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Body

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by Zelda Howell*

Frequent scene: You have a consultation with a potential client. She has been dating a man from Mexico for a year and would like him to move to the United States. They have discussed marriage, but she would like to know what their immigration options are before they tie the knot.

K-1 Fiancé(E) Visa

Before we discuss how to de-mystify the two options for our potential client, we should go over a little background on the K-1 and the I-130 with immigrant visa. The K-1 fiancé(E) visa was introduced by Congress in 1970. For a K-1 beneficiary to obtain a K-1 visa and enter the United States, the U.S.-citizen petitioner must file Form I-129F with USCIS with:

1. Evidence of the petitioner's U.S. citizenship;
2. Proof that the petitioner and beneficiary have met in person in the two years prior to filing the petition;
3. Evidence of the petitioner and beneficiary's bona fide intent to marry within ninety days of the beneficiary's entry into the United States; and
4. Evidence that the petitioner and beneficiary are legally able and actually willing to conclude a valid marriage in the United States within ninety days of the beneficiary's arrival.[1]

Since its introduction, I-129F processing times have varied, making it a more or less attractive option when compared to the I-130/Immigrant Visa route. Currently, I-129F processing times are eight months. After the I-129F is approved, USCIS sends the petition to the National Visa Center, which

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[1] INA § 214(d), 8 U.S.C. § 1184(d).

sends the petitioner a notification that it received the approved petition and then passes it to the U.S. consulate that will conduct the K-1 visa interview. The K-1 beneficiary will need to complete the DS-160 online and provide the requested documents in the K visa packet to the consulate. Although the K-1 is a nonimmigrant visa, a medical exam is required prior to the interview. All grounds of inadmissibility contained in INA § 212 apply. Although a K-1 applicant must prove that he or she will not become a public charge, the I-864 is not required.[2] If a K-1 applicant is inadmissible on any ground that can be waived by an INA § 212(d)(3) waiver, he or she can apply for the waiver only if an immigrant waiver will be available after the marriage to the petitioner.[3] Currently, the 212(d)(3) waiver processing time is approximately six months.

Requirement that the Petitioner and Beneficiary Have Met

A common issue is the requirement that the parties have met in person within the two years prior to filing the petition. In many countries, prearranged marriage in which the couple agree to marry without having met is common, and some couples follow traditions and customs that prohibit meeting prior to the wedding day. INA § 214(d)(1) allows the Secretary of Homeland Security to waive this requirement ″in his discretion''; 8 C.F.R. § 214.2(k)(2) permits this exception in two situations:

> [I]f it is established that compliance would result in extreme hardship to the petitioner or that compliance would violate strict and long-established customs of the K-1 beneficiary's foreign culture or social practice, as where marriages are traditionally arranged by the parents of the contracting parties and the prospective bride and groom are prohibited from meeting subsequent to the arrangement and prior to the wedding day. In addition to establishing that the required meeting would be a violation of custom or practice, the petitioner must also establish that any and all other aspects of the traditional arrangements have been or will be met in accordance with the custom or practice.

The regulation does not define ″extreme hardship'' as it relates to this section. However, practitioners should look out for any factors in a client's situation that prevent him or her from undertaking a trip to visit the beneficiary, including health, finances, conditions in the beneficiary's country, mobility of the beneficiary, or significant family obligations of the petitioner (such as having small children who cannot travel or would not have a caretaker if the petitioner were to leave). In any case, the petitioner must submit significant evidence of the claimed hardship or hardships. It is also helpful to submit proof of an existing relationship, including any evidence that the petitioner and beneficiary have met in person at any point in the past and that they regularly communicate.

To meet the requirements for the ″strict and long-established customs'' exception, the couple must submit documentary evidence of the traditions or customs of the beneficiary's culture that prevent the couple from meeting in person. Documents regarding cultural customs from reputable sources are helpful, as are notarized affidavits from religious leaders, community members in leadership positions, or other appropriate officials detailing the customs and arrangements made for the couple. Notarized letters from the family members or individuals who arranged the marriage may also be helpful.

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[2] U.S. Department of State 9 Foreign Affairs Manual (FAM) 41.81 N4(b), *available* in vols. 17-19 of *Immigration Law and Procedure* or on Lexis.com or LexisAdvance.

[3] 9 FAM 41.81 NN9, 9.3.

Practitioners should note that USCIS values notarized affidavits above handwritten letters and typewritten letters that are signed but not notarized.

If the petitioner and beneficiary cannot prove that they have met in person within the two years prior to filing or that the requirement should be waived due to hardship or violation of the beneficiary's strict and long-established cultural or social practice, the petition will be denied. However, a denial will not prejudice the filing of a new I-129F once the petitioner and beneficiary have met in person and can submit the appropriate evidence.[4]

What if your client has met the beneficiary in person in the two years prior to filing but says she does not have evidence of the meeting? Our hypothetical client has driven through a land port of entry to meet the beneficiary in a rural area of Mexico. If she had taken a plane, she could submit the itinerary or copy of the air tickets. It is common for U.S. citizens not to receive stamps in their passports. However, she could submit copies of hotel accommodations that she stayed in on her way to meeting him or during her visit; copies of toll road records showing her route; photos of them together with the date and place of the photo written on the copies; affidavits of at least two other friends, family members, or other people with knowledge of the meeting or who were present; and her own statement, which must include the date, place, and circumstances of her meeting with the beneficiary. The petitioner's statement alone will not be sufficient to sustain an approval.

