis of a marriage to a United States citizen. *Id.*

83. INA § 204(b), 8 U.S.C. § 1154(b) (1982). The Attorney General would typically reserve judgment on the application for 60 days after the interview in case adverse information was received. *SCIRP*, *supra* note 6, at 80 (statement of Coven, president, American Immigration Lawyers Association).

84. Marriage Fraud Act, SEC. 2, § 216(b)(1) (to be codified at 8 U.S.C. § 1186). An alien's conditional status is included, for the purposes of naturalization, in calculating the three-year permanent resident status requirement. Thus, an alien spouse may apply for naturalization under the relevant provision of INA, one year after the conditional status has been removed. *Immigr. L. Advisory*, *supra* note 34, at 15.

85. Marriage Fraud Act, SEC. 2, § 216(c)(1)(A), (d)(2) (to be codified at 8 U.S.C. § 1186).

(II) has not been judicially annulled or terminated, other than through the death of a spouse, and

(III) was not entered into for the purpose of procuring an alien's entry as an immigrant; and

(ii) no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of [the] petition . . .⁸⁶

The couple is further obligated to submit a statement setting forth each spouse's residence and place of employment since the date of the initial I-130 filing.⁸⁷ This information affords the INS valuable insight into the marriage. Given its intolerance for nontraditional lifestyles, the Service will probably refuse to recognize a marriage in which the parties work in different regions and are forced to spend considerable periods living apart.⁸⁸ The INS then has ninety days from the date of the interview to reach a decision as to the bona fides of the relationship.⁸⁹ A favorable determination results in the removal of the conditional status and the emergence of the alien as a lawful permanent resident.⁹⁰ Conversely, if the INS makes an adverse determination with respect to the qualifying marriage, either prior to,⁹¹ or as a result of,⁹² the interview, the alien is stripped of any existing legal immigrant status and becomes deportable.

The Act also contains a termination clause. Failure to satisfy these procedures, whether through filing an untimely petition, or failing to keep the interview date, in the absence of a good cause showing,⁹³ will cause the alien's conditional status to effectively expire at the

86. *Id.* § 216(d)(1)(A).

87. The couple must state: "(i) the actual residence of each party to the qualifying marriage since the date the alien spouse obtained permanent resident status on a conditional basis . . . and (ii) the place of employment (if any) of each such party since such date, and the name of the employer of such party." *Id.* § 216(d)(1)(B).

88. Fragomen, *supra* note 41, at 16.

89. Marriage Fraud Act, SEC. 2, § 216(c)(3)(A) (to be codified at 8 U.S.C. § 1186).

90. *Id.* § 216(c)(3)(B).

91. *Id.* § 216(b)(1)(A), (B). Such an adverse determination may result if the Attorney General finds that the marriage is not legitimate because it was entered into primarily for immigration purposes, or has been legally dissolved, or some consideration was given to the citizen spouse for entering the marriage. If this finding occurs prior to the second anniversary of the alien's obtaining conditional residence status, the alien's status will be terminated. *Id.*

92. *Id.* § 216(c)(3)(C).

93. Relief from the harsh effects of the Act may be granted at the discretion of the Attorney General. Even if the statutory requirements have not been met, the alien's temporary status may be adjusted if the alien can demonstrate that "extreme hardship would result if [the] alien is deported" or that the qualifying marriage was entered into in good faith but "has been terminated . . . by the alien spouse for good cause and the alien was not at fault in failing to meet the requirements of [the statute]." *Id.* § 216(c)(4).

The extreme hardship waiver is also available in deportation cases, where it has been construed very narrowly. Under the new law, the Attorney General is only permitted to take account of circumstances evidencing extreme hardship that occur during the period of conditional residency. Fragomen, *supra* note 41, at 15.

end of the two-year period and render him or her deportable.⁹⁴

This concept of withholding permanent residency is not new. Indeed, in their efforts to control marriage fraud, many other countries impose conditional immigrant status on an alien spouse for periods ranging from three months to ten years.⁹⁵ Theoretically, conditional status works as a deterrent through the sheer passage of time.⁹⁶ Although the new procedure may be only a "minor inconvenience"⁹⁷ to a genuinely married couple, it was apparently believed that the strain of "sustain[ing] the appearance of a *bona fide* marriage over a long period" would prove an insurmountable barrier to a couple who had entered into a fraudulent relationship.⁹⁸

Moreover, by postponing the personal interview until the couple has enjoyed at least two years of married life together, it is feasible that the INS will harbor an unwritten expectation that the spouses will be greatly familiarized with each other, and will consequently demand more exacting responses to the marriage "quiz."⁹⁹

Other provisions of the Marriage Fraud Act impose severe penalties for actively participating in or even conspiring to engage in marriage fraud.¹⁰⁰ The feeling among members of the subcommittee that met to discuss the possibility of new legislation was that the then-existing penalties were ineffective as a real deterrent.¹⁰¹ The new law, therefore, establishes stiffer criminal sanctions, increasing the maximum fine to \$250,000 and the maximum imprisonment term to five years.¹⁰²

94. If no petition is filed or the spouses fail to appear at the interview, then the alien's resident status will be terminated as of the second anniversary of the alien's lawful admission for permanent residence. Marriage Fraud Act, SEC. 2, § 216(c)(2)(A) (to be codified at 8 U.S.C. § 1186).

