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Breaking the Law to Be within the Law

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I. INTRODUCTION

For many, marrying an American citizen is the “simplest and quickest way of immigrating to this country.” Of the various immigration policies and procedures subject to continuous debate, perhaps the most intriguing is that of “sham” marriages. A sham or fraudulent marriage is a marriage contracted for the sole purpose of obtaining legal status in the United States. Under the federal statutes forbidding sham marriages, it appears that the crime is not the marriage itself, but rather the conspiracy to violate immigration laws. For example, 18 U.S.C. § 371 makes it a crime to “conspire either to commit any offense against the United States, or to defraud the United States . . .” Section 1325(c) of Title 8 of the United States Code goes a step further, providing that “[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.”

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3. Id.
The problem of sham marriages is important to address, mainly because the increasing number of fraudulent marriages undermines the integrity of the United States immigration system. Congress has made several attempts to improve the immigration system, namely by implementing the Immigration and Control Act of 1986 ("IRCA") and the Marriage Fraud Amendments of 1986 ("IMFA" or "Amendments"). While both Acts have affected some positive change, neither has been as successful as predicted, leaving several loose ends without creating a viable solution to the problem.

This Article will offer an alternative approach. First, the Article will trace the history of sham marriages in the United States. Second, it will analyze congressional attempts to limit sham marriages. Finally, this Article will argue for the adoption of a new law specifically targeting a well-defined group that will incorporate several provisions from the IRCA and IMFA Acts and will create an alternative route for immigrants to obtain legal status in the United States without breaking the law.

II. HISTORY

A. The Problem of Sham Marriages

According to the latest United States Census Bureau data, the estimated number of immigrants (legal and illegal persons living in the United States who were not American citizens at birth) in the country reached a new record of forty million in 2010, representing nearly thirteen per cent of the total population (5.6% naturalized citizens and 7.3% noncitizens). New immigration, both legal and illegal, plus births by immigrants, added 22 million residents to the country over the last decade, equal to eighty percent of total population growth. Immigrants represent one-sixth of the United States' total population. In 2010, the immigrant population was double that of 1990, nearly triple that of 1980, and quad-
rule that of 1970, when it was at 9.6 million. In addition, estimates suggest that "between twelve and fifteen million new immigrants will likely settle in the United States in the next decade."

Among the different categories of immigrants who are eligible to gain legal status in the United States, the family-sponsored category is one of the most popular. In order "to promote family unity, immigration laws allow United States citizens to petition for certain qualified relatives to come and live permanently in the United States." Specifically, the Immigration and Nationality Act ("INA") provides that "aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence [include] . . . family-sponsored immigrants . . . ." Additionally, the INA gives immediate relatives special immigration priority by providing them with an unlimited number of visas, which allows them to circumvent the typical visa waiting period. The term "immediate relatives" means the unmarried children under the age of twenty-one, spouses, and parents of a United States citizen. While there are other categories of family-sponsored immigrants, they are limited.

Nonetheless, marriage to an American citizen is still considered to be the easiest and the fastest path toward becoming a lawful permanent American resident. In fact, between 1998 and 2007, more than 2.3 million foreign nationals gained lawful permanent resident ("LPR") status through marriage to an American citizen, accounting for more than a quarter of all green cards issued in

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11. Id. at 9.
12. Id. at 5.
13. See 8 U.S.C. § 1151(c) (2009). Other categories of immigrants eligible to gain legal status include "employment-based" immigrants and diversity lottery winners, who are also known as green card holders. Id. § 1151(a).
14. Id.
15. Id. § 1151(c).
18. Id. § 1151(c)(1)(A). The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is, subject to subparagraph (B), equal to (i) 480,000. Id.
2007. That number has increased dramatically since 1985, and has quintupled since 1970. In 2006 and 2007, nearly twice as many green cards were issued to spouses of American citizens than for all employment-based immigration categories combined.

The process of obtaining legal status in the United States through marriage to an American citizen is complicated. First, the United States citizen or her immediate relative must file a Form I-130 with the U.S. Citizenship and Immigration Service ("USCIS") if the person lives in the United States or, if she lives abroad, at an American embassy or consulate. The Form I-130 must either be pending approval or approved by USCIS. Second, after an alien receives a Form I-797, Notice of Action, showing that the Form I-130 has either been received by USCIS or approved, then he/she must file a Form I-485. When filing an I-485 application package, they must include a copy of the Form I-130 receipt or approval notice (the Form I-797). The alien's spouse must then apply for "adjustment of status" to have the "alien lawfully admitted for permanent residence." A couple typically files the petition and the application for adjustment simultaneously.

