

WHEN IS A DIVORCE NOT A DIVORCE?

**The recognition of non-judicial and customary divorces and its
impact on those seeking marriage-based immigration benefits.**

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“If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”

--Justice Robert Jackson, *Estin v. Estin*, 334 U.S. 541, 553 (1948).

I. Introduction

This paper will examine the basic principles applied to the recognition of international divorces and then look at how these principles are applied, or modified, in the context of immigration law. Many thousands of immigrants each year come to the United States as the spouse of someone who is already a United States Citizen or Lawful Permanent Resident and issues surrounding the proof of a valid marriage include the burden of proving the legal termination of all prior marriages of both parties. For many immigrants from countries with radically different traditions surrounding divorce, changes in marital status made many years before contemplation of emigration to the United States can come back to cause problems. Customary and consent divorces, which have freed them to remarry at home, are often not recognized by United States Immigration and Citizenship Services (“USCIS”, formerly the “INS”. References to both USCIS and INS throughout this paper refer to this same agency.), which oversees adjustment of status to lawful permanent resident within the United States, or the Department of State, which oversees the many embassies and consulates which issue immigrant visas. In 1997, spouses of United States Citizens accounted for 21% of all immigrants or 170,263 individuals.¹ This number does not include spouses of lawful permanent residents, who are not counted separately from other family members (but who doubtless account for a significant number of the 113,681 additional spouses and minor children of lawful permanent residents admitted that same year).

After establishing the basic principals that apply to domestic relations law in general, and to immigration law in particular, a number of illustrative cases² will be presented from both areas, including analyses of state (including North Carolina) and immigration law.

While the strict examination of prior divorces undertaken by USCIS certainly serves the policy of discouraging marriage (and divorce) fraud by those who seek immigrant status in the United States, there are also those who find themselves accused of adultery and bigamy in the eyes of the United States, despite complying with the laws and traditions of the home country. Only recently did the United States recognize that some may have been made victims of unscrupulous spouses who obtained dubious foreign divorce, and passed VAWA 2000, permitting abused immigrant spouses who were unwittingly led into bigamy by their abusive putative spouses to self-petition.³

II. Underlying principles of comity

Marriage and divorce are generally considered matters reserved to the states rather than to the federal government.⁴ There is no treaty in force between the United States and any country on enforcement of judgments, including recognition of foreign divorces.

The general rule is that a decree of divorce valid where rendered is valid everywhere and will be recognized either under the “full faith and credit” clause of the United States Constitution, or in the case of divorces rendered in foreign countries, under the principle of comity, provided that recognition would not contravene public policy.⁵ A foreign court must have jurisdiction to render a valid decree, and the applicable tests of jurisdiction are ordinarily those of the United States, rather than of the divorcing country. A divorce obtained in a foreign country will not normally be recognized as valid if neither of the spouses had a domicile in that country, even though domicile is not a requirement for jurisdiction under the divorcing country’s laws.

In 1678, Lord Chancellor Nottingham, speaking in the House of Lords in Cottington's Case, said of a foreign divorce:

It is against the law of nations not to give credit to the judgments and sentences of foreign countries till they be reversed by the law, and according to the form, of those countries wherein they were given; for what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences!"⁶

A divorce decree issued in a foreign country is generally recognized by a state in the United States on the basis of comity⁷ ("the informal and voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another"⁸), provided both parties to the divorce received adequate notice, *i.e.* service of process and, generally, provided one of the parties was domiciled in the foreign country at the time of the divorce. Under the principle of comity, a divorce obtained in another country under the circumstances described above is recognized in all other states and countries that recognize divorce. Although recognition may be given to an *ex parte* divorce decree, states usually consider the jurisdictional basis upon which the foreign decree is founded and may withhold recognition if not satisfied regarding domicile in the foreign country. Many state courts that have addressed the question of a foreign divorce where both parties participate in the divorce proceedings, but neither has domicile there, have followed the view that such a divorce invalid^{9,10}.

The requirement of domicile as a prerequisite to the recognition of a foreign divorce decree reflects the public policy interest the state has in regulating the marriages of its citizens. Without compliance with the same jurisdictional prerequisites required for full faith and credit among sister states, jurisdictions in the United States generally decline to extend comity to a foreign divorce decree, on the grounds that the decree-granting nation lacked a sufficient interest in the marriage to grant a decree severing a marital relationship.

At least two jurisdictions have drawn different conclusions and have adopted alternatives to the majority view. The Supreme Court of Tennessee has chosen not to require domicile but rather to extend comity to bilateral divorces when the parties had satisfied the jurisdictional requirements of the decree-granting nation. The grounds for the divorce itself must be substantially similar to recognized grounds for divorce in Tennessee, and the parties to the divorce must assert the validity of the divorce.¹¹ In making its decision, the Tennessee court, while acknowledging the state's interest in protecting the institution of marriage of its citizens, recognized a countervailing public policy in not forcing the continuance of a marriage "which exists in name only."¹²

New York takes a more liberal view in extending comity to foreign divorce decrees. In *Rosenstiel v. Rosenstiel*,¹³ the Court of Appeals of New York extended comity to a bilateral divorce where the jurisdictional requirements of the decree-granting nation were met, regardless of the similarity of the grounds for the divorce in the foreign nation and New York. However, even New York has refused to extend comity to an *ex parte* foreign divorce decree not based on domicile,¹⁴ or to a divorce in which the jurisdictional requirements of the decree-granting nation have not been met.¹⁵

A foreign judicial divorce will generally be recognized in the United States.¹⁶ Courts will ordinarily accord recognition to foreign judgments of divorce under the doctrine of comity.¹⁷ There is no national policy concerning recognition of foreign country divorces and the Hague Convention on the Recognition of Divorces and Legal Separations does not have the force of law in this country.¹⁸ Recognizing a foreign divorce as terminating a marriage, as is generally required as a matter of comity, does not however give a foreign divorce the legal status equivalent to a decree of dissolution entered by a state court.¹⁹

States may also choose not to recognize “quick divorces” obtained by its citizens on overnight trips to foreign countries where the attitudes and philosophies of the courts, as well as the concepts of substantive and procedural due process, are unknown and possibly inconsistent with our own.²⁰ However, a divorce granted by a foreign country will be afforded comity by a state when the jurisdiction of the foreign tribunal was predicated upon the consent of both parties and residency, rather than domicile, was established by a statutory brief contact through the appearance of one of the parties.²¹

III. Immigration consequences

In order to confer the benefits of permanent resident status on a noncitizen spouse, the sponsoring spouse must establish the validity of the current marriage and, in order to do so, must satisfy USCIS that all prior marriages were lawfully terminated: “In addition to evidence of United States citizenship or lawful permanent residence, the petitioner must also provide evidence of the claimed relationship. A petition submitted on behalf of a spouse must be accompanied by [...] a certificate of marriage issued by civil authorities, and proof of the legal termination of all previous marriages of both the petitioner and the beneficiary.”²² The validity of a marriage for immigration purposes is generally governed by the law of the place of celebration of the marriage.²³ Where one of the parties to a marriage has a prior divorce, USCIS will look to the law of the state where the subsequent marriage was celebrated to determine whether or not that state would recognize the validity of the divorce.²⁴ However, the presumption of validity of a second marriage, applied in many states, does not apply in the context of immigration. For this reason, the recognition of foreign divorces takes on added significance in the context of marriage-based immigration. In visa petition proceedings the burden of proof to establish

eligibility for the benefit sought rests with the petitioner, and in the absence of proof of the legal termination of a U.S. citizen petitioner's prior marriage, reliance on the presumption of validity to a subsequent ceremonial marriage to beneficiary is not satisfactory evidence of the termination of a prior marriage and is insufficient by itself to sustain petitioner's burden of proof of a valid marriage on which to accord beneficiary status.²⁵ The petitioner retains the burden of proving eligibility for immigration benefits at all stages of immigration proceedings and where evidence of dissolution of the respondent's first marriage is unsatisfactory, the presumption of validity attaching to a subsequent marriage to a United States citizen is insufficient by itself to sustain the respondent's burden of proving a valid marriage.²⁶

The petitioner must convince USCIS that the couple legally terminated all prior marriages before their current marriage will serve as a basis for the beneficiary spouse's immigration.²⁷ However, even when the petitioner supplies USCIS with appropriate, certified documents attesting to the end of the prior marriage(s), USCIS may challenge the validity of the marriage's termination for immigration purposes.²⁸