95. S. REP. NO. 491, 99th Cong., 2d Sess. 2 (1986). In France, conditional residency status is imposed for three months; in Japan the period is ten years. *Id.*

96. *Id.* at 12.

97. *SCIRP*, *supra* note 6, at 87 (stating that the inconvenience will be that the parties will be required to go to the INS offices twice instead of once).

98. S. REP. NO. 491, 99th Cong., 2d Sess. 12 (1986).

99. Interview with Hiram Kwan, Professor of Law, Pepperdine University School of Law, and attorney of immigration law (Feb. 10, 1986).

100. The Marriage Fraud Act amends section 1154(c) of 8 U.S.C. to provide that a petition for permanent residence shall not be approved if the "alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Marriage Fraud Act, SEC. 4 (to be codified as amended at 8 U.S.C. § 1154(c)) (emphasis added). In its original form, the Act punished only those aliens who had actually secured a visa through a sham marriage. It did not penalize anyone for merely attempting to do so. INA § 204(c), 8 U.S.C. § 1154(c) (1982).

101. *SCIRP*, *supra* note 6, at 19-20 (statement of Nelson).

102. Marriage Fraud Act, SEC. 2(d) (to be codified as amended at 8 U.S.C. § 1325).

Furthermore, the Marriage Fraud Act seeks to close loopholes in the immigration laws that have commonly been exploited. One such problem area involves what have been dubbed "eleventh hour marriages."¹⁰³ In these situations, an alien marries an American citizen and applies for an adjustment of status to circumvent exclusion or deportation proceedings that have already been initiated against him or her.¹⁰⁴ The newly promulgated section is designed to curtail this type of abuse by providing that these newly married aliens would not be eligible for immediate relative status until they have resided outside the United States for two years commencing on the date of the marriage.¹⁰⁵

Another fraudulent scheme that the INS has encountered is where an alien marries a United States citizen in order to obtain the requisite permanent resident status. The alien then divorces the first spouse and uses this lawful status to file a petition, under the second preference, for the immigration of another alien via a subsequent marriage.¹⁰⁶ Recognizing that this scenario might result from the frailties of human nature, Congress has not curtailed this avenue altogether. Rather, it has established an additional deterrent by mandating that five years elapse before the Attorney General will approve a spousal petition that has been filed by an immigrant who had himself or herself obtained permanent resident status predicated on a marriage.¹⁰⁷ The second spousal petition may be approved sooner, however, if it can be shown by clear and convincing evidence that the first marriage was not a sham, or that the first marriage had terminated due to the death of the citizen spouse.¹⁰⁸

B. *The Impact*

The revisions of the Marriage Fraud Act are expected to impact a quarter of a million citizens seeking to confer permanent residency

103. See Steel, *11th Hour Marriages: The Issue of the BIA Ignoring Precedents*, IMMIGR. J. 12 (Apr.-June 1986).

104. In *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986), the alien was found deportable after her immigrant status expired. Eleven days later, she married a United States citizen and filed a motion to re-open the deportation proceedings. The decision of the BIA dismissing the appeal was reversed by the Ninth Circuit as contrary to precedent.

105. Marriage Fraud Act, SEC. 5(b) (to be codified as amended at 8 U.S.C. §1154).

106. See, e.g., *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979). Mr. Dabaghian, an Iranian, entered the United States in 1967 on a visitor's visa. He married an American citizen in September, 1971 and applied for an adjustment of status in October of the same year. It was approved in January, 1972 by which time Mr. Dabaghian and his wife had separated. He filed for a divorce in the same month, and in September, 1973, he married an alien from Iran.

107. Marriage Fraud Act, SEC. 2(c)(2) (to be codified as amended at 8 U.S.C. §1154(a)).

108. *Id.*

on their alien spouses.¹⁰⁹ Not surprisingly, Congress harbors the greatest expectations of the new legislation, and predicts that it will reduce the number of aliens resorting to marriage as a means to circumvent quantitative and qualitative immigration restrictions by as much as fifteen percent.¹¹⁰