Unfortunately, this way of obtaining a legal status in the United States has opened a door to many immigrants who are willing to enter into a sham marriage for the sole purpose of obtaining legal status. Marriage fraud in immigration has been an issue for years. As one commentator has explained, "[m]ore than 20 years ago the United States Senate held hearings on the topic and concluded that it was a significant and growing problem, but only a few of the recommendations proposed ever went anywhere."
While there is no way of determining the real number of sham marriages, according to one USCIS officer, the number could be as high as thirty percent of all immigrant marriages: "from almost 30 interviews conducted by one officer a week, at least five couples have fraudulent relationships." Another commentator similarly noted that "[t]here is no way of knowing what percentage of the 300,000-plus spouses who gain green cards each year through marriage to American citizens or LPRs do so based on a fraudulent relationship, but consular officers interviewed for this Backgrounder offered estimates ranging from 5 to 30 percent."

Accordingly, sham marriage is one of the main problems facing the immigration system. As the USCIS officer interviewed for this Article explained:

[T]he biggest problem is that the way the law is written now it promotes marriage fraud. There are no alternative routes, besides marrying an American citizen, for obtaining legal status for aliens who originally came to the United States with a valid visa but for one reason or another overstayed it and automatically became disqualified from any other immigration program.

In addition, the increasing number of sham marriages undermines the integrity of the legal immigration system in the United States. For example, "legitimate international couples can face longer wait times due to the huge number of bogus marriage petitions that bog down an already slow and cumbersome visa bureaucracy." Also, the issue is important to address for national security reasons. Terrorists can easily exploit the current system to obtain entry to the United States. It is important to make changes in the immigration law in order to prevent terrorists from taking advantage of the system and obtaining legal status through fraud.

Recognizing the true intent with which the parties entered the marriage is the biggest difficulty that USCIS officers face in determining whether a marriage is a legitimate one. The court in

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31. Seminara, supra note 19, at 12.
32. Interview with USCIS officer, supra note 30.
33. Seminara, supra note 19, at 2.
34. Id. at 1.
35. Interview with USCIS officer, supra note 30.
Marblex Design International, Inc. v. Stevens pointed out that "[the] federal statutes do not address the question of the validity of a marriage; they only address the intent with which the parties entered the marriage, as a portion of a conspiracy. In short, no federal statute says the marriage, itself, is 'illegal.'" The only documents that immigration officers have to work with on the first stage of the process, in order to determine the true intent with which the parties entered the marriage, are the petition itself, marriage and birth certificates, passports, supporting documents and photographs of the couple that are meant to prove the validity of the relationship. Therefore, the immigration officers "essentially are flying blind in approving marriage and fiancé-based petitions." The officers must try to identify potential fraud at the first stage of reviewing the file and petition. Different income levels (such as when one partner is on disability/welfare and the second one has a doctoral degree), different addresses, lack of proof of marriage, and large age differences give an officer a red flag, and the petition is forwarded to the second stage of further investigation.

The United States Attorney General has delegated broad investigatory powers to officers of the INS; among them are the powers to take evidence and to conduct searches. Accordingly, an officer has the authority to conduct a "Stokes interview" in all suspected marriage fraud cases. During such an interview, the officer has an opportunity to meet with the couple in person for the first time. First the officer conducts an interview with the American citizen and asks questions about the couple's relationship. Questions can vary from the basic ones, such as where the couple met, how long they have been together, and where they got married, to more spe-

37. Seminara, supra note 19, at 3.
38. Id.
39. See id.
40. Interview with USCIS officer, supra note 30.
42. The name "Stokes interview" is derived from the case Stokes v. INS, 393 F. Supp. 24 (S.D.N.Y. 1975), in which the Federal District Court for the Southern District of New York ruled that every I-130 spouse petition filed in the New York District Office in which a question of the bona fides of the marriage is at issue must be adjudicated using the specific guidelines. The officer may consider interviewing the petitioner and beneficiary separately when there is suspicion regarding the documentation that was submitted, the beneficiary and petitioner have given inconsistent testimony, or other factors that may indicate fraud. Id. It is at the officer's discretion when determining if parties should be interviewed separately. Id.
cific questions that require more detailed answers. For example, a hearing officer might ask one of the parties to describe the couple’s house, her significant other’s morning routine or recent activities during the weekend. Then the officer asks the alien the same questions without a partner present. Finally, he brings them into the room together and gives the couple a chance to explain any discrepancies in their answers.\footnote{43}