USCIS will assess a divorce's validity by first examining whether the state or country which granted it properly assumed jurisdiction over the divorce proceedings.²⁹ USCIS will then scrutinize whether the parties followed the legal formalities required by that state or country, with the resulting legally binding divorce.³⁰ As with marriage, the general rule is that "a decree of divorce valid where rendered is valid everywhere" unless it violates public policy.³¹ Lastly, USCIS will examine the laws of the state where the divorced party in the immigration proceeding resided at the time of the divorce, or of the place where that person subsequently remarried, before ruling whether the divorce will be recognized as legally effective for

immigration purposes.³² If the pertinent state recognizes the divorce, USCIS should also consider it valid, unless to do so would violate public policy.³³

USCIS closely scrutinizes and generally disfavors “mail order” divorces, those undertaken in foreign jurisdictions where neither of the parties to the marriage is a domiciliary at the time of the divorce.³⁴ However, both in those cases and in the cases of other foreign country divorces in which at least one of the parties to the divorce had some level of contact with the country that terminated the marriage, USCIS will ordinarily defer to the appropriate state or country’s judgment regarding the divorce’s validity.³⁵

A threshold question is which law USCIS will apply to determine whether the foreign country divorce will be valid for immigration purposes. This issue can be critical in cases where the place of the parties’ residence at the time of divorce and at the time of remarriage differ.

As a general rule, USCIS should look to the law of the place where the parties to the divorce resided when the divorce occurred. As the Board of Immigration Appeals (“BIA”) has stated:

Since the place where the parties to the divorce were domiciled at the time of the divorce was the only place with an interest in the proceedings at that time, the parties should be able to rely on the law of that state, even if they move to another jurisdiction ... (t)o hold otherwise would create constant problems in our increasingly mobile society.³⁶

In *Matter of Weaver*³⁷ the foreign spouse/beneficiary obtained a divorce in the Dominican Republic while she and her former spouse were residents of the Bahamas. The beneficiary subsequently married the petitioner in Connecticut. The INS determined that under Connecticut law, the beneficiary’s divorce was invalid. However, the BIA found the INS’ reliance on Connecticut law unpersuasive. Because the beneficiary and her former spouse both lived in the Bahamas at the time of their divorce, the BIA held that the law of the Bahamas should control.³⁸

In *Matter of Sena*,³⁹ the petitioner was a resident of Rhode Island at the time he obtained his

“mail order” divorce. The BIA found that since Rhode Island recognized that divorce, New Jersey, the state to which the petitioner later moved and where he remarried, owed “full faith and credit” to Rhode Island’s stance on the issue, despite the fact that New Jersey ordinarily did not recognize “mail order” divorces.

As a practical matter, USCIS ordinarily has little occasion to scrutinize the validity of a foreign divorce unless a visa petition has come before it based on a marriage celebrated after the granting of the divorce. Frequently, the subsequent marriage takes place in the same jurisdiction where one of the divorcing parties lived at the time of the divorce. In that case, USCIS need only examine the laws of the state or country of the remarriage to determine whether to accord legal validity to the foreign country divorce.⁴⁰

In judging the validity of the foreign divorce undertaken by a party who lived in the United States at the time, USCIS will also examine whether the foreign court properly assumed jurisdiction over the divorce, ordinarily applying the law of the state where the parties lived when the divorce took place.⁴¹ For example, under New York law, New York courts have exclusive jurisdiction over the divorces of its residents. Therefore, in *Matter of H—*,⁴² where the parties resided in New York at the time that they obtained their divorce under Egyptian law at the Egyptian consulate there, the BIA found that New York would not recognize the divorce. The BIA found that the improper divorce invalidated the subsequent marriage and denied the visa petition accordingly.⁴³

The petitioner must also establish that the parties to the divorce correctly followed the foreign country’s divorce procedures.⁴⁴ If the foreign divorce was properly obtained and the appropriate state in the United States, applying principles of comity, recognizes its validity, USCIS will ordinarily respect the state’s decision.⁴⁵ For example, the INS deemed a petitioner’s

“mail order” Hungarian divorce, though legal under Hungarian law, invalid for immigration purposes since California law, where both of the parties to the divorce resided, specifically gave no effect to such divorces.⁴⁶ Conversely, where New Jersey recognized absentee divorces, the BIA agreed that the INS should recognize a Dominican Republic divorce if all of the Dominican Republic’s procedures were followed, regardless of the fact that neither of the parties was in the Dominican Republic during the divorce proceedings.⁴⁷

USCIS will also recognize customary divorces undertaken without the intervention of the usual civil authorities.⁴⁸ Not surprisingly, the petitioner has an extremely high burden to prove both the facts and the legal legitimacy of the customary divorce.⁴⁹ The petitioner may meet that burden either by obtaining a certified judicial decree confirming the divorce,⁵⁰ or by submitting evidence regarding the tribe, clan or group to which she belongs, the prescribed divorce procedures, and compliance with those procedures.⁵¹ To establish the necessary elements, the petitioner may proffer affidavits of legal scholars or other knowledgeable persons, legal treatises or commentaries, and advisory opinions from organizations or experts with knowledge in the particular customary law.⁵² In the case of a Ghanaian customary divorce, however, USCIS will require the petitioner to supply a judicial decree confirming the divorce,⁵³ and additionally, will accord affidavits of persons who were present at the performance of the pertinent rites little probative value.⁵⁴ Due to the high incidence of fraud, the United States Consulate in New Delhi, India, also requires that all customary divorces be verified by a confirming court decree.⁵⁵

Immigrants from countries with often drastically different divorce laws are therefore faced with a labyrinthine maze of jurisdictional approaches in the United States, and the fate of their application for permanent residence may depend as much on the state in which they end up marrying or residing as it does on the law of the country in which they divorced. Few will be in a

position to make the right decision on whether to settle in California or New York without specialized legal advice.

IV. Illustrative Cases

a. **Chertok v. Chertok**⁵⁶

This early (1924) case concerned the annulment of a marriage on the ground that at the time of the marriage between plaintiff, Eva Chertok, and the defendant, Morris Chertok, the defendant was still married. The complaint also alleged that this marriage was contracted by plaintiff without any knowledge on her part of such prior marriage.

In September, 1910, Morris Chertok married Anna Rubinstein, in the city of Warsaw, Russia, and lived with her for about a year and a half. Sometime in 1912 he came to the United States and took up residence in New York City.

In November, 1917, Anna Rubinstein, defendant's first wife, began proceedings for an absolute divorce, according to rabbinical laws, at the suggestion and instigation of her father, Jacob Rubinstein, who was then residing in New York. He and the defendant went to a rabbi in New York and obtained a rabbinical divorce. The divorce was finally consummated in Russia, according to rabbinical laws recognized by the government of Russia. Defendant claimed that the marriage existing between defendant and Anna Rubinstein, his first wife, was thereby dissolved.

Testimony about the procedure for obtaining a divorce in Russia between those residing there, or between parties residing in the United States and Russia, was offered by defendant. Depositions were taken, in Russia, of the first wife of defendant and of the rabbi in Petrograd, Russia, who delivered the rabbinical divorce there. He confirmed that the divorce was granted in accordance with the rabbinical laws in Russia and that such a divorce was at that time recognized by the Russian government.

The court considered the evidence and testimony and determined that the alleged divorce, although ratified in Russia by the delivery of the alleged divorce granted by a rabbi in New York City, was not in accord with New York law. New York did not recognize the act of the local rabbi in granting the divorce and the court declared it void, despite the recognition of it by the Russian government. In effect, the court found that New York did not have to grant comity to a foreign government's ratification of an invalid divorce carried out in New York State.

b. Chaudry v. Chaudry⁵⁷

Plaintiff wife and defendant husband in this case were both citizens of Pakistan. The wife and the children of the marriage resided in Pakistan, while the husband resided and practiced medicine as a psychiatrist in New Jersey.

The wife filed an "amended complaint" alleging (1) that she and the defendant were married, that he abandoned her without justification in May 1972 and that he refused adequately to support her and their children. She sought separate maintenance, as well as support of the children. Alternatively, she claimed that, if the court were to find that defendant was indeed lawfully divorced from her, she should receive alimony and equitable distribution and the children should receive adequate support. The husband defended, among other issues, that he had already obtained a valid divorce in accordance with the laws of Pakistan, that the Pakistan court had confirmed the divorce, and that it had full jurisdiction to deal with all of the issues, including support, raised in this proceeding and its actions were "dispositive of the matters raised" in the complaint.