This author, however, is more reserved about the likely impact and feels it is far from a panacea. The new criminal sanctions, for example, may have earned a reputation as the worst ever included in an immigration bill,¹¹¹ but they are largely superfluous. Penalties already existed under the immigration laws for contracting a sham marriage¹¹² and criminal liability could have been imposed under a variety of federal statutes.¹¹³ The best solution, therefore, may not be to increase the severity of the punishment, but rather to simply publicize "the unlawfulness and dire consequences" of engaging in a sham marriage.¹¹⁴ One commentator suggests that this could be accomplished by clearly identifying the existing laws and potential penalties for engaging in any kind of fraud on the I-130 marriage petition form itself,¹¹⁵ and by employing "a variety of media to convey [the message] that aliens are often deported, and U.S. citizens sent to jail for participating in sham marriages."¹¹⁶ Moreover, the increased penalties will have to be aggressively enforced if they are to operate as a viable deterrent. Unfortunately, the shortage of funds and adequate personnel in the INS¹¹⁷ means that many offenses will continue to go undetected, while still other known violations will go unprosecuted.¹¹⁸

109. Fragomen, *supra* note 41, at 14.

110. S. REP. NO. 491, 99th Cong., 2d Sess. 15 (1986).

111. L.A. Daily J., Nov. 10, 1986, at 1, col. 2 (quoting Richard Bonaparte, president of Los Angeles chapter of American Lawyers Association.)

112. *See, e.g.*, INA § 204(c), 8 U.S.C. § 1154 (1982) (barring an alien from lawful permanent residency for fraudulently obtaining a visa). *See generally* J. WASSERMAN, IMMIGRATION LAW AND PROCEDURE 509-17 (3d ed. 1979) (discussing civil and criminal penalties).

113. These offenses include: (1) knowingly making a false statement of a material fact under oath in any application or affidavit required by the immigration laws, 18 U.S.C. § 1546 (1969); (2) committing perjury, *id.* § 1621; (3) making a materially false statement to a federal agency, *id.* § 1001.

114. SCIRP, *supra* note 6, at 84 (statement of Coven).

115. Currently, the form "contains only three short lines of fine print warning of unspecified 'severe penalties' for knowingly and willfully" engaging in any kind of fraud. *Id.* at 85.

116. Note, *supra* note 60, at 1253-54.

117. SCIRP, *supra* note 6, at 82 (statement of Coven). *See also* NORTH, *supra* note 37, at 17 (calculating the cost of investigating and apprehending an alien in 1980).

118. *See* SCIRP, *supra* note 6, at 46-47. Ms. Beshara, duped into marrying an alien

Undoubtedly, the cornerstone of the new legislation is the imposition of the two-year conditional residency requirement. However, Congress' faith in the efficacy of this new requirement may prove overly optimistic as it contains many inherent weaknesses. First, the new legislation focuses on changing the procedures to which the petitioner and beneficiary spouses must adhere.¹¹⁹ In most instances, these new procedures are more sophisticated than their former counterparts.¹²⁰ However, there seems to be no attempt to develop corresponding, more sophisticated devices for the INS to employ in ferreting out sham marriages. The fulcrum of the system is still the marriage fraud interview.¹²¹ This places enormous faith in the creative questioning techniques, and powers of observation of the interviewing officers to discern a marriage that is authentic from one that is not. It is hardly a fool-proof procedure: in 1980 the INS detected 4,600 fraudulent marriages,¹²² but this is still far short of the 50,000 spurious marriage petitions that it estimated were processed through its offices that same year.¹²³

The INS' investigative procedures are necessarily constrained by the Supreme Court's finding of a right to privacy surrounding the marriage relationship.¹²⁴ Close scrutiny of the intimate aspects of a couple's relationship, while possibly revealing more about the validity of the marriage,¹²⁵ would likely abridge these privacy rights. To avoid intrusion into this constitutionally protected area, therefore, the INS limits its interview investigation to somewhat "innocuous question[ing] about matters such as gifts"¹²⁶ In so doing, it forfeits the opportunity to make a more thorough evaluation of the legitimacy of the relationship, and thereby limits the utility of the marriage fraud interview.

Moreover, the Service's shocking lack of manpower and finances means that it may not even be able to put the new statutory rules to the test.¹²⁷ In fact, the primary impact of the new legislation may ac-

so that he could stay in the United States, implored the INS to take action against her "husband," and amassed evidence of his trickery in support of her claim. Unfortunately, the INS responded that it received two or three cases like hers every day and usually could not adequately investigate and prosecute such cases because of the lack of money and manpower. *Id.*

119. See *supra* notes 84-87 and accompanying text.

120. See *supra* section IIA.

121. See *supra* note 58-60 and accompanying text.

122. Note, *supra* note 60, at 1241 & n.21.

123. *Id.*

124. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

125. Note, *supra* note 60, at 1246 n.58 (quoting Roberts, *Marital Status and the Alien*, 62 INTERPRETOR RELEASES 64, 69 (1985)) (stating that inquiries into the sexual conduct of the parties are offensive, but may nonetheless be relevant, "since marriage contemplates a relationship between the parties that is more than Platonic.")

126. *Id.* at 1247.