Observing the couple’s demeanor and body language is especially important for the officer conducting the interview.\footnote{44} According to the USCIS officer:

‘Legitimate’ couples act more normal—they look at each other during the conversation, interrupt each other, sometimes even argue—where the potential fraud couple does not have the same behavior and in most instances the alien, since he or she is the one who has the most to lose, is the one who answers a majority of the questions even if they were not addressed to him or her.\footnote{45}

If, after the initial interview, the USCIS officer still believes that the couple’s marriage is potentially fraudulent their file is sent to a Fraud Detection and National Security (“FDNS”) officer.\footnote{46} USCIS created FDNS in 2004 in order to “strengthen USCIS’s efforts to ensure immigration benefits are not granted to individuals who pose a threat to national security or public safety, or who seek to defraud our immigration system.”\footnote{47} FDNS officers resolve background check information, “engage in fraud assessments to determine the types and volumes of fraud in certain immigration benefits programs,” and systematically perform reviews “of certain types of applications or petitions to ensure the integrity of the immigration benefits system.”\footnote{48} The FDNS officer will visit the couple and will try to determine if they are living together and if they are in a real relationship.\footnote{49}

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43. Interview with USCIS officer, \textit{supra} note 30.
44. \textit{Id.}
45. \textit{Id.}
46. \textit{Fraud Detention and National Security Directorate, U.S. Citizenship and Immigration Services,} http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ae89243c6a7543f6d1a/?vgnextoid=66965ddca7977210VgnVCM100000082ca60aRCRD&vgnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD (last updated Nov. 18, 2011).
47. \textit{Id.}
48. \textit{Id.}
49. See \textit{id.}
the FDNS officer engages in a number of investigatory tactics, such as staking out the couple's home, talking with neighbors, visiting their offices or even contacting the citizen's parents.\textsuperscript{50}

B. Congressional Attempts to Limit Sham Marriages

Congress has implemented some changes to the immigration law and procedures in order to limit immigration fraud. For example, the Legalization Act (the "Act"), also known as the Immigration Reform and Control Act of 1986,\textsuperscript{51} was an attempt to improve the immigration system. The Act provided a means for certain aliens who have maintained an unlawful residence in the United States since before January 1, 1982, and who were physically present in the United States from November 6, 1986 until the date of filing of the application, to become temporary residents.\textsuperscript{52} Upon application and fulfillment of continuous residence and other conditions, the alien may file for permanent residence.\textsuperscript{53} In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that her period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the government as of such date.\textsuperscript{54} The Act also required that the applicant be admissible to the U.S. as an immigrant, registered under the Military Selective Service Act, not have been convicted of a felony or three or more misdemeanors, and not have persecuted others.\textsuperscript{55} Applicants also need to meet the requirements for English language proficiency and knowledge and understanding of United States history and government.\textsuperscript{56} In addition, IRCA created civil and criminal penalties for the United States employers who knowingly hired undocumented immigrants.\textsuperscript{57} Nearly 1.6 million persons received LPR status under IRCA's general legalization program.\textsuperscript{58}

\textsuperscript{50} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. § 1255(a)(2)(B).
\textsuperscript{55} Id. § 1255(a)(4).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
Unfortunately, the IRCA was not as successful as predicted. One of reasons was the ambiguous language of the Act itself. For example, in *Farzad v. Chandler*, the court discussed the ambiguous nature of the Act, especially the phrase “known to Government” within the meaning of the provision.  

Farzad was a native and citizen of Iran who entered the United States on September 19, 1976 as a nonimmigrant student under the provisions of 8 U.S.C. § 1101(a)(15)(F). He was ultimately authorized to remain in this country until June 1, 1982 but overstayed his visa and engaged in unauthorized employment in violation of Section 241(a)(9) of the INA. Farzad applied for a stay of deportation and satisfied all the requirements of IRCA but was denied by the INS because the agency did not know of his unlawful status (i.e., his unauthorized employment). INS relied on its proposed regulations, interpreting the phrase “known to the Government” to mean “known to INS” and as excluding “other government agents such as Internal Revenue Service.” In addition, “INS maintain[ed] that ‘known’ means that, before January 1, 1982, INS: (1) received factual information constituting a violation of the alien’s non-immigrant status which was recorded in the official INS alien file, or (2) had already made an affirmative determination of deportability.” The court concluded that “this interpretation appeared implausible because it collapsed the two bases for legalization.”

