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Ms. Justine Akman, Director, Social Policy and Programs,
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Dear Ms. Akman:

RE: *Notice requesting comments on a proposal to introduce a conditional permanent residence period of two years or more for sponsored spouses and partners in a relationship of two years or less with their sponsors.*

I am writing to provide comments as requested. I teach, research and write in the field of migration and citizenship law.

I understand that the intent of the amendment is to deter and reduce the incidence of 'marriage fraud' perpetrated by foreign nationals, sometimes with the collusion of their permanent resident or citizen sponsors. This might be described as a problem of 'false positives' (permanent residence granted to individuals who do not actually meet criteria for immigration as members of the family class). False positives can be distinguished from the category of 'false negatives' (permanent residence denied or delayed inordinately with respect to individuals who do actually meet the criteria). The 'false negative' problem has also been subject to expressions of concern by various individuals and groups engaged in immigration, but the Notice does not explain how or why the problem of 'false positives' exceeds and requires intervention more than the problem of 'false negatives'.

Because the proposal of a conditional permanent residence period is described in imprecise terms, my comments consist of a series of questions rather than declarative statements. My views of the proposed amendments – their legality, wisdom and efficacy -- depend to a significant degree on the answers to the questions I pose. I regret that I am unable to provide more definitive comments, but I would welcome the opportunity to discuss with you the actual or potential elements of the proposed policy that are not elaborated upon in the Notice.

1. The immigration regimes of all major western states (including the US, the UK, NZ, and Australia, each of which is favorably referenced in the Notice), experience the problems identified as marriage fraud. The problem remains in states with 'conditional status', insofar as people who do not intend to remain married simply plan to 'wait out' the two

years before terminating the relationship. Is there an evidentiary basis for concluding that the conditional status models in these various countries has significantly reduced the incidence of the problem?

2. Under the current regime, sponsors and applicants undergo rigorous 'up front' screening prior to issuance of a visa to the sponsored spouse. A certain proportion are rejected on grounds that the relationship is in 'bad faith' under Reg. s. 4; some rejections are appealed to the IAD, and some of those decisions are judicially reviewed by the Federal Court. Doubtless CIC has statistics on each of these stages of the process, cross-tabulated by country of origin of the applicant. This process is slow, labour intensive and costly for CIC as well as participants. It also imposes lengthy (and painful) delays on spousal reunification in genuine cases that are eventually approved, but only after many months or years. These are the 'false negative' cases I referred to above. States that impose conditional 2 year visas do not invest the same resources in 'up front' evaluation because they invest in 'back end' evaluation at the end of the two year conditional period to verify that the relationship is valid and subsisting. Therefore, the [conditional status] spouse can, in principle, be reunited with his or her sponsor much faster than in the 'front end' system Canada currently employs. Does the proposal to introduce a 2 year conditional permanent residence entail an elimination of the intensive front-end evaluation, or will it supplement the existing process? If the former, it may go some distance toward reducing the burdens currently imposed on 'false negatives'. If the latter, what are the financial, temporal and other costs imposed on all parties consequent to adding (rather than replacing) a back end process to a front end process? Equally importantly, what would be the rationale for retaining the front end process?

3. The proposal would only apply to relationships of less than two years' duration. How would that period be measured in the case of common law and conjugual partner relationships? Assuming a significant time lapse between receipt of the application and approval for permanent residence, how will processing time be credited to applicants? One possibility is that sponsors can apply to CIC anytime to sponsor (e.g. immediately after the wedding), but an approval will be dated no sooner than two years from the initiation of the marriage/common law/conjugal relationship. Alternatively, CIC might require that the relationship must exist for 2 years prior to the application. Depending on the length of processing an application (see my queries in #2), this alternative route could add significant and potentially unfair delay because of slow processing times.

4. When and why would a conditional status of more than two years be imposed? What indicia would be used to identify 'cases targeted for fraud'? In both cases, criteria would have to be transparent, non-arbitrary and non-discriminatory.