On December 16, 1973 the husband dispatched a letter from Trenton, New Jersey, to his wife in Pakistan, stating that he had filed divorce papers with the Pakistan consulate in New York City. The Pakistan appellate court found that the wife had received this letter. The husband

also sent her a copy of the divorce pronouncement or deed (*talaq*) after it was effected at the Pakistan consulate. The divorce was confirmed by the Pakistan lower court on November 5, 1974. The wife then petitioned the appellate court, contending that the divorce was invalid. The validity of the divorce was upheld, after a hearing by the Pakistan appellate court, in a written opinion dated December 30, 1975. The wife was represented by counsel in both Pakistan courts.

Both parties were citizens of Pakistan during the entire period of the Pakistan divorce proceedings and the hearings in the United States. There was expert testimony presented at trial to the effect that such citizenship constitutes a sufficient basis for the divorce judgment in Pakistan, at least where the matter, as in this case, was contested. For the purposes of validity of the divorce, the court found it immaterial that the husband was residing here or was “domiciled” here. The court additionally found that Pakistan had jurisdiction to enter a divorce that should be recognized here by reason of (1) the Pakistan citizenship of the parties, (2) the wife’s residence there, even though it may have been against her will and by reason of the husband’s acts, and (3) the judgment of the appellate court in Pakistan which validated the divorce. Irrespective of the manner in which the divorce action was instituted and the legal effect of the divorce document at the time it was filed in the New York consulate or thereafter when it was acted upon in Pakistan, the final result was a divorce judgment entered after contested proceedings in Pakistan in which the parties appeared through counsel. The court saw no reason for holding that this foreign judgment adjudicating the status of the parties as divorced offends the public policy of this State.

An analysis of the opinion of the appellate court in Pakistan satisfies us that the validity of the divorce was amply litigated and determined there in that country. The Pakistan judgment should have been recognized and enforced to the extent it affects the marital status of the parties.⁵⁸

Although superficially similar in its facts to *Chertok*, *Chaudry* is distinguishable on the grounds that the divorce proceeding, initiated at the Pakistan consulate in New York, was fully

litigated in Pakistan, where the wife was domiciled and able to contest the proceedings. In *Chertok*, in contrast, the proceeding which purported to effect the divorce took place entirely in the United States, and was merely ratified by the foreign country. While the court was prepared to extend comity to a divorce proceeding carried out in full accordance with Pakistan's judicial process, and in Pakistan's courts, it was not willing to go so far as to recognize a customary divorce carried out on United State soil and merely ratified abroad.

c. Matter of Hosseinian⁵⁹

The marriage between the parties in this case was celebrated in California, and the issue before the BIA was whether the petitioner's divorce in Hungary would be recognized as valid under California law. The petitioner was a 39-year-old native of Hungary and citizen of the United States. The beneficiary was a 38-year-old native and citizen of Iran. A marriage certificate was submitted with the visa petition indicating that the petitioner and the beneficiary had married in California on May 29, 1983. The petitioner had two prior marriages. To show the legal termination of these marriages, the petitioner submitted divorce decrees purporting to terminate each of them. One divorce decree, dated November 23, 1978, was issued by a Hungarian court. This decree stated that a marriage entered into by the petitioner and her first husband in Hungary on September 14, 1968, was dissolved with the agreement of both parties. According to the decree, both the petitioner and her first husband were then residing in Los Angeles and were represented in court by Hungarian attorneys. No law in Hungary required the parties to a divorce to appear personally before the court if they are represented by a duly authorized attorney, unless the court finds it necessary to hear their testimony. The Hungarian court also had jurisdiction over the proceedings because under Hungarian law the parties remained citizens of Hungary even if they acquired citizenship from another country. The

divorce decree from the Hungarian court specifically states that both the petitioner and her first husband were residing in Los Angeles at the time the judgment was entered. Thus, it was clear that California would refuse to recognize the Hungarian decree, despite the fact that it is valid under Hungarian law, because both parties were domiciled in California at the time of the foreign divorce proceeding. The BIA concluded that, as California would not recognize the Hungarian divorce, then neither could USCIS.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner has neither shown that her Hungarian divorce is valid under the law of California, which denies recognition to foreign divorces granted to two domiciliaries of California, nor has she rebutted the information in the Hungarian divorce decree indicating that she and her first husband were residents of California at the time the judgment was entered. Because the petitioner has not established that her first marriage was legally terminated, she has not established that she had the capacity to marry the beneficiary. Her marriage to the beneficiary, therefore, is deemed invalid for immigration purposes.⁶⁰

d. Dulai v. INS⁶¹

This case dealt with a customary divorce obtained in India. In 1959, Mr. Dulai married Joginder Kaur in the Punjab region of India. In 1976, after more than twenty years of marriage, Mr. Dulai left his wife and children and went to Canada. Shortly after his arrival in Canada, Mr. Dulai crossed the border into the United States, entering without inspection, and set up residence.

In early 1981, after being separated from his wife for 5 years, Mr. Dulai received the news from his family that his wife was seeking a divorce in India. Mr. Dulai decided not to contest his wife's petition for divorce and sent a power of attorney to his father so that his father could represent him at the divorce proceedings and accede to his wife's wishes.

On May 15, 1981, the "Gram Panchayat" (the elected Village Committee) in Sangatpur heard Joginder Kaur's petition for divorce to which Mr. Dulai gave his consent. In the presence

of Mr. Dulai's family and other villagers, the Panchayat granted the parties a divorce according to local custom and recorded the decision in the village register. Joginder Kaur then left the Dulai family home and went back to live with her parents. Mr. Dulai has now been separated from his first wife for 17 years, and divorced for 12 years.

On August 20, 1983, over two years after his "divorce" from Joginder Kaur, Mr. Dulai married Linda Lee Rodarte in Kent, Washington.⁶² After their marriage, the Dulais lived in an apartment in Auburn, Washington.

In February, 1984, six months after their marriage, Mrs. Linda Lee Dulai filed a petition to classify her husband as an immediate relative. A year later, the petition for Mr. Dulai was approved. On March 29, 1985, Mr. Dulai was admitted to the United States as a lawful permanent resident. The U.S. Consulate in New Delhi, India, however, suspended action on the cases for the children, pending an investigation of the validity of Mr. Dulai's divorce from Joginder Kaur.

On June 15, 1985, an investigator from the U.S. Embassy visited Sangatpur to investigate the circumstances of Mr. Dulai's customary divorce. He spoke with five "neighbors" in the village, and allegedly none of them knew of Joginder Kaur's divorce from Mr. Dulai.

After this visit to Sangatpur, the U.S. Embassy claimed that Mrs. Linda Lee Dulai's five step-children were not entitled to immigrant visas on grounds that their father had not been properly divorced and therefore his marriage to Linda Lee Dulai would not be recognized for immigration purposes. The U.S. Embassy then sent the petitions to the INS for "reconsideration."

On December 5, 1985, Joginder Kaur petitioned the District Court of Jalandhar Province, for a declaratory judgment affirming the validity of the 1981 Panchayat customary divorce

decree. In its decision, the District Court declared that Joginder Kaur is “the divorced wife of the defendant [Gurcharan Singh Dulai] with effect from 15-5-81 [May 15, 1981]” and granted a “permanent injunction restraining the defendant [Mr. Dulai] from proclaiming that the plaintiff is still his legally wedded wife.”

On appeal of the revocation of his status, Mr. Dulai argued that his alleged 1981 divorce was a valid customary dissolution of marriage under the Hindu Marriage Act of 1955 (“Marriage Act”). The Marriage Act permits married couples to divorce in accordance with local custom and without judicial intervention.⁶³

Under the Marriage Act, the threshold question is whether local custom in Dulai’s home village of Sangatpur recognized extrajudicial divorce by mutual consent. Marriage Act at § 3(a) (custom must be “certain and not unreasonable or opposed to public policy” and must have been “observed for a long time”). The INS found no evidence that such a local custom existed.

Specifically, the Immigration Judge (“IJ”) and the BIA relied upon two Library of Congress memoranda in finding that the claimed customary divorce was invalid. The 1986 Library of Congress memorandum prepared by Krishan Nehra, Senior Legal Specialist, American-British Law Division, outlined the requirements that must be met to establish a valid customary divorce under Indian law and concluded that Dulai’s Indian divorce did not meet these requirements. In its 1987 memorandum, also prepared by Nehra, the Library of Congress confirmed its 1986 determination that Dulai’s customary Indian divorce was invalid, specifically explaining that the 1985 declaratory judgment obtained by Kaur from the Sub-Judge First Class did not substantiate the validity of Dulai’s customary divorce.