First, the vast majority of nonimmigrants do not have an official file with the INS unless and until they are somehow determined to have been in violation of their status. . . . INS does not record how or when it initially learned of violation of status. Without such record-keeping, INS would make it impossible, through its own practices, for an applicant to meet the burden required by its interpretation of the Act.

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 692.
64. *Id.* at 693.
65. *Id.* at 694.
66. *Id.*
Second, "INS's position that 'the Government' means only the INS is not supported by the language of the Reform Act." Therefore, the court concluded that "Congress intended the phrase 'the Government' to be broader than merely the INS, and at least broad enough to include the Internal Revenue Service and the Social Security Administration." Unfortunately, the Act has not been successful in its attempt to limit illegal immigration; in fact, it has attracted more illegal immigrants who have wanted to take advantage of the new changes.

Congress has also enacted legislation directed at immigration marriage law, the most important of which is the Immigration Marriage Fraud Amendments of 1986 ("IMFA"). The IMFA were enacted in response to a growing concern about aliens seeking permanent residence in the United States on the basis of marriage to a citizen or resident when either the alien acting alone, or the alien and his or her reputed spouse acting in concert, married for the sole purpose of obtaining permanent residence. Section 216 created a conditional residence status for aliens who acquire permanent residence based on recent marriages. To do so, persons subject to the provisions of IMFA are required to petition the USCIS two years after obtaining residence for removal of the conditional basis of the residence. After a petition for removal is properly filed, the INS interviews the couple to determine if the marriage is bona fide. In the petition, the spouses must state that: (1) the marriage is valid under the laws of the jurisdictions where celebrated, (2) the marriage has not been judicially annulled or terminated, (3) the marriage was not entered into solely to obtain an immigration benefit, and (4) no fee or other consideration was given, excepting attorney's fees, in filing the petition.

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67. *Id.* at 693.
68. *Id.*
69. Interview with USCIS officer, *supra* note 30.
70. 8 U.S.C. § 1186(a) (2009); *see also* 8 C.F.R. § 216 (2009).
71. 8 C.F.R. § 216 (2009). Congress was particularly moved by the testimony of numerous citizens whose alien spouses had left them shortly after obtaining residence, as well as the testimony of Service representatives concerned with "marriage for hire" schemes. *Id.*
72. *Id.*
73. *See* 8 U.S.C. § 1186(a)(c)(1)(B); *see also* 8 C.F.R. § 216.4(b)(1) (1997) (requiring the regional service center director "to determine whether to waive the interview required by the Act. If satisfied that the marriage was not for the purpose of evading the immigration laws, the regional service center director may waive the interview and approve the petition.").
74. 8 C.F.R. § 216.4(a)(5). The petition "shall be accompanied by evidence that the marriage was not entered into for purposes of evading the immigration laws" and may
Failure to properly file a petition for removal, or denial of the petition, will result in the alien losing residence status and being removed from the United States as a deportable alien.  

It is important to note that the Act itself does not contain a statutory definition of "marriage" that would aid the INS in evaluating a marriage under immigration law. However, the Supreme Court first formulated a definition of "marriage" in *Lutwak v. United States*, stating, "[t]he common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien spouses' in the War Brides Act, is that two parties have undertaken to establish a life together and assume certain duties and obligations." The Court also noted that "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship."

Historically, the INS tried to implement its own interpretation of the Act by including a "viability" standard when judging whether to grant the permanent resident status for the alien spouse. The *Chan v. Bell* case stated that there is no reference in the Act to marriage viability or solidity. The court in *Chan* criticized the INS's proposed drafting of the Act because it would have included a "viability" standard: "The construction proposed by the Service is inherently incompatible with due process, as it would vest in that agency an unreasonably wide, and essentially unreviewable discretion to determine which marriages are or are not viable."

include documents showing joint ownership of property, joint tenancy, children's birth certificates, financial resources, affidavits of third parties. *Id.*

75. *Id.* § 216.4(a)(6).

76. Domestic relations matters are reserved to the States under the Tenth Amendment. U.S. CONST. amend. X ("The power not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people."). See also *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.").