127. *SCIRP*, *supra* note 6, at 82 (statement of Coven).

tually "double the workload of the already beleaguered [INS]."¹²⁸ This thought prompted one observer to suggest that the first step toward overcoming the problem of marriage fraud should have been "the provision of more adequate agency resources to examine spouse petitions and to prosecute 'sham marriages.'"¹²⁹

A second major weakness is that the Marriage Fraud Act does not appear to require that the qualifying marriage be *viable*¹³⁰ after the two-year conditional residency, only that it be legally intact.¹³¹ Although it is particularly disturbing to discover "the fact that many [couples] secure dissolutions almost immediately after the Green Card issues,"¹³² the INS has very limited discretion to deny status adjustment, even if the marriage has subsisted for only a very short period of time.¹³³ In assessing the spousal relationship, the INS may properly inquire into whether the marriage is legally valid in the jurisdiction in which it was celebrated,¹³⁴ and also whether it is valid for immigration purposes.¹³⁵ In addition, although it lacked statutory authority to do this, the INS had begun to implement a requirement that the marriage also be "viable."¹³⁶

A series of decisions in the 1970's, however, explicitly rejected this

128. *Id.* at 83. The counterargument to this is that, although there would be increased paperwork, "there would be a corresponding reduction in interviews and investigations because of the deterrent effect . . ." S. REP. NO. 491, 99th Cong., 2d Sess. 15 (1986).

129. *SCIRP*, *supra* note 6, at 85.

130. "Viable" is defined as "capable of growing or developing." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2548 (3d ed. 1979).

131. INS final regulations which might have resolved this issue were not available at the time of writing.

132. ALEINIKOFF, *supra* note 5, at 150.

133. *See, e.g.*, *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979) (marriage dissolved after only one year); *see also In re Gonzalez-Portillo*, 13 I. & N. Dec. 309 (1969) (parties had become irreconcilably separated after four months).

134. GORDON & ROSENFELD, *supra* note 14, at § 2.18a. The burden of establishing the validity of the marriage is on the party petitioning on behalf of the alien. *In re Martinez-Solis*, 14 I. & N. Dec. 93 (1972). Generally, there is a presumption in favor of the legality of the marriage which can be rebutted if the marriage is considered odious to United States public policy. *Kazanos v. Murff*, 170 F. Supp. 182 (S.D.N.Y. 1959). For example, the INS does not recognize polygamous marriages, even if they are valid in the country of origin. *In re H.*, 9 I. & N. Dec. 640 (1962).

135. *See* GORDON & ROSENFELD, *supra* note 14, at § 2.18a. A marriage entered into purely to circumvent immigration laws is not valid for immigration purposes. *Lutwak v. U.S.*, 344 U.S. 604 (1953).

136. *See In re Lew*, 11 I. & N. Dec. 148 (1965). There, the INS took the position that a viability requirement made sense in light of Congress' policy to unite families. Such a policy could not be effected if the alien was no longer interested in being united with his or her spouse. *Id.* at 149.

standard as being too arbitrary.¹³⁷ In the first of these cases, the Ninth Circuit ruled that the INS had erred in relying on the fact of a couple's separation to support a conclusion that the underlying marriage was a sham.¹³⁸ Similarly, in *Whetstone*, the court objected to the adoption of a viability standard to deny an adjustment of status because Mrs. Whetstone had left her husband less than thirty days after the wedding.¹³⁹ It was not important that the couple have had a lasting relationship, but only that they so intended when they married.¹⁴⁰ Evidence of a couple's floundering relationship is not dispositive of the intent issue because it is generally not correct to assume that if the parties separate, they had never intended to live together from the inception.¹⁴¹

The possibility of incorporating a viability requirement when reviewing citizen-alien marriages raised two serious problems. First, the courts were afraid that the INS might employ methods to test the viability of the marriage which would inevitably lead to "invasions of privacy which even the boldest of government agencies have heretofore been hesitant to enter."¹⁴² Such intrusion would necessarily raise serious constitutional issues.¹⁴³ Second, the courts were unable to find a statutory basis for the viability requirement.¹⁴⁴ Hence, while it sympathized with the INS' desire to engraft some standard of marriage durability, the *Whetstone* court noted it "cannot apply a statute that Congress has not enacted."¹⁴⁵

Of course, Congress had that very opportunity when it enacted the Marriage Fraud Act, but opted not to take it. The possibility of adopting a viability standard into the legislation was actually thoroughly aired at the Subcommittee hearing.¹⁴⁶ Nelson, Commissioner of the INS, recommended that marriage be statutorily defined in terms of affirmative viability rather than "in terms of merely being the absence of a final divorce or annulment decree."¹⁴⁷ Without such language, case law enabled the "paper creation of families" to benefit

137. *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979); *Menezes v. INS*, 601 F.2d 1028 (9th Cir. 1979); *Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978); *Whetstone v. INS*, 561 F.2d 1303 (9th Cir. 1977); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). See also Comment, *The Marriage Viability Requirement: Is it Viable?*, 18 SAN DIEGO L. REV. 89 (1980).