The finding in this case is very much in keeping with similar cases dealing with customary divorces in Ghana and other countries. The burden of showing that a customary

divorce both occurred and is well-established in the country where it took place is a heavy one for the petitioner to carry (see *Matter of Kumah*, supra).

e. Matter of Karim⁶⁴

This case dealt with the issues arising from a different form of customary divorce, this time a consent divorce from Pakistan. The petitioner and the beneficiary, a native and citizen of Pakistan, were married in the State of Washington on August 23, 1971. The beneficiary was previously married in Pakistan. He submitted to INS an affidavit in which he states that he and his first wife were divorced by mutual consent through an exchange of letters on July 25, 1970. He has also submitted three affidavits by his former wife in which she states that she divorced him.

While there are several methods to obtain a legal divorce under Pakistani law certain procedures outlined in sections 7 and 8 of the Muslim Family Laws Ordinance (1961), XIV The Pakistan Code 67 (1967), must be complied with: (1) the husband (or wife, if she initiates the divorce; or the court, if the wife seeks a khula divorce in court) must notify the Chairman of the Arbitration Council in writing of the desire for a divorce; and (2) within 30 days of receipt of this notice, the Chairman must begin reconciliation proceedings. In the absence of evidence showing that beneficiary's first wife complied with the above procedures in obtaining the purported Pakistani divorce from beneficiary, the legal termination of beneficiary's first marriage and, hence, the validity of his subsequent marriage to the United States citizen petitioner were found not to have been established for immigration purposes.

In response to the BIA's request, a Legal Specialist at the American-British Law Division of the United States Library of Congress, prepared a memorandum on divorce law in Pakistan. According to this memorandum, the BIA determined that there are several ways to

obtain a legal divorce under Pakistani law, including two types of divorce by mutual consent. One, called khula divorce, involves an offer, made by the wife and accepted by her husband, to compensate the husband if he releases her from her marital duties. Once the offer is accepted, the divorce is immediately effective; its operation is not postponed until the execution of the written document called the deed of khula or khulanama, (If the husband refuses to grant a khula divorce, the wife may seek one from the court) The other divorce by mutual consent is called mubara't. It is obtained when both parties desire separation. In other respects it is like the khula.

Whether either of these mutual consent divorces may be obtained through an exchange of letters was questioned by the BIA. Among Sunni Muslims the divorce (talaq) may be written or oral and need not be pronounced in the presence of the wife. However, without a written document, proof of such a divorce is difficult. Among Shia Muslims the talaq must be pronounced orally in the presence of the wife and two competent witnesses in a set of Arabic words. Such a divorce communicated solely in writing is not valid unless the husband is physically incapable of speech. It was not clear from the proceedings whether the beneficiary or his wife was a member of either of these groups.

Under Pakistani law, IX The Pakistan Code 716 (1966), a wife may divorce her husband on certain grounds, none of which were found by the BIA to be applicable in this case or mentioned in the wife's affidavits. Under Muslim personal law, a wife may divorce her husband if he has delegated that power to her. No proof was offered that such a delegation of power was made in this case.

The court summed up its findings as follows:

The record is ambiguous as to the method by which the purported divorce was obtained, and there is no evidence tending to show that the above procedures were followed. Without this evidence, we are in no position to conclude that the marriage between the beneficiary and his first wife has been legally terminated in

accordance with Pakistani law. Consequently, we cannot recognize as valid for immigration purposes the subsequent marriage between the beneficiary and the petitioner, upon which the visa petition depends.⁶⁵

f. Matter of Kumah⁶⁶

Matter of Kumah presents the question of recognition of tribal divorces by USCIS. While it is clear that such divorces may be granted comity, it is equally clear that the evidentiary burden for the petitioner is high, and may be impossible to meet after the passage of time. The petitioner in this case was a 26-year-old United States citizen and the beneficiary a 40-year-old native and citizen of Ghana. They were married in Springfield, Massachusetts, on October 31, 1979. The beneficiary had previously been married in Ghana on December 3, 1970, according to local tribal custom. The beneficiary asserted that her first marriage was dissolved by divorce on November 20, 1973, according to the Ashanti tribal laws and custom. The petitioner filed a visa petition on behalf of the beneficiary on July 9, 1980.

The record presented by the petitioner included a sworn statement from the beneficiary's uncle, executed in Ghana on March 9, 1983, and uncertified photocopies of sworn statements from the beneficiary's father and from her first husband's father which were also executed in Ghana on December 27, 1979. These sworn statements attested to the customary divorce in Ghana between the beneficiary and her first husband on November 20, 1973.

USCIS denied the visa petition on the grounds that the petitioner had failed to prove the legal termination of the beneficiary's prior Ghanaian marriage and that the petitioner had failed to establish that he has a bona fide marital relationship with the beneficiary. USCIS found that the legal requirements to prove the validity of a nonjudicial Ghanaian divorce had not been established by the evidence presented by the petitioner. In particular, USCIS found that the record did not specify or document the tribal affiliations of the two parties to the divorce and that

the petitioner did not present any objective documentation to show the tribal rituals necessary for divorce.

On appeal, the petitioner argued that the beneficiary's Ghanaian customary marriage was validly terminated by an Ashanti customary divorce, and thus, there was no legal impediment to the marriage between the petitioner and the beneficiary. Petitioner claimed to have sustained his burden of proving the validity of the beneficiary's nonjudicial divorce under Ghanaian customary law in accordance with the BIA's holdings in *Matter of DaBaase*, and *Matter of Akinola*.⁶⁷ Petitioner claimed that the petitioner has established the tribal affiliations of the beneficiary and her first husband, the customary divorce law of that tribe, and that the ceremonial formalities were in fact properly followed. In support of these contentions, the petitioner proffered on appeal certified photocopies of sworn statements executed in Ghana on November 17, 1983, by the father of the beneficiary's first husband and by the chief witness to the customary divorce between the beneficiary and her first husband. These two sworn statements attest to the execution of certain delineated customary rituals performed in the Ashanti region of Ghana to dissolve the customary marriage between the beneficiary and her first husband on November 20, 1973.

Prior to this case, the BIA had held that in the absence of a court decree which either grants or confirms the customary divorce, the petitioner could prove a nonjudicial divorce by presenting sufficient proof to establish that the divorce under Ghanaian customary law was validly obtained.⁶⁸ In this regard, the BIA specifically held that the petitioner must establish the tribe or ethnic group to which the parties of the customary divorce belong, the customary divorce law of such tribe or group, and that the pertinent ceremonial procedures were followed.⁶⁹ In *Matter of DaBaase* the BIA advised that the evidence submitted to establish the customary law

may include evidence derived from reported cases, legal treatises and commentaries, and depositions of legal scholars. It noted that proof that the customary divorce was properly perfected could be established by specific affidavits from the parties and witnesses involved. The BIA's holding in these published decisions was initially based on a Library of Congress expert memorandum which indicated that it is indeed possible to effect a valid Ghanaian customary divorce without recourse to the courts. However, that memorandum also stated that the district courts of Ghana have been given jurisdiction over divorces governed by customary law. In *Matter of Akinola*,⁷⁰ the BIA stated that the local Ghanaian courts are uniquely equipped to determine the validity of a customary divorce. In contrast to a court-decreed judicial divorce, a purely customary divorce in a traditional tribal setting is difficult to prove without confirmation by a Ghanaian court. As there is no document issued for a customary divorce and there is no system of registration, proof of a customary divorce necessarily would be provided by witnesses.⁷¹

The section relating to Ghana in Appendix B/C/E of the State Department's Foreign Affairs Manual, which is used by USCIS to determine the availability of foreign documents pursuant to USCIS Operations Instructions 204.2a, has been amended extensively to virtually eliminate the probative value of affidavits by family members attesting to a customary divorce. On July 9, 1982, the Foreign Affairs Manual was amended to provide that the preferred documentation for the dissolution of a customary marriage is an application by the parties concerned to the appropriate Ghanaian court under the Matrimonial Causes Act of 1971 (Act 367), section 41(2), for a decree of divorce, and that the affidavits attesting to a divorce under customary law provided by the heads of the respective families are of minimal reliability.⁷² Effective July 27, 1984, that section was again amended, and the amended section states in

pertinent part:

Divorce Certificate: Available. Certificates for the dissolution of a civil marriage may be obtained from the court which granted the divorce. Proper documentation of the dissolution of a customary marriage is a decree, issued by a high court, circuit court or district court under the Matrimonial Causes Act of 1971 (Act 367), Section 41(2), stating that the marriage in question was dissolved in accordance with customary law. Affidavits or ‘statutory declarations’ attesting to a divorce under customary law, even when duly sworn, do not constitute proper documentation of the dissolution of a Ghanaian customary marriage. (Amended)⁷³

In light of the information provided in the Foreign Affairs Manual as recently amended and after reevaluating prior decisions, the BIA held that it considered a court decree which either granted or confirmed a Ghanaian customary divorce to be an essential element of proof in substantiating a claimed customary divorce. A court decree confirming a customary divorce issued by an appropriate Ghanaian court is accepted as evidence both that a customary marriage was dissolved by a customary divorce and that the customary divorce is regarded as valid by the Ghanaian Government. The BIA did not question the validity of a customary divorce which is valid under the law of Ghana. Rather, it considered that:

a Ghanaian court decree to be an essential element of proof in establishing the customary divorce in that if the petitioner is unable to persuade Ghanaian court officials that the decree of confirmation should be issued because of questions relating to the tribal affiliations of the parties concerned, the customary divorce law of that tribe, or the conformance to the pertinent ceremonial procedures, then that petitioner cannot satisfy his burden of proving the claimed customary divorce for purposes of our immigration laws.⁷⁴

g. Matter of Palsang⁷⁵

The petitioner and the beneficiary in this case were both Buddhists, natives of Tibet. They were married according to Tibetan custom and tradition in India on July 10, 1974, and the marriage was attested in the Court of the Southern District Judicial Magistrate at Darjeeling, India, on July 13, 1974. However, the beneficiary had been married before, apparently under

Tibetan custom and tradition.

An agreement dissolving the prior marriage was submitted. This agreement was sworn and executed by the beneficiary and her first husband before officials of The Darjeeling Tibetan Refugee Cooperative Collective Farming Society, Ltd. It, however, was dated November 28, 1974; this was four months after the date of the marriage which supports the visa petition.

On appeal it was asserted that the effective date of the dissolution of the beneficiary's first marriage was not November 28, 1974 the date of the agreement, but rather in July, 1973, when the parties ceased to live together as man and wife. It was argued that under Tibetan tradition and custom, such cessation of cohabitation constitutes a lawful divorce between the parties.

In support of this a letter dated July 9, 1975, from the New York Office of the Representative of His Holiness of the Dalai Lama in New Delhi was submitted. In that letter it is stated in reference to the agreement dissolving the marriage dated November 28, 1974:

The statement is not a formal decree, effective upon signing, since according to Tibetan custom, the divorce was legally effective when the couple ceased to reside as man and wife in July of 1973.⁷⁶

A Buddhist marriage in India may be dissolved under section 29 of the Hindu Marriage Act, 1955, No. 25, in accordance with custom and without the intervention of a court. Additionally, under section 3 of the Act, the custom must be certain; not unreasonable, nor opposed to public policy. However, a party that desires to have the benefit of the custom must prove not only the prevalence of that custom, but also its applicability to him.

The BIA found that the existence of the custom, and its applicability to the beneficiary were not been substantiated: "Absent evidence that a dissolution of the marriage meets the stated requirements, a subsequent customary marriage will not be recognized for immigration

purposes.”⁷⁷ Once again, the BIA found that the petitioner carries a weighty burden of proof when seeking to establish a customary marriage.

V. Recognition under state law of North Carolina⁷⁸

North Carolina’s leading case on recognition of divorce decrees granted in foreign nations is *Mayer v. Mayer*.⁷⁹ In *Mayer*, the Court endorsed the majority view requiring domicile as a jurisdictional prerequisite to recognition. In deciding whether to extend comity to a divorce granted by the Dominican Republic, the North Carolina Court of Appeals held that if the foreign divorce evaded either the jurisdictional requirement of domicile or the public policy of the state, then North Carolina would refuse to grant comity. Although the Court found that the Dominican proceeding was *ex parte*, it indicated that even if the proceeding had been bilateral, the Court would have required domicile as a prerequisite to a comity. The petitioner argued that the grounds for which the Dominican Republic granted her divorce (“irreconcilable differences”) were substantially similar to grounds for divorce as recognized by North Carolina and, therefore, the state should recognize the divorce. The Court rejected this argument, emphasizing the state’s public policy interest against the “hasty dissolution of marriages.” Since an *ex parte* divorce was at issue, the holding applies narrowly to *ex parte* divorces.

The Court of Appeals focused on another *ex parte* foreign divorce in *Atassi v. Atassi*.⁸⁰ In *Atassi*, the Court affirmed that divorces granted by foreign nations must meet the jurisdictional prerequisite of domicile. The defendant was a native of Syria who had lived in North Carolina for over thirteen years and obtained a divorce in Syria. Because of the length of his residence in North Carolina, the facts in the record were not conclusive on whether he had changed his domicile. Because there was a genuine issue of material fact on defendant’s domicile at the time

of the Syrian divorce, the Court remanded, noting that if he were no longer domiciled in Syria at the time of the divorce, North Carolina would not grant it comity.

a. Mayer v. Mayer⁸¹

In this case, Victor Mayer asserted the invalidity of his marriage to Doris Mayer, because of the invalidity of her Dominican Republic divorce from her first husband. Victor Mayer, desiring to marry, had apparently suggested to Doris Mayer that she obtain a Dominican divorce. He apparently also promised to support her ‘in a manner better than the one she had been accustomed to’, thereby causing Doris Mayer to sign away any alimony she may have been entitled to from her first husband. In addition, he accompanied her on her trip to the Dominican Republic, paying for her transportation and lodging, and other personal expenses. After the divorce, Victor Mayer continued to uphold its validity as he and Doris Mayer sign a prenuptial agreement and married. During the marriage, Victor Mayer lived in Doris Mayer’s house and borrowed money from her, including \$ 25,000 which he admits he has not repaid. Victor Mayer never questioned the validity of the marriage until he abandoned Doris Mayer. In addition, Doris Mayer relied on the divorce’s validity.

In this case, the court found that the Dominican Republic had no interest in the marriage of the two North Carolinians, Doris Mayer and Fred Crumpler. Despite this, on Doris Mayer’s short trip to the Dominican Republic, the Dominican court purported to dissolve the marriage of two domiciliaries of North Carolina upon the grounds of “irreconcilable differences.” Neither of the parties in this lawsuit had any connection with the Dominican Republic, save Doris Mayer’s five-day stay there for the sole reason, by her own testimony, of obtaining the divorce decree.

There is no evidence that Doris’s first husband appeared, through counsel or personally, in the Dominican proceeding. Doris Mayer did testify that her husband signed some “papers” in

connection with the Dominican proceeding, but the trial court did not find as a fact that he made an actual or constructive appearance in the Dominican proceeding.

We cannot sanction a procedure by which citizens of this State with sufficient funds to finance a trip to the Caribbean can avoid our legislature's judgment on the question of divorce. To hold otherwise would be to flout our law; it would permit domiciliaries of North Carolina to submit their marital rights and obligations to the contrary policies and judgments of a foreign nation with which they have no connection.⁸²

Despite finding that North Carolina would not, as a matter of policy, extend comity to such *ex parte* divorces where there was no showing of domicile, the court did find that, based upon his encouragement and condonation of the divorce proceedings, "Victor Mayer is estopped from asserting as a defense the invalidity of Doris Mayer's divorce, and that Doris Mayer is entitled, based on the trial court's findings, to alimony *pendente lite* and reasonable attorney's fees."⁸³ There is however no case law to suggest that such principles of estoppel have ever been, or indeed will ever be, applied in immigration cases, where a much stricter notion of the mechanics of divorce proceedings applies.

b. Atassi v. Attassi⁸⁴

In this case, plaintiff wife, Batoul Atassi, filed a complaint in Cumberland County District Court against defendant husband, Dr. Inad Atassi, for alimony, alimony *pendente lite*, child custody and support, relief from domestic violence, and equitable distribution. Without filing an answer, defendant moved, pursuant to *G.S. § 1A-1, Rule 12(b)(1)*, to dismiss the action for lack of subject matter jurisdiction. Subsequently, defendant moved, pursuant to *G.S. § 1A-1, Rule 56*, for partial summary judgment dismissing all claims except child custody and support.