78. *Id.*


80. Chan v. Bell, 464 F. Supp. 125, 129 (D.D.C. 1978). "We find no requirement in the statute that . . . a marriage, once lawfully performed according to state law, is to be deemed insufficient proof of a 'valid marriage' merely because at some later time the marriage is either terminated, or the parties separate." *Id.*

81. *Id.* at 129. See also *Johl v. United States*, 370 F.2d 174, 176 (9th Cir. 1966) ("Serious problems of vagueness may well be presented by the fact that the 'normal' marriage is nowhere defined and that differing views as to this standard may be entertained by differ-
Similarly, in *Menezes v. INS*, 82 the Ninth Circuit Court of Appeals held that "if the marriage had been entered into in good faith, the INS could not consider its continuing viability in passing upon an application for permanent resident status submitted under the fiancé statute ...except insofar as it was relevant to the parties’ intent at the time of the marriage." 83 In reaching that decision, the court relied upon *Bark v. INS*, in which the INS denied adjustment of status to an alien spouse whose marriage, it asserted, was a sham. 84 The court in *Bark* held that evidence of separation of the parties is insufficient by itself to prove that a marriage was not bona fide when it was celebrated. 85 The court concluded that "[a]liens cannot be required to have more conventional or more successful marriages than citizens" and emphasized that "conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married." 86 After receiving similar rulings in other cases, the Board of Immigration Appeals ("BIA") accepted the courts’ mandate that if the spouses were living apart and if "there was no evidence of lack of intent to make a life together at the beginning of the marriage, the INS cannot deny the benefit solely because the parties do not live together." 87

III. ANALYSIS

A. The Failures of IMFA and IRCA

Both the IMFA and the IRCA were Congress’ attempt to try to fix the immigration problem and limit the number of illegal immigrants entering this county. By implementing both of those Acts, Congress was pursuing the objective of better serving the integration and public safety goals of legalization programs. Unfortunately, neither Act has been as successful as predicted, leaving many loopholes that have created more problems than solutions.

83. *Id.* at 1033 n.6.
84. 511 F.2d 1200 (9th Cir. 1975).
85. *Id.* at 1202.
86. *Id.* at 1201-02 (citing Lutwak v. United States, 344 U.S. 604, 610 (1953)).
Before addressing the negative factors of the IMFA, it is important to note some positive effects the Act has had on immigration policy and procedures. First, and probably most importantly, the two year conditional status of an alien who married an American citizen gives USCIS officers a longer time frame in which to judge and determine whether a true and real marital relationship exists. Additionally, the two-year requirement acts as an effective deterrent to an alien who wants to enter into a sham marriage solely for obtaining a legal status. The alien understands that for the next two years, she will need to live in a constant lie by pretending to have a real marriage relationship. She will also need to be ready for the possibility of being checked on by the USCIS officers at any time. Not all immigrants are willing to sacrifice their real relationships and their time and undergo all of the stress and expenditures for that two year period in order to keep up appearances of a marriage. Second, IMFA moved in the right direction by shifting the burden of proving that the marriage is bona fide to the citizen and alien spouses. Third, IMFA places the burden on petitioning spouses to make a timely petition during the ninety-day period before the two years expire; noncompliance with the filing deadlines can result in somewhat harsh penalties such as termination of permanent status and ultimately deportation of the alien spouse. Finally, the IMFA Act is trying to positively serve the traditional goal of saving family unity.

Putting the benefits of the IMFA aside, the Amendments leave multiple loopholes that negatively impact the immigration system. One of the biggest downfalls is the lack of clarifying language as to the definition of “marriage” and the lack of a “viability of marriage” standard. The USCIS recognized those two requirements as being important and appealed to Congress for amendments in the Act, claiming that those changes would make it more effective at deterring and detecting marriages entered into solely to evade the immigration laws. The Amendments, however, do not contain a specific definition or a list of “bona fide” marriage characteristics for immigration purposes; nor does it define or require a “viable marriage” standard. One commentator has explained that