138. *Bark*, 511 F.2d at 1202.

139. *Whetstone*, 561 F.2d at 1304.

140. *Id.* at 1306.

141. *Bark*, 511 F.2d at 1202.

142. *Chan*, 464 F. Supp. at 130 n.13.

143. See Comment, *supra* note 137, at 90, 100-04.

144. *Chan*, 464 F. Supp. at 128.

145. *Whetstone*, 561 F.2d at 1309 (Sneed, J., concurring).

146. See *SCIRP*, *supra* note 6, at 18.

147. *Id.*

from certain immigration provisions.¹⁴⁸

The proponents of viability initially won much support in the Senate, because when the bill appeared it contained a requirement that the alien's conditional status be removed and the alien deported if the Attorney General determined that "the parties to the [qualifying] marriage ha[d] not maintained a *bona fide* marital relationship."¹⁴⁹ Moreover, the parties could establish that they maintained a *bona fide* marital relationship by proof of "*cohabitation*."¹⁵⁰ Furthermore, the Senate intended that the Act would state unequivocally that "separation [defined as actually living apart or having initiated any action to dissolve or annul the marriage] will result in the denial of the permanent resident status."¹⁵¹ Such explicit language would have eliminated the possibility of judicial interpretations along the lines of *Bark* or *Whetstone*.¹⁵²

This subsection, however, is conspicuously absent from the version that was ultimately enacted.¹⁵³ In order to obtain permanent resident status under the Marriage Fraud Act, the alien must maintain the qualifying marriage for two years.¹⁵⁴ However, "holding out" for this conditional period does not appear to demand an extraordinary feat of compatibility of the parties. The law merely requires that the couple stave off a judicial annulment or termination of the relationship during those initial years, but says nothing about the effect of a physical separation.¹⁵⁵ This is unfortunate. A requirement that the

148. *Id.*

149. S. REP. NO. 491, 99th Cong., 2d Sess. 3 (1986).

150. *Id.* at 11.

151. *Id.* at 12.

152. *Id.* See also H.R. REP. NO. 906, 99th Cong., 2d Sess. 10 (1986) (suggesting that the Act should require the existence of an actual family unit at the time of the application, and that separation would result in a denial of permanent resident status).

153. Marriage Fraud Act, Pub. L. No. 99-639, Sec. 2, § 216, 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186).

154. See *supra* note 84 and accompanying text. Formerly, the INA created a presumption of fraud if the marriage was terminated within two years of the alien becoming eligible for permanent resident status. INA § 241(c), 8 U.S.C. § 1251(c) (1982). This presumption could be overcome if the alien could convince the Service that there was no intention to evade the immigration laws. Griffith, *Reforming the Immigration and Nationality Act: Labor Certification, Adjustment of Status, the Reach of Deportation, and Entry by Fraud*, 17 J. L. REFORM 265, 287 (1984). The new law effectively replaces the presumption with an automatic revocation of conditional status.

155. Marriage Fraud Act, SEC. 2, § 216(d)(1)(A)(II) (to be codified at 8 U.S.C. § 1186). See Danilov & Nerheim, *supra* note 35, at 678 (stating that although a formal legal separation will have the same effect on an alien's immigrant status as a final divorce, a mere physical separation will not). Cf. *In re Lenning*, 17 I. & N. Dec. 2817 (1980) (refusing to approve a spousal petition where the parties had separated, but had not obtained an absolute divorce decree).

marriage be “alive and kicking”¹⁵⁶ would have enabled the Marriage Fraud Act to wield greater impact, forcing the parties to not only remain married, but also to continue cohabiting for the entire two-year conditional period. Under these circumstances, spouses involved in a phony marriage would be far less likely to “hold out.”

Some commentators have argued, however, that such a standard would undermine support for a couple who are genuinely married, but encountering marital difficulties.¹⁵⁷ If the viability requirement were applied uniformly, such couples would find their marriages not only ailing, but actually bludgeoned into an early and involuntary dissolution as the alien spouse would be declared deportable. Besides, there are many legitimate reasons which might cause a couple to separate including “educational needs, employment opportunities, illness, poverty, and domestic difficulties”¹⁵⁸ It is also possible that one spouse might leave the other because of physical abuse.¹⁵⁹ In none of these instances does the couple’s separation indicate a sham marriage.

Arguably, however, these concerns are not mindful of the purpose of the statute. The foremost concern of Congress, in providing special immigration privileges to alien spouses was to preserve the unity of the family.¹⁶⁰ Why should an alien receive preferential immigration treatment if the couple “manifestly has no interest in unifying”?¹⁶¹ It makes a hollow mockery of the rule to invoke the sanctity of marriage as the reason for its enactment, and then to permit non-viable relationships to reap the benefits. Once the couple has separated and their relationship has become nothing more than an empty shell, the reason behind the special immigration provisions has disappeared.¹⁶² So should the special immigration provisions.