Defendant was born in Syria and maintains his Syrian citizenship. He is also a naturalized citizen of the United States, having become a citizen in 1984. Defendant is 47 years old and has been practicing neurosurgery in Fayetteville for the last thirteen years. For over twenty years,

defendant has continuously resided in the United States, first completing his post-graduate medical training at various American hospitals and then beginning his practice in Fayetteville.

In December of 1990, defendant returned to Syria, where he arranged a meeting with, and later marriage to, plaintiff. Immediately following their February 1991 marriage in Syria, defendant returned to Fayetteville with his new wife, and another marriage ceremony was performed there on 26 March 1991 for the purpose of facilitating plaintiff's application for permanent residence. They have resided in Fayetteville since that time.

The marriage was an unhappy one, and at the end of October, 1992, defendant took the couple's nine-month old son and went to Atlanta in preparation for a return trip to Syria. Defendant called plaintiff from Atlanta and told her that she would have to return to Syria with him if she wished to see her son again. Plaintiff accompanied defendant and their son to Syria, where defendant told her to remain with her parents. They stayed in Syria approximately two weeks, after which time defendant returned to Fayetteville alone.

Upon his return, defendant obtained, through his attorney in Syria, a revocable divorce from plaintiff. The Syrian divorce was obtained, according to plaintiff, without her knowledge or consent, and she received no notice and made no appearance at any proceeding. She and her family in Syria received notice, after the fact, that defendant had divorced plaintiff on 25 November 1992, while he was in the United States. A few days later, defendant called plaintiff to tell her that he had revoked the Syrian divorce and to request that she return to Fayetteville. Plaintiff did so and resumed the marital relationship in December of 1992.

For the next three months, defendant and plaintiff lived, traveled, and generally held themselves out as husband and wife, including a visit by plaintiff's father and a family trip to Washington, D.C. On 23 March 1993, defendant removed his wedding ring, threw it at plaintiff,

and began a course of indignities directed at making plaintiff miserable enough to leave and return to Syria. Plaintiff filed the present action for relief on 4 June 1993.

The *Atassi* court first reiterated the grounds for recognition of foreign divorce. Quoting *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659, disc. review denied, 311 N.C. 760, 321 S.E.2d 140 (1984), the Court noted:

Recognition of foreign decrees by a State of the Union is governed by principles of comity. Consequently, based on notions of sovereignty, comity can be applied without regard to a foreign country's jurisdictional basis for entering a judgment. More often than not, however, "many of the American states are likely to refuse recognition [to deny comity] to a divorce decree of a foreign country not founded on a sufficient jurisdictional basis." That is, "a foreign divorce decree will be recognized, if at all, not by reason of any obligation to recognize it, but upon considerations of utility and mutual convenience of nations. Recognition may be withheld in various circumstances, as where the jurisdiction or public policy of the forum has been evaded in obtaining the divorce." Since the power of a State of the Union to grant a divorce decree is dependent upon the existence of a sufficient jurisdictional basis - domicile or such a relationship between the parties [and] the State as would make it reasonable for the State to dissolve the marriage - it follows that the validity of a foreign divorce decree should depend upon an adequate jurisdictional basis.⁸⁵

In order to determine whether North Carolina would afford recognition to the Syrian divorce in this case, the court considered the jurisdictional question. "Under our system of law, judicial power to grant a divorce - jurisdiction, strictly speaking - is founded on domicile."⁸⁶ "Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence It is the place where he intends to remain permanently, or for an indefinite length of time."⁸⁷ Although a person may have more than one residence, he can only have one domicile.⁸⁸ Domicile is a question of fact to be determined by the finder of fact.⁸⁹

The court went on to set out the circumstances which would support a finding that defendant had abandoned his original domicile of Syria and established a new domicile in North

Carolina: (a) his consistent, actual residence in North Carolina for over thirteen years; (b) his former status as a permanent resident alien, and his more recent naturalization as an American citizen; (c) the location of his medical practice and all other sources of income, i.e. investments and real estate holdings in the United States; (d) his admissions in deposition and his stated intentions for the couple in the premarital agreement, to wit “we have agreed to marry and intend to reside together in North Carolina as husband and wife;” (e) his attempt to fashion a premarital agreement specifically in compliance with North Carolina General Statutes Chapter 52B; (f) his bringing his wife from Syria to live with him in this country; and (g) his general lifestyle and actions which, while demonstrating some connection to Syria, indicate that defendant intends to remain in North Carolina permanently or indefinitely.

The court chastised the defendant, as an American citizen domiciled in North Carolina, for seeking to use his former status and relationship with Syria to evade the laws of North Carolina governing domestic relations. North Carolina’s interest in the marriage prevails over any foreign divorce. Citing *Mayer* once again, the court noted that the “great weight of authority in this country is that divorces granted in foreign countries to persons who are domiciliaries of the United States are not valid and enforceable.”⁹⁰

VI. Conclusion

The lessons to be learned from the cases on comity from the BIA are that the scrutiny applied to divorces from foreign countries is very close. While genuine divorces, undertaken in good faith, following a wide variety of customs and legal traditions, are capable of recognition, it can be very difficult for the parties to document, particularly in situations where tribal and consent divorces are involved. Some of the equitable principles applied by state courts to ameliorate the harshest outcomes that might result from a lack of recognition of foreign divorces,

namely estoppel and the presumption of validity of subsequent marriages, are thus far absent in the immigration context.

¹ *Triennial Comprehensive Report on Immigration*, USCIS (2002). See Appendix I.

² For a more complete reference listing of cases, see Appendix II.

³ 8 U.S.C 1154(a)(1)(A)(iii)(II)(aa)(BB) (an alien described in this subclause is an “who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such citizen of the United States.”).

⁴ See, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) and *Armstrong v. Armstrong*, 508 F. 2d 348 (1st Cir. 1974).

⁵ 27B C.J.S., Divorce, sections 326-333 (1959).

⁶ 2 Swanst. 326, Cited in *Hilton v. Guyot*, 159 U.S. 113 (1895).

⁷ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

⁸ Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/comity>.

⁹ *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978); *Everett v. Everett*, 345 So. 2d 586 (La. Ct. App. 1977); *Kugler v. Haitian Tours, Inc.*, 120 N.J. Super. 260, 293 A.2d 706 (1972); *Estate of Steffke v. Wisconsin Department of Revenue*, 65 Wis.2d 199, 222 N.W.2d 628 (1974); *Commonwealth v. Doughty*, 187 Pa. Super. 499, 144 A.2d 521 (1958); *Bobala v. Bobala*, 68 Ohio App. 63, 33 N.E.2d 845 (1940); *Golden v. Golden*, 41 N.M. 356, 68 P.2d 928 (1937).

¹⁰ There have been a number of determinations by the U.S. Social Security Administration, Veterans Administration, and Internal Revenue Service regarding the validity of foreign divorces based on the laws of the state of residence applicable with respect to claims for benefits. See also, 20 C.F.R. 404.314, SSR 66-1; 20 CFR 404.328(a), 404.1101, and 404.1104, SSR 72-61; 20 CFR 404.335(a), SSR 73-10a; 20 CFR 404.336, SSR 75-16; SSR 61-65; 20 CFR 404.340(c), SSR 88-15c, Section 202(g)(1)(A) of the Social Security Act (42 U.S.C. 402(g)(1)(A) (*Slessinger v. Secretary of Health and Human Services*, 1A Unempl. Ins. Rep. (CCH), 17,843 (1st Cir. 1987). (*Cunningham v. Harris*, 658 F.2d 239, 243 (4th Cir. 1981); *Thompson v. Harris*, 504 F. Supp. 653, 654 (D. Mass. 1980); *Lugot v. Harris*, 499 F. Supp. 1118 (D. Nev. 1980). For Veterans Administration, see 27 FR 6281, July 3, 1962, as amended by 35 FR 16831, October 31, 1970; 40 FR 53581, November 19, 1975; 52 FR 19349, May 22, 1987. For the IRS, see *Estate of Felt v. Comm’r*, 54 T.C.M. (CCH) 528 (1987).