88. 8 U.S.C. § 1186a(d)(1)(B) (2009). Under these provisions, the petitioning spouses must make the requisite allegations and provide the addresses of residences and employers. Id.
89. Id. § 1186a(a)(2).
90. Tingle, supra note 79, at 741.
the omission of the definition was intentional: "Congress's purpose in not providing this definition can be interpreted as recognition of the validity of the courts' criticism of the Service's viability standard." Based on the cases discussed previously, the parties to a sham marriage can live apart and simply refrain from divorce and that alone does not disqualify them from the benefit. Although the USCIS does require a higher level of proof that marriages were not fraudulently entered into with couples that are living apart, it does not discourage aliens from entering into a sham marriage since there is no "official" requirement of cohabitation. Requiring the couple to live together is an important issue that needs to be addressed. This change in the law will not be a burden on legitimate couples, who presumably are living together. However, for the fraudulent couples, it will become an obstacle in their actions to defraud the system and will act as a possible deterrent from entering into a sham marriage.

Another negative aspect of IMFA is that it increases the workload for an already understaffed USCIS office. The lack of manpower and resources existed even before the agency took on the role of enforcing the Amendments. The additional procedures and paperwork caused by the IMFA have created a significant burden on the office. For example, the officers need to interview up to six couples a day. This daily workload is excessive, and it is unrealistic to believe that each file will be explored and investigated in depth. The process is better described as a "screening," during which the officer merely looks for something unusual and suspicious, rather than an in-depth, thorough investigation. Because IMFA creates a larger workload for USCIS officers, Congress should have provided officials with the appropriate funding that would compensate for the new changes in the system. Congress also should have created more formal training programs to inform officers of the existing and new techniques of preventing sham marriages.

92. Tingle, supra note 79, at 752.
95. Interview with USCIS officer, supra note 30.
96. Id.
97. Id.
98. Id.
Without so intending, the Amendments created a less favored status for alien/citizen marriages. By promoting family unity, it undermined the existence of honest, "legitimate" marriages and infringed upon the rights of law-abiding spouses, something IMFA's drafters had feared. Legitimate couples need to undergo the same process as a suspected fraudulent one, which requires them to spend their time and resources and undergo emotional stress during the interview process. Some questions often explore more intimate aspects of the couple's marriage, bordering on an invasion of privacy.

Moreover, IMFA aggravated already harmful domestic situations for immigrant women who are forced by necessity to live apart due to abuse by their citizen spouse. Based on the provisions of the Amendments, battered immigrant spouses have the choice of either remaining in the abusive relationship for at least two years in order for their conditional resident status to be removed or leaving the abusive partner and risking deportation or withdrawal of the petition by the abusive, sponsoring spouse. As one group explained during the Congressional hearings on the Amendments, "[t]he already considerable barriers to escaping an abusive spouse become seemingly insurmountable to a woman who is waiting for the lapse of the two year period in order to complete the process of immigrating legally."

Congress did attempt to respond to this problem by enacting the Immigration Act of 1990, which allowed a battered spouse to file

99. "Specific objections to the Service's proposed two year conditional increased workload for an already understaffed Service, creating less-favored status for alien/citizen marriages, and 'locking in' parties to what could become an intolerable relationship." Tingle, supra note 79, at 742.

100. "A provision that deterred sham marriages but simultaneously crippled honest marriages would not be in keeping with the overall purpose of family reunification." Tingle, supra note 79, at 742; id. at 752 (quoting statement of Rep. Frank: "[A] bill that does both protect the innocent and give the authorities the tools to go after the guilty.").

101. Interview with USCIS officer, supra note 30.


103. Id. at 679 (quoting statement of Rep. Louise M. Slaughter who stated that the vagueness of the IMFA places a battered immigrant woman in dilemma of facing an abusive husband or risking deportation to a country that has ceased to be her home).

104. 8 U.S.C. § 1186a(c)(4)(C) (2009). An immigrant spouse must demonstrate that she entered into the qualifying marriage in good faith, either she or her child was battered or subjected to extreme cruelty during the marriage, and she was not at fault in failing to file the joint petition and scheduling personal interview. Id.

The phrase 'was battered by or was the subject of extreme cruelty' includes, but is not limited to any forcible detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molest-
for a hardship waiver that would remove the conditional basis of the permanent residency status if certain conditions are met. However, the Immigration Act did not solve the problem. The power to grant a hardship waiver or battered spouse waiver is completely discretionary to the USCIS officer; thus there are no guarantees that a waiver will be granted even if all requirements are met.\textsuperscript{105} The standard is too subjective and lacks any uniformity: what one officer considers as an abusive relationship, another may not. Further, the IMFA can result in locking parties into an intolerable relationship.