Interestingly, the *Whetstone* court was also concerned that the viability test would enable the INS to regulate marital relationships by prescribing a certain number of months or years that the marriage must survive in order to overcome an inference of fraud.¹⁶³ In particular, it might lead to a state of affairs in which aliens would be required to have more successful marriages than citizens in order to

156. L.A. Daily J., Nov. 10, 1986, at 1, col. 2 (containing remarks of spokesperson Sophia Nash, who stated that the new legislation required the marriage to be “alive and kicking” at the end of the two-year conditional residency period).

157. *SCIRP*, *supra* note 6, at 83 (statement of Coven).

158. *McLat v. Longo*, 412 F. Supp. 1021, 1026 (D. St. Croix 1976).

159. *SCIRP*, *supra* note 6, at 33 (statement of Penner).

160. *See Lau v. Kiley*, 563 F.2d 543, 547 (2d Cir. 1977); *Scalzo v. Hurney*, 225 F. Supp. 560, 561 (E.D. Penn. 1963).

161. *ALENIKOFF*, *supra* note 5, at 153.

162. *Lutwak v. United States*, 344 U.S. 604, 611-15 (1953).

163. *Whetstone v. INS*, 561 F.2d 1303, 1306-09 (9th Cir. 1977).

obtain immigrant status.¹⁶⁴ Yet the imposition of a two-year conditional residency requirement, during which time the couple cannot dissolve or annul the marriage, is tantamount to such a state of affairs.¹⁶⁵ A corollary of this concern is that an unscrupulous spouse might blackmail an alien spouse, using the threat of divorce during the two-year period of conditional status.

At least one other factor might frustrate the impact of the Marriage Fraud Act, which Congress apparently has not weighed sufficiently. For many illegal aliens, permanent resident status does not merely facilitate access to the prized United States labor market; it is actually a way to transcend a life of unsparing political persecution and abject poverty.¹⁶⁶ Thus, in the majority of cases, the value of the green card may simply prove so high that the alien spouse will expend any amount of time and effort to overcome the strictures of the new legislation. The two-year provisional status will be regarded as a hurdle rather than a barrier. Besides, during these two years the alien is not in a vacuum: he or she still enjoys freedom of access to the United States labor market, and the other rights and privileges accorded to the permanent resident.¹⁶⁷ Moreover, with the prospect of *unconditional* status within grasp, many aliens will probably be sufficiently motivated to string out the sham marriage for the extended period. Of course, the petitioning spouse, not having the incentive of impending permanent resident status, might become uncooperative. The alien spouse could contract around this, however, by making a sizeable portion of any consideration offered in connection with the I-130 petition contingent on the successful completion of the application.

C. *The Alternatives*

The Marriage Fraud Act, by imposing its two-year conditional residency requirement strikes at the effect, rather than the cause, of marriage fraud. The underlying cause, in some instances, is the political and economic "push" forces causing people to leave their de-

164. *Bark v. INS*, 511 F.2d 1200, 1201-02 (9th Cir. 1975).

165. In California, the two-year conditional residency requirement effectively demands that immigrants have more successful marriages than the population at large: one-half of all marriages in California are dissolved within the first year. *L.A. Daily J.*, Oct. 1, 1982, at 4, col. 4.

166. See generally Comment, *The Struggle Against the Immigration Control Act*, 8 CHICANO L. REV. 1 (1985). See also Danilov & Nerheim, *supra* note 35, at 676.

167. See generally WASSERMAN, *supra* note 112, at 531-35 (discussing the rights of aliens to work, own land, and gain access to courts in the United States).

pressed homelands in search of a better life.¹⁶⁸ In other instances, the aliens simply do not have sufficient existing kinship ties in this country, or are disillusioned about their chances of obtaining one of the limited labor-based immigration visas.¹⁶⁹ Since the possibility of securing a visa through the proper immigration channels is slim, an increasing number of individuals have come to regard a sham marriage as not only the most expeditious, but also the only realistic route to permanent residence here.