5. What procedure is envisaged for the back-end process where CIC suspects that a relationship is not genuine? At present, IRPA s. 40 authorizes withdrawal of permanent resident status on grounds of misrepresentation. This process is currently available to address alleged cases of 'marriage fraud', but is almost never used, presumably because it

is very resource intensive at each of the investigatory, adjudicatory and enforcement stages. What process is envisaged for the revocation of conditional status under the proposed changes?

6. The Notice adverts to possible future development of exceptions to the conditionality of permanent residence for sponsored partners who terminate a relationship for reasons of domestic violence. The attached excerpts from UK and US sources indicate some of the issues that have arisen in these jurisdictions under systems of exceptional relief in cases of domestic violence. These issues would also require attention under any Canadian model.

7. The Notice appears to contemplate setting out the terms of exceptional relief for domestic violence at some future date after the implementation of conditional status. Since the domestic violence issue is such a crucial issue, it is not possible to evaluate a proposal for conditional status without clear, feasible and realistic terms under which exceptional relief will be granted.

8. Under the proposed regulatory changes, a sponsored person is required to remain in the relationship for at least two years in order to secure permanent resident status. Both federal and provincial law (Criminal Code and family law statutes) oblige all partners to financially support one another. If the proposed regulation is enacted, there appears to be little rationale for retaining the three year sponsorship undertaking for spousal reunification. Would the elimination of the undertaking be a component of this regulatory change?

I hope these comments are useful to you as you continue in your deliberations. If there arises an occasion for making formal or informal oral submissions on this subject, I would welcome an opportunity to do so. I have appended the description of the proposed amendments from the Canada Gazette, as well as academic and parliamentary commentary on the US and UK models for providing exceptional relief in situations of domestic violence.

Yours truly,
Audrey Macklin

APPENDIX

*Canada Gazette*

**Description**

Citizenship and Immigration Canada proposes to introduce amendments to the *Immigration and Refugee Protection Regulations* specifying that, under the family class or the spouse and common-law in Canada class, a spouse or a common-law or conjugal partner who is in a relationship of two years or less with their sponsor at the time of sponsorship application would be subject to a period of conditional permanent residence. The condition would require that the sponsored spouse or partner remain in a bona fide relationship with their sponsor for a period of two years or more following receipt of their permanent residence status in Canada. Only cases targeted for fraud would be reviewed during the conditional period. Permanent residence could be revoked (leading to initiation of removal) if the condition of remaining in a bona fide relationship was not met. For all other cases, the condition would be automatically lifted after the specified conditional period had elapsed. Beyond the requirement to satisfy the condition, the conditional permanent residence would not differ from permanent residence.

Given concerns about the vulnerability of spouses and partners in abusive relationships, a process for allowing bona fide spouses and partners in such situations to come forward without facing enforcement action would be developed if a conditional permanent residence period were introduced.

*UK House of Commons, Select Committee on Home Affairs, Fifth Report, Session 2005-6.*

**ABUSIVE MARRIAGES**

312. For some time now the Government has recognised that foreign spouses who have been the victim of domestic violence are in a very vulnerable position. A 'domestic violence concession' has now been incorporated into the Immigration Rules, providing that people in the UK whose marriages ended during the two-year "probationary period"[324] can be granted Indefinite Leave to Remain if they can prove the marriage ended because of domestic violence.[325] However, while their applications under this rule are being considered, they remain subject to all the conditions on their leave, including the requirement that they have "no recourse to public funds". This means that they cannot therefore access emergency local authority accommodation or refuges for victims of domestic violence.