IRCA has had less of an impact on immigration policies involving the family-based category of immigrants than the Marriage Fraud Amendments, but has nonetheless affected immigrants from that category. For example, the "IRCA did not provide derivative benefits to family members; therefore, IRCA beneficiaries had to wait to become LPRs and then petition for family members, which led to substantial backlogs in family-based immigration categories."\textsuperscript{106} As a result of these backlogs, "millions of persons with approved petitions (i.e., who had established a qualifying relationship to a US citizen or LPR) languished for years in unauthorized status."\textsuperscript{107} In some way IRCA contributed to a dramatic growth of the immigration population in the 1990s and the first half of the 2000s: "[t]his growth can be attributed in part to the failure of US legal immigration policies—which IRCA left almost entirely intact—to meet US labor market needs during these years."\textsuperscript{108} Despite all of the negative aspects, some provisions of IRCA can provide a good starting point for the recommendation discussed infra.

B. An Alternative Approach

In order to make the proper recommendations to solve the marriage fraud problem, one needs to delve deeper into the issue and

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\textsuperscript{8} C.F.R. § 216.
\textsuperscript{105} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. "It can also be attributed to inconsistent enforcement of the employer verification laws and flaws in the employer verification regime that make it difficult to detect when unauthorized workers present the legitimate documents of others." Id.
understand why aliens choose this avenue of obtaining legal status in the United States. The majority of people who obtain legal status from marriages to an American citizen are younger or are middle-aged people, ages 18-40. The majority of the young immigrants come to the United States on a student visa or travel visa. Thus, at the beginning of their stay they do have a legal status; the problem arises when they overstay their visas. Many aliens who come to the United States on a student visa settle down in the United States, build their lives here and consider this country their second home. The majority of immigrants come from countries that do not have economic stability, efficient government, or democratic liberties and offer no or very limited future career possibilities for the young population. It is no wonder that after a brief stay in this country, with unlimited opportunities and possibilities, a majority of immigrants decide to stay, even if it means breaking immigration law by overstaying their visas. As previously stated, aliens who overstay their visas for one reason or another "automatically become disqualified from any other immigration program besides marrying an American citizen." In short, this category of immigrants has no other alternatives to become a lawful resident of this country except by breaking the law and entering into a sham marriage. The irony is that essentially they are breaking the law in order to be within the law, allowing them to become legal in this country and become a productive member of society.

There are two main types of marriage fraud: "cash-for-vows" weddings, in which Americans are paid to wed, and "heartbreakers," in which foreigners trick Americans into believing their intentions are true, when they actually just want a green card. The typical fee for "cash-for vows" ranges between $5,000 and $10,000. Usually, the immigrants try to attract Americans that

109. Interview with USCIS officer, supra note 30.
110. Id.
111. Id.
112. In the author's own experience, a lot of students who come to the United States on student visas build their lives here, secure employment, build relationships, and consider this country their "home."
113. Camarota, supra note 9, at 15.
114. Interview with USCIS officer, supra note 30.
115. Seminara, supra note 19, at 2.
116. Id. at 7. An officer with experience in an Andean country in South Africa explained that "the going rate for bogus marriage there is $5,000," while officers with experience in the Pacific Rim noted that "many intending immigrants will pay up to $20,000 to marry an American." Id.
are on the lower end of the socioeconomic spectrum to marry them. For such people, $10,000 is pretty appealing, considering all they need to do is lie to the government. In addition, “most fraud perpetrators know that marriage fraud is extremely difficult to prove and few are ever punished.” The other kind of fake marriage, “heartbreakers,” is harder to prevent because it involves personal feelings and emotions: the American believes that the marriage is based on mutual affection and love, while the immigrant only wants to obtain a legal status. The most common victims are middle-aged American men who are desperate for companionship and affection and are willing to do anything for the exotic international bride, including marrying her. According to the USCIS officer, the problem is that American victims genuinely believe that their relationships are real and that their foreign partners love them, even if the evidence shows otherwise. They are literally “blindly in love.”

One possible and viable solution to the problem of sham marriages is creating an alternative route for immigrants to obtain legal status in the United States. One option is creating a statute that specifically addresses those who have overstayed their student or travel visas. Such a statute should not open the door for all foreigners who have overstayed their visas, but only to those who have proven to be productive members of society and intend to stay in this country. The basic conditions for obtaining the status for a qualified immigrant can be borrowed from the IRCA. For example, the applicant should not have been convicted of a felony or three or more misdemeanors. Moreover, the applicant should have registered under the Military Selective Service Act and satisfied the requirements for English language proficiency and knowledge and understanding of United States history and government. In addition, it is proposed that other, new requirements should be added, including the following: the applicant should have lived in the United States continuously for at least six years.