The best solution to the problem of sham marriages is comprehensive reformation of the INA. Two major changes would be appropriate: the thrust of the reform would be to redress the imbalance between the number of visas issued for labor-related immigration and those based on kinship criteria. In recognition of the tremendous "pull" forces of the United States labor market, Congress should increase the quota of immigrants admitted with labor-based visas and shift the focus away from visas based on nepotism.¹⁷⁰

A growing consensus is vigorously opposed to any increase in labor-related immigration. These groups argue that alien workers displace qualified Americans and lower the standard of living for everyone else.¹⁷¹ A number of eminent authorities, however, have attempted to refute these concerns by arguing that labor-based immigration, as opposed to kinship-based immigration, would actually have a favorable impact on the standard of living in the United States.¹⁷²

It is also worth noting that the recent passage of the Simpson-Rodino bill¹⁷³ in November, 1986, may provide a long-awaited alternative for an inestimable number of illegal aliens. Basically, the Act allows any aliens who have lived in this country illegally since January 1, 1982, to adjust their status to that of permanent legal residents.¹⁷⁴ It is entirely feasible that some of the beneficiaries of the

168. See MORRIS, *supra* note 26, at 73 (discussing the political and economic pull of the United States); *Recent Developments—Legalization of Illegal Aliens: A Humanitarian Approach Long Overdue*, 12 SYRACUSE J. INT'L L. & COM. 572, 576-77 (1986) (stating that Congress recognizes the enormous economic advantage of immigrating to the United States).

169. See *supra* text accompanying note 31.

170. See Chiswick, *supra* note 38, at 920 (urging shift in focus of immigration policy to the alien's estimated productivity in the United States, measured by earnings, employment, education, and knowledge of English).

171. See Simon, *Nine Myths About Immigration*, IMMIGR. J. 3 (July-Sept. 1985). See also Griffith, *supra* note 153, at 292.

172. See Simon, *supra* note 171. See also Comment, *supra* note 166; Comment, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce*, 7 CARDOZO L. REV. 223 (1986).

173. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

174. The Immigration Reform and Control Act sets out four criteria which determine who is eligible for legalization: (1) the applicants must have resided continuously in the United States since January 1, 1982; (2) they must have been physically present

Immigration Reform and Control Act might have endeavored to adjust their status through a sham marriage if the legalization program had been further stymied in Congress.

Second, the INA should continue to facilitate the reunification of nuclear families, but should relax its definition of a nuclear family. Current immigration policy is wedded to a bright-line test: the only close relationships that merit immigration benefits are those between spouses, siblings, parents, and children.¹⁷⁵ Such a hard and fast rule runs roughshod over the myriad other close family relationships. One commentator has argued, therefore, for the potential inclusion of other family members, such as cousins, where the petitioner demonstrates that "in his ethnic group—or perhaps only in his particular family—such ties are as close as the average ties among members of the usual suburban American nuclear family"¹⁷⁶

Additionally, immigration benefits should be extended to relationships based on affinity, and not merely consanguinity. Such an approach would give recognition to the multiplicity of viable and often permanent relationships that people form outside the nuclear family: these relationships include those between an increasing number of couples who live together but are not married,¹⁷⁷ and those between individuals of the same sex who are formally married.¹⁷⁸ Yet, however tolerant society and the judiciary in general may be,¹⁷⁹ immigration law has been less solicitous of such relationships which "violate traditional and often prevailing societal mores."¹⁸⁰ The INS seemingly has *carte blanche* to not only define who qualifies as an "immediate relative," but also to delimit what is a bona fide purpose for marrying, as well as what is a bona fide lifestyle.¹⁸¹

in the country since November 6, 1986, when the statute was enacted; (3) they must have been in an unlawful immigration status since January 1, 1982; (4) they must be "otherwise admissible as an immigrant." *Id.* SEC. 201, 100 Stat. 3394-95 (to be codified at 8 U.S.C. § 1255).

175. See *supra* note 28 and accompanying text.

176. ALENIKOFF, *supra* note 5, at 140.

177. See Glendon, *supra* note 4, at 685-86.

178. See, e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

179. See, e.g., Glendon, *supra* note 4, at 688 (describing increasingly tolerant judicial attitudes toward cohabiting couples in child custody awards).

180. *Adams*, 673 F.2d at 1043.

181. *But see* *Antoine-Dorcelli v. INS*, 703 F.2d 19 (1st Cir. 1983) (where the INS considered the family-like equities of a 30-year long relationship between an alien housekeeper and her host family); *Tovar v. INS*, 612 F.2d 794 (3rd Cir. 1980) (where the court considered an alien's emotional attachment and financial dependence on her grandchild to be akin to a parent-child relationship).

The cost of favoring these relationships, while maintaining an instinctive aversion to others, may be partly reflected in an increased incidence of sham marriages. Those aliens having family-like ties to American citizens which satisfy the substance, but not the form, of the INA may be effectively forced to resort to a sham marriage to traverse the otherwise impenetrable borders of the United States.

Of course, if the INA were revised to embrace every permutation of association, the lurking problem of proving the legitimacy of all close relationships becomes all too obvious. The INS would be unable to cope with the burden of investigating the individual merits of each case. Indeed, Congress may have been willing to accept any arbitrary outcomes resulting from their bright-line test because it "considered a case-by-case assessment of closeness . . . not worth the administrative costs."¹⁸² However, at least one Justice has rejected the administrative convenience argument, arguing that it is hardly a sufficient jurisdiction for interfering with the right of American citizens to be united with those individuals with whom they share close ties.¹⁸³ Besides, the problem could be partially overcome by imposing the burden of proof on the parties to establish the existence and requisite "closeness" of their relationship through affidavits or documentary evidence.