¹¹ *Hyde v. Hyde*, 562 S.W.2d 194, 197 (Tenn. 1978) (finding “irreconcilable differences” substantially equivalent to “incompatibility of temperaments”). See also *Yoder v. Yoder*, 330 A.2d 825, 827 (Conn. Super. Ct. 1974) (noting that “[t]he grounds on which the Mexican divorce was granted do not differ so greatly from our current divorce law as to be considered repugnant”; extending comity to the Mexican divorce, despite the lack of domicile in Mexico since the parties did not contest the validity of the divorce). But see *Bruneau v. Bruneau*, 489 A.2d 1049 (Conn. App. Ct. 1985) (recognizing in equity but not at law a foreign divorce not based on domicile); *Sherman v. Sherman*, 1992 Conn. Super. LEXIS 3121, at *2 (Conn. Super. Ct. 1992). In *Sherman*, the Superior Court of Connecticut made no mention of *Yoder* in holding that “[i]t is uniformly true that, when collaterally attacked, our courts will not recognize a foreign divorce unless at least one of the spouses had a domicile in the foreign state.” *Id.*

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- ¹² *Hyde*, 562 A.2d at 198 (quoting *Farrar v. Farrar*, 553 S.W.2d 741, 745 (Tenn. 1977)).
- ¹³ 209 N.E.2d 709 (N.Y. 1965).
- ¹⁴ *Steffens v. Steffens*, 657 N.Y.S.2d 339 (N.Y. App. Div. 1997).
- ¹⁵ *Gorie*, 274 N.Y.S.2d at 987 (noting that “such divorce does not rise to a level much higher than the criticized and unrecognized mail-order divorces”).
- ¹⁶ *Henley v. Henley*, 95 Wash. App. 91, 974 P.2d 362 (Div. 2 1999), as amended, (Apr. 30, 1999).
- ¹⁷ *Watson v. Blakely*, 106 N.M. 687, 748 P.2d 984 (Ct. App. 1987); *Matter of Estate of Lovick*, 201 A.D.2d 736, 608 N.Y.S.2d 310 (2d Dep’t 1994); *Henley v. Henley*, 95 Wash. App. 91, 974 P.2d 362 (Div. 2 1999), as amended, (Apr. 30, 1999).
- ¹⁸ *Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371 (1995).
- ¹⁹ *Henley v. Henley*, 95 Wash. App. 91, 974 P.2d 362 (Div. 2 1999), as amended, (Apr. 30, 1999).
- ²⁰ *Everett v. Everett*, 345 So. 2d 586 (La. Ct. App. 4th Cir. 1977), writ denied, 349 So. 2d 329 (La. 1977).
- ²¹ *Kushnick v. Kushnick*, 196 Misc. 2d 140, 763 N.Y.S.2d 889 (Sup 2003).
- ²² 8 C.F.R. § 204.2(a)(2).
- ²³ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983); *Matter of Bautista*, 16 I&N Dec. 602 (B.I.A. 1978); *Matter of Arenas*, 15 I&N Dec. 174 (B.I.A. 1975); *Matter of P--*, 4 I&N Dec. 610 (B.I.A., Acting A.G. 1952).
- ²⁴ *Matter of Hosseinian* 19 I&N Dec. 453 (B.I.A. 1987), citing *Matter of Ma*, 15 I&N Dec. 70 (B.I.A. 1974).
- ²⁵ *Matter of Brantigan*, 11 I&N Dec. 493 (B.I.A. 1966).
- ²⁶ *Matter of Bok Nyeo Chung a.k.a. Bok Nyeo Lim* (B.I.A. 2005). 8 C.F.R. § 1204.8(d); *See Matter of T-S-Y-*, 7 I&N Dec. 582 (B.I.A. 1957).
- ²⁷ 8 CFR § 204.2(a)(2).
- ²⁸ *Matter of Revelo*, 16 I&N Dec. 685 (B.I.A. 1979) (INS has the power to challenge the validity of foreign divorces in visa petition proceedings); *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983); *Matter of Hann*, 18 I&N Dec. 59 (B.I.A. 1981). But see *Matter of San Juan*, 17 I&N Dec. 66 (B.I.A. 1979) (where neither the place of divorce nor the state where remarriage occurred would permit collateral attack of the divorce, INS must accept the divorce, and the subsequent marriage, as valid).
- ²⁹ *Matter of Hussein*, 15 I&N Dec. 736 (B.I.A. 1976) (where the parties to the marriage were born, married, and their children were born in the foreign country, there were sufficient contacts for that country’s courts to take jurisdiction over the case, notwithstanding that both of the parties to the marriage lived in New York).
- ³⁰ *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983) (a divorce decree issued by the appropriate civil authority, “unless irregular on its face” will be prima facie evidence of full compliance with local divorce procedures, though the INS can present evidence to rebut this presumption). But see *Matter of Chu*, 19 I&N Dec. 81 (B.I.A. 1984) (where there is “potential for fraud or error” in the issuance of certain foreign civil documents, they will not be viewed as conclusive proof of the legal proceeding they purport to represent, and the petitioner should be prepared to submit corroborating evidence).
- ³¹ *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983).

³² *Matter of Hosseinian*, 19 I&N Dec. 453 (B.I.A. 1987) (where California would not recognize foreign divorce, neither would INS); *Matter of San Juan*, 17 I&N Dec. 66 (B.I.A. 1979) (Puerto Rico granted divorce even though the petitioner complied with none of the jurisdictional requisites. Where New York later recognized the divorce as valid, INS must grant subsequent marriage petition). See *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983); *Matter of M—*, 7 I&N Dec. 556 (B.I.A. 1957); In the *Matter of H—*, 6 I&N Dec. 470 (B.I.A. 1954). See also Legal Opinion No. 97-9 of David Martin, INS General Counsel, entitled “Validity of Foreign Divorces and Subsequent Remarriage,” (June 25, 1997), reprinted in 75 Interpreter Releases 586 (April 27, 1998).

³³ *Matter of San Juan*, 17 I&N Dec. 66 (B.I.A. 1979). Cf. *Matter of Ma*, 15 I&N Dec. 70 (B.I.A. 1974) (even though divorce valid under Korean law, INS need not recognize its validity for immigration purposes).

³⁴ *Matter of Luna*, 18 I&N Dec. 385, 386 (B.I.A. 1983) (“The domicile of the parties has long been recognized as the primary, if not the exclusive, basis for the judicial power to grant a divorce”).

³⁵ *Id.*, (“(T)he applicable tests of jurisdiction are ordinarily those of the United States, rather than of the divorcing country”).

³⁶ *Matter of Weaver*, 16 I&N Dec. 730, 732 (B.I.A. 1979).

³⁷ *Id.*

³⁸ *Id.*; see *Matter of Sena*, 16 I&N Dec. 688 (B.I.A. 1979); *Matter of Allison*, 12 I&N Dec. 835 (B.I.A. 1968); In the *Matter of H—*, 6 I&N Dec. 470 (B.I.A. 1954).

³⁹ *Matter of Sena*, 16 I&N Dec. 688 (B.I.A. 1979). New Jersey later changed its position on mail order divorces. *Matter of Zambrano*, 18 I&N Dec. 46 (B.I.A. 1981).

⁴⁰ *Loughran v. Loughran*, 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed. 1219 (1934); *Matter of Hosseinian*, 19 I&N Dec. 453 (B.I.A. 1987); *Matter of Levine*, 13 I&N Dec. 244 (B.I.A. 1969); In the *Matter of P—*, 4 I&N Dec. 610 (B.I.A. 1952).

⁴¹ *Matter of Luna*, 18 I&N Dec. 385, 386, (B.I.A. 1983) (“(A) divorce obtained in a foreign country will not normally be recognized as valid if neither of the spouses had a domicile in that country, even though domicile is not a requirement for jurisdiction under the divorcing country’s laws”); In the *Matter of H—*, 6 I&N Dec. 470 (B.I.A. 1954).

⁴² In the *Matter of H—*, 6 I&N Dec. 470 (B.I.A. 1954).

⁴³ *Id.* (B.I.A. 1954). In fact, the remarriage occurred in Maryland, not in New York. However, the B.I.A. found that under full faith and credit principles, Maryland should respect New York’s determination regarding the divorce’s validity. In addition, the B.I.A. noted that had the parties actually traveled to Egypt and properly obtained a divorce while physically present there, New York would have been compelled under comity principles to recognize the foreign divorce.

⁴⁴ *Matter of Zambrano*, 18 I&N Dec. 46 (B.I.A. 1981); *Matter of Annang*, 14 I&N Dec. 502 (B.I.A. 1973). In most cases, the petitioner meets her burden by supplying USCIS with a certified copy of the divorce decree and translation. However, if USCIS has doubts regarding whether the foreign divorce was properly granted, it will consult the Library of Congress regarding the foreign country’s divorce laws. It may then ask the petitioner to supply additional information regarding how the divorce was obtained. *Matter of Hann*, 18 I&N Dec. 59 (B.I.A. 1981).