117. Interview with USCIS officer, supra note 30.
118. Seminara, supra note 19, at 8. “An immigrant’s workplace in the United States is often an ideal place for [immigrants] to find someone desperate or greedy enough to marry foreigners for cash.” Id.
119. Id. at 11.
120. Interview with USCIS officer supra note 30. See also Seminara, supra note 19, at 11. “Sometimes consular officers interview wide-eyed, love-stricken Americans who have no idea that the person they have just married or are about to marry has a track record of visa denials, fraud, or immigration violations . . .” Id.
years, the applicant should have records of paying taxes for each year employed in the United States, and the applicant should pay a fee of $10,000 to the government of the United States.

The proposed statute reads as follows:

The status of an alien has been inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien:

(1) makes an application for such adjustment and on the date of filing an application for adjustment of status, is present in the United States;

(2) (a) has been physically present in the United States for a continuous period of at least six years since the date of admission as a nonimmigrant; and

(b) throughout such period, has been a person of good moral character, as demonstrated by the following:

i. the applicant should have not been convicted of a felony or three or more misdemeanors;

ii. the applicant should have registered under the Military Selective Act;

iii. the applicant should have satisfied the requirements for English language proficiency and for knowledge and understanding of U.S. history and government; and

iv. the applicant should have filed a taxed return and paid taxes for all years employed in the United States.

(3) has, in the opinion of the Secretary of Homeland Security, justified that his or her continued presence in the United States (even if the applicant has overstayed his/her visa) is allowable on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and

(4) has paid a fee of $10,000 to the Attorney General of the United States.
This proposed statute will not only improve immigration policies, but it will also limit sham marriages. The first and most important benefit is that entering into a sham marriage will no longer be the only way of obtaining legal status for those immigrants who have overstayed their visas. The second advantage is that foreigners will no longer need to break the law in order to obtain legal status. Third, the conditions of obtaining legal status will encourage foreigners to be productive members of society, finish higher education, secure employment, timely file tax returns, and refrain from violating laws. Moreover, the USCIS will still have discretionary power in determining when the adjustment of the legal status is justified, taking into account all of the circumstances and evidence from the alien’s application.

The $10,000 fee is also important for several reasons. First, instead of paying the American citizen the fee to get married and defraud the immigration system of the United States, the fee goes toward obtaining legal resident status. If aliens were willing to pay this amount of money in order to break the law, there is little doubt that they would prefer to pay it to the government in order to obtain legal status without violating the law. Second, the fee will be contributed to the USCIS office, which will help to decrease the problems of understaffing and limited resources. Most importantly, the statute will not open the door to all foreigners who have overstayed their visas, but only to those who can prove that while remaining in the United States for over six years, they did not only build their lives in this country, but were productive members of society and benefited the country.

Like any other statute, this proposal has flaws and will no doubt draw criticism. For example, the possibility of obtaining legal status this way will encourage foreigners to intentionally overstay their visas. Second, by remaining in the United States after the expiration date of their legitimate visas, aliens will have violated the terms and conditions of the existing admission, which required indication of no intention of staying in this country illegally. Third, one could argue that the fee of obtaining the legal status is unconstitutional because one is basically “buying” his/her own legal status. Even though the proposed statute has some negative aspects, the benefits outweigh them. The proposed statute will not only assist in decreasing sham marriages in the United States, but will also help to improve the immigration system in general.

122. Interview with USCIS officer, supra note 30.
IV. CONCLUSION

With the increased number of sham marriages undermining the integrity of the immigration system in the United States, Congress should legislate proactively in order to eliminate, or at least to limit, negative consequences of illegal immigration. The only viable and logical solution to the problem of fraudulent marriages is enacting legislation that simultaneously creates an alternative route for those illegal persons with strong equitable ties and long tenure in the United States, while also screening out those applicants who are clearly abusing matrimonial immigration policy. Therefore, any future immigration legislation should recognize the causal roots of sham marriages, and as a result, be tailored to reduce the incentives that leave immigrants no option but to break the law in order to be within the law.