IV. CONCLUSION

The problem of fraudulent marriages has been described as "one of the most prevalent forms of fraud."¹⁸⁴ It is easily created, and as a method of immigration it offers unparalleled benefits, waivers, and privileges.

The Marriage Fraud Act was Congress' response to the growing problem of sham marriages. It is no panacea. Many aliens will regard the two-year conditional residency status as nothing more than a minor setback, rather than a real deterrent, and will not heed the newly imposed, stiffer penalties. Furthermore, any new rules enacted to combat marriage fraud will ultimately draw on the limited resources of the already beleaguered INS. A more effective solution would be to increase the resources available to the Service in examining spousal petitions and prosecuting sham marriages.¹⁸⁵

Moreover, Congress should give the INS clear direction on how to safely implement a "viability" standard when reviewing spousal petitions. This could be best achieved by imposing a statutory definition of a qualifying marriage for immigration purposes that requires the

182. *Fiallo v. Bell*, 430 U.S. 787, 812-13 (1977) (Marshall, J., dissenting).

183. *Id.* at 813-16 (Marshall, J., dissenting).

184. *SCIRP*, *supra* note 6, at 23 (statement of Penner).

185. *Id.* at 85 (statement of Coven).

Congress, and it was signed into law by President Reagan on November 10, 1986.⁷⁹ The provisions of the Act are designed to combat marriage fraud in two ways: first, by fashioning tough, new procedural measures that will make marriage-related immigration a more cumbersome and risky prospect;⁸⁰ and second, by creating aggressive criminal penalties for participating or conspiring to engage in a fraudulent marriage.⁸¹

The *pièce de résistance* of the newly enacted section 216 is that it confers only temporary immigrant status on the alien beneficiary.⁸² Formerly, the citizen spouses could submit an I-130 petition for an adjustment of status for their alien spouses at any stage after the marriage. The Attorney General, upon "determin[ing] that the facts stated in the petition [were] true," would approve it at that time.⁸³ The new promulgations, however, withhold permanent resident status for two years and also threaten that an alien's conditional residence status may be terminated by the Attorney General at any time during those two years.⁸⁴

The new law requires the couple to jointly submit an additional petition to the Attorney General and appear for a personal interview before an INS official within ninety days of the second anniversary of the alien being granted conditional residence status.⁸⁵ The petition must attest and the interview confirm that:

(i) the qualifying marriage—

(I) was entered into in accordance with the laws of the place where the marriage took place,

79. Fragomen, *supra* note 41, at 14. The bill was sponsored by Senator Paul Simon (D. Ill.) and Representative Bill McCollum (R. Fla.).

80. See *infra* notes 82-87 and accompanying text.

81. See *infra* notes 100-102 and accompanying text.

82. Marriage Fraud Act, Pub. L. No. 99-639, SEC. 2, § 216(a)(1), 100 Stat. 3537 (1986) (to be codified at 8 U.S.C. § 1186). The conditional status applies equally to any individual who becomes admissible for permanent residence by virtue of being the son or daughter of an individual who qualified for permanent residence on the basis of a marriage to a United States citizen. *Id.*

83. INA § 204(b), 8 U.S.C. § 1154(b) (1982). The Attorney General would typically reserve judgment on the application for 60 days after the interview in case adverse information was received. *SCIRP*, *supra* note 6, at 80 (statement of Coven, president, American Immigration Lawyers Association).

84. Marriage Fraud Act, SEC. 2, § 216(b)(1) (to be codified at 8 U.S.C. § 1186). An alien's conditional status is included, for the purposes of naturalization, in calculating the three-year permanent resident status requirement. Thus, an alien spouse may apply for naturalization under the relevant provision of INA, one year after the conditional status has been removed. *Immigr. L. Advisory*, *supra* note 34, at 15.

85. Marriage Fraud Act, SEC. 2, §§ 216(c)(1)(A), (d)(2) (to be codified at 8 U.S.C. § 1186).

marriage to be "alive and kicking" at the time the alien receives permanent immigrant status.¹⁸⁶

Finally, Congress must consider the underlying causes of marriage fraud and reform the INA accordingly. Current immigration laws are overwhelmingly dominated by a policy of family reunification. This virtually eclipses the possibility of immigration based on labor criteria, and denies entirely the possibility of immigration based on close, but not statutorily enumerated, relationships. Many aliens feel that in such a restrictive climate, marriage fraud is the only infallible way to immigrate. The ultimate irony of this situation is that rather than preserving the sanctity of marriage, the current system actually demeans marriage and in so doing guts the very purpose of the INA.

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186. *See supra* note 156.