⁴⁵ *Matter of Luna*, 18 I&N Dec. 385 (B.I.A. 1983); In the *Matter of P—*, 4 I&N Dec. 610 (B.I.A. 1952).

⁴⁶ *Matter of Hosseinian*, 19 I&N Dec. 453 (B.I.A. 1987). The visa petition denied here was filed on behalf of the petitioner's third husband. The petitioner had earlier filed an immediate relative visa petition on behalf of her second husband, which the INS granted without questioning the validity of the Hungarian divorce. On appeal from the denial of the visa petition filed on behalf of her third spouse, the B.I.A. disagreed with the petitioner's argument that the INS was estopped from using the foreign divorce as the basis to deny the later visa application, when it had not done so with the earlier one.

⁴⁷ *Matter of Zambrano*, 18 I&N Dec. 46 (B.I.A. 1981).

⁴⁸ *Matter of Kumah*, 19 I&N Dec. 290 (B.I.A. 1985); *Matter of Faruque*, 10 I&N Dec. 561 (B.I.A. 1964). See also *Matter of Palsang*, 15 I&N Dec. 706 (B.I.A. 1976) (customary divorce effectuated in India); but see INS Cable No. HQ 1706-c (July 2, 1993), reprinted in 70 Interpreter Releases 1039 (Aug. 9, 1993) (United States Embassy in New Delhi now requires judicial decree confirming customary divorce).

⁴⁹ 8 CFR § 204.2(a)(2) (Sept. 9, 1992); INS Examinations Handbook, 11 Gordon & Mailman, Immigration Law & Procedure (hereinafter "Gordon & Mailman") App. I-209 (Relative Visa Petition, Prior Marriages); *Matter of Kumah*, 19 I&N Dec. 290 (B.I.A. 1985).

⁵⁰ *Matter of Dabaase*, 16 I&N Dec. 39 (B.I.A. 1976). However, USCIS will not necessarily accept an after-acquired judicial decree as conclusive proof of the customary divorce where there is the possibility of fraud and error in the issuance of the decree; the petitioner should also submit corroborating evidence of the customary divorce with the visa petition. *Matter of Kumah*, 19 I&N Dec. 290, 295 (B.I.A. 1985). In fact, if the petitioner fails to provide corroborating evidence, the B.I.A. has found that the INS could reasonably suspect that the court decree is fraudulent, under the assumption that the petitioner should be able to supply the INS with at least the same documents submitted to the court in order to obtain the confirming court decree. *Id.* The INS should inquire into fraud possibilities where other evidence in the record is inconsistent with information in the court decree. *Id.*

⁵¹ *Matter of Kumah*, 19 I&N Dec. 290 (B.I.A. 1985); *Matter of Akinola*, 15 I&N Dec. 359 (B.I.A. 1975); *Matter of Annang*, 14 I&N Dec. 502 (B.I.A. 1973).

⁵² *Matter of Dabaase*, 16 I&N Dec. 39 (B.I.A. 1976).

⁵³ Vol. 9 Foreign Affairs Manual (hereinafter "9 FAM"), Part IV, Appendix B/C/E, "Ghana, Republic of," (July 2, 1984), reprinted in 7 Gallagher, Immigration Law Service (2d ed.) (hereinafter "Immigration Law Service"). The Ghanaian court decree is "an essential element of proof in establishing the customary divorce in that if the petitioner is unable to persuade Ghanaian court officials that the decree of confirmation should be issued because of questions relating to the tribal affiliations of the parties concerned, the customary divorce law of that tribe, or the conformance to the pertinent ceremonial procedures, then that petitioner cannot satisfy his burden of proving the claimed customary divorce for purposes of our immigration laws." *Matter of Kumah*, 19 I&N Dec. 290, 294 (B.I.A. 1985).

⁵⁴ *Matter of Kumah*, 19 I&N Dec. 290 (B.I.A. 1985).

⁵⁵ INS Cable HQ 1706-C (July 2, 1993) to all field offices disseminating information received from the United States Embassy in New Delhi, reprinted in 70 Interpreter Releases 1039 (Aug. 9, 1993).

⁵⁶ *Chertok v. Chertok*, 208 A.D. 161; 203 N.Y.S. 163 (N.Y. App. Div. 1924).

⁵⁷ *Chaudry v. Chaudry*, 159 N.J. Super. 566, 388 A.2d 1000 (1978).

⁵⁸ *Id.*

⁵⁹ *Matter of Hosseinian* 19 I&N Dec. 453, (B.I.A. 1987).

⁶⁰ *Id.* at 456.

⁶¹ *Dulai v. INS*, 42 F.3d 1399 (9th Cir. 1994)

⁶² Both parties had been married and divorced. Mrs. Dulai had been married twice and had four children. Mr. Dulai had also married Virginia Laure Neslin in early 1983 only to discover that she was married to another man and had not properly divorced him. On August 12, 1983, Mr. Dulai obtained a declaration of invalidity of this marriage from the King County Superior Court. No immigration benefits were ever sought from this good faith but invalid marriage.

⁶³ See Marriage Act § 29(2). (“Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.”)

⁶⁴ *Matter of Karim*, 14 I&N Dec. 417 (B.I.A. 1973).

⁶⁵ *Id.* at 419

⁶⁶ *Matter of Kumah*, 19 I&N Dec. 290 (B.I.A. (1985)

⁶⁷ *Matter of DaBaase*, 16 I&N Dec. 39 (B.I.A. 1976); *Matter of Akinola*, 15 I&N Dec. 359 (B.I.A. 1975) (“If the party to the tribal divorce prefers to prove the validity of the proceeding without the assistance of the Ghanaian judicial system, he must provide evidence which establishes (1) the tribe to which he belongs, (2) the current customary divorce law of that tribe, (3) the fact that the pertinent ceremonial procedures were followed.”)

⁶⁸ *Matter of DaBaase*, 16 I&N Dec. 720 (B.I.A. 1979), *aff’d*, *DaBaase v. INS*, 627 F.2d 117 (8th Cir. 1980) (per curiam), *Matter of DaBasse*, 16 I&N Dec. 39 (B.I.A. 1976); *Matter of Akinola*, *supra*.

⁶⁹ *Matter of DaBaase*, 16 I&N Dec. 720 (B.I.A. 1979), *aff’d* *DaBaase v. INS*, 627 F.2d 117 (8th Cir. 1980) (per curiam); *Matter of DaBaase*, 16 I&N Dec. 39 (B.I.A. 1976); *Matter of Akinola*, *supra*.

⁷⁰ *Matter of Akinola*, 15 I&N Dec. 359 (B.I.A. 1975).

⁷¹ *Matter of DaBaase*, 16 I&N Dec. 39 (B.I.A. 1976).

⁷² See Vol. 9, Foreign Affairs Manual, Part IV, Appendix B/C/E, ‘Ghana, Republic of,’ as amended on July 9, 1982.

⁷³ Vol. 9, Foreign Affairs Manual, Part IV, Appendix B/C/E, ‘Ghana, Republic of,’ as amended on July 27, 1984

⁷⁴ *Matter of Chu*, Interim Decision 2966 (B.I.A. 1984)

⁷⁵ *Matter of Palsang*, 15 I&N Dec. 706 (B.I.A. 1976).

⁷⁶ *Id.* at 707.

⁷⁷ *Id.* at 707.

⁷⁸ 2-7 Lee’s North Carolina Family Law § 7.70.

⁷⁹ *Mayer v. Mayer*, 66 N.C. App. 522; 311 S.E.2d 659 (1984).

⁸⁰ *Atassi v. Atassi*, 117 N.C. App. 506; 451 S.E.2d 371 (1995).

⁸¹ *Mayer v. Mayer*, 66 N.C. App. 522; 311 S.E.2d 659 (1984).

⁸² *Id.*, 311 S.E.2d at 665.

⁸³ *Id.*, 311 S.E.2d at 669.

⁸⁴ *Atassi v. Atassi*, 117 N.C. App. 506; 451 S.E.2d 371 (1995).

⁸⁵ *Mayer*, 66 N.C. App. at 527-28, 311 S.E.2d at 663-64. (Citations omitted.)

⁸⁶ *Williams II*, 325 U.S. at 229, 89 L. Ed. at 1581.

⁸⁷ *Farnsworth v. Jones*, 114 N.C. App. 182, 186, 441 S.E.2d 597, 600 (1994), quoting *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972).

⁸⁸ *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 331 S.E.2d 744 (1985).

⁸⁹ *Burke v. Harrington*, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

⁹⁰ *Mayer* at 529, 311 S.E.2d at 664.