313. Southall Black Sisters welcomes the changes relating to domestic violence but is still concerned about the restrictive nature of the rule, the quality of decision-making within the Home Office on such applications and in particular the effects of the "no recourse to public funds" rule which are raised in about half of the 40 cases and 180 immigration enquiries on domestic violence it handles each year. They argue that "this continuing restriction defeats the very purpose for which the domestic violence rule was introduced". They gave us evidence about

problems caused by lack of recourse to public funds and provided a series of case studies to highlight the range of problems encountered by women who cannot access safe accommodation or welfare benefits in the UK to support themselves. According to their survey, about 500 women in the UK subject to immigration control are affected by violence and abuse every year. They suggest that sponsors should pay the costs of providing benefits and housing to women who escape violence and abuse.

*Olga Grosh, "Foreign wives, Domestic Violence: US Law Stigmatizes and Fails to Protect "Mail-Order Brides", (2011) 22* Hastings Women's Law Journal *81-111, at 97-99.*

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**IV. STIGMATIZATION DETERS LEGAL RECOURSE**

To ameliorate the harsh effects of immigration law on foreign brides in abusive marriages, Congress passed the Violence Against Women Act (VAWA) in 1994with subsequent amendments in the years 2000 and 2005.

A. A Step Forward: Self-Petitioning Exceptions

To remove an abusive spouse's control over a foreign bride's immigration status, VAWA allows battered spouses to self-petition for permanent residency status, also known as receiving a "green card." The self-petition process is also often called a battered spouse waiver, as the joint petition requirement is waived in domestic violence cases. This legal remedy is available to the battered spouse who had endured "battery or extreme cruelty" at the hands of her citizen or legal permanent resident husband. Battery or extreme cruelty are defined as, but are not limited to, an act or threat of violence, such as forceful detention, and sexual abuse including rape, incest, and forced prostitution. Regulations also recognize that domestic violence is a pattern, and while some acts may not qualify on their own as "an act or threat of violence," the totality of such acts may amount to battery or extreme cruelty. When a foreign spouse encounters such heinous domestic abuse, VAWA strips the citizen or LPR spouse of control over the foreign spouse's immigration process.

If an immigrant spouse has been married to a U.S. citizen or legal permanent resident for less than two years, she is not directly eligible for **98* legal permanent residency. Instead, she is granted "conditional residency," and she and her husband must file a joint petition for adjustment of status within ninety days of the two-year anniversary of the conditional status grant. To protect newlywed women in abusive marriages, a pivotal provision allows battered foreign spouses to self-petition to adjust their immigration status from conditional to permanent residency.

VAWA "provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims . . . including . . . interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims." A foreign bride no longer requires her husband's cooperation in order to preserve or adjust her immigration status. This means that the abusive husband has fewer ways to use immigration status in order to control his foreign wife. As a result, VAWA helps to level the

power dynamics in an immigrant bride marriage. The self-petition exceptions pull U.S. immigration law away from the archaic notion of coverture, which dictated that the husband owned and controlled his wife.

B. A Negative Presumption of Immigration Fraud Through Marriage Remains

Although VAWA ameliorates the time restrictions IMFA placed on foreign bride marriages, the abused foreign bride still faces several legal hurdles. In addition to proving that the battered spouse entered marriage in good faith, that the marriage was legal, and that she was battered or subjected to extreme cruelty, the battered spouse also carries the burden of proving that the marriage was a bona fide marriage. The battered spouse must rebut the negative presumption that she married a U.S. citizen solely to obtain the benefit of a legal permanent resident status. The "bona fide marriage" requirement is difficult to prove due to the ambiguity of evidentiary standards and the arbitrary and unpredictable outcomes that result from discretionary power held by immigration officials.

Instead of presuming that the marriage is facially valid, the current petitioning requirement places the burden of proof on the immigrant victim. It is particularly difficult for a battered foreign spouse to carry her burden of proof because her abusive marriage, dependent economic status, and language and cultural barriers combine to keep her powerless and uninformed. The negative presumption combined with the language and economic difficulties create an almost insurmountable barrier to a successful petition. The daunting VAWA petition process and the lack of clear standards for applying discretion over petitions present significant obstacles to the battered foreign spouse.