Showing Bona Fide Intent To Marry

If you have a client who is marrying the beneficiary based on an arrangement, there may be a contract or other promissory document regarding the marriage. In other cases, the intent to marry can be evidenced through photos of the engagement ceremony or the ring presented to the beneficiary, or through correspondence indicating the couple intends to marry. However, this requirement can be easily proven by submitting a statement from the petitioner stating that he or she intends to marry the beneficiary within ninety days of entry into the United States. Occasionally, USCIS and/or DOS requests a statement of intent to marry from the beneficiary as well.

After the Petition Is Approved

After the visa interview, the K-1 visa stamp will be put in the beneficiary's passport. As soon as the beneficiary enters the United States on the K-1 visa, which is usually single-entry and valid for up to six months, he or she has ninety days to legally marry the petitioner. The K-1 status expires in ninety days from entry. After the petitioner and beneficiary marry, the beneficiary must either file for adjustment of status or leave the country and apply for an immigrant visa in order to obtain permanent residence. A K-1 beneficiary is not authorized to work in the United States incident to status. However, he or she may work once the employment authorization document that is included in the adjustment of status is received.

If the beneficiary does not marry the K-1 petitioner within ninety days, he or she is ineligible to adjust status. However, if the marriage ends in separation or divorce, the K-1 may still file for AOS.[5] In

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[4] 8 C.F.R. § 212.2(k)(2).

[5] Matter of Sesay, 25 I. & N. Dec. 431 (BIA 2011).

addition, he or she cannot marry another U.S. citizen and then file for Adjustment of Status. Once the ninety days expires, if the beneficiary does not file for Adjustment he or she will be subject to removal as a visa overstay under INA § 237(a)(1)(B).[6]

Conditional Residence

If the petitioner and beneficiary have been married for less than two years by the time permanent residence is granted the beneficiary will receive a conditional permanent resident card (I-551) with a validity of two years and must file a joint I-751 Petition to Remove Conditions on Residence in the ninety days prior to the expiration of the I-551.[7] The petition should include any conditional resident children. The I-751 should be accompanied by evidence that marriage was entered into in good faith, demonstrated from documents from the date of the marriage to the time of the I-751. If the spouses have separated, but not legally divorced, by the time the I-751 must be filed, they can still file a joint petition, although they need to ensure they provide substantial evidence that they entered into the marriage in good faith. If, when the I-751 is filed, the couple has legally divorced; the U.S.-citizen spouse has passed away; or the conditional resident was battered or subject to extreme cruelty by the U.S.-citizen spouse, the conditional resident applies for a waiver of the joint filing requirement by selecting the appropriate reason on the form and including the appropriate evidence.

The conditional resident may also apply for a waiver of the joint filing requirement if termination of his or her status and subsequent removal would result in ″extreme hardship.'' No qualifying relative is required for this waiver; thus, the resident may prove hardship to himself or herself, dependent children of the marriage, or other family members. The statute and regulations state that USCIS ″shall consider circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis.''[8]

If the conditional resident fails to file the I-751 by the second anniversary of when conditional residence was granted (which should be the expiration date on the I-551), the residence status is automatically terminated and the noncitizen is subject to removal.[9] Form I-751 may be filed late if the noncitizen provides a written explanation and request excusing the late filing. The explanation must demonstrate that the delay was for good cause.[10]

K-2 Dependent Children

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6 8 U.S.C. § 1227(a)(1)(B).

7 INA § 216(a)(2), 8 U.S.C. § 1186a; 8 C.F.R. § 216.4.

8 INA § 216(c)(4)(D); *see also* 8 C.F.R. § 216.5(e)(1) (USCIS ″shall take into account only those factors that arose subsequent to the alien's entry as a conditional permanent resident'').

9 INA§ 216(c)(3); 8 C.F.R. § 216.3.

10 INA § 216.4(a)(6). USCIS instructions to Form I-751 state that the noncitizen may file a late petition ″If your failure to file was through no fault of your own'' and if the ″delay was due to extraordinary circumstances beyond your control and that the length of the delay was reasonable.'' Form I-751 Instructions 04/11/13, at 1.

Unmarried children of the principal K-1 beneficiary are eligible to apply for K-2 visas to accompany or follow to join the K-1.[11] The petitioner must list the beneficiary's children on the I-129F so that they may apply for and obtain visas at the consulate. Each dependent child must complete Form DS-160 and follow any requirements for visa issuance. Children receive K-2 nonimmigrant visas with the same validity as the K-1 principal beneficiary's. Once the principal marries the petitioner, the K-2 dependents are eligible to file for adjustment of status. Even if the petitioner and beneficiary married after a K-2 child turned eighteen (and thus the child would not meet the definition of stepchild in INA § 101(b)(1)) the child can adjust status.[12] Furthermore, in *Matter of Le* the BIA ruled that there is no requirement that a K-2 remain under twenty-one years old in order for the K-2 to adjust status.[13] To adjust status based on a K-2 visa, the applicant must establish that he or she was under twenty-one at the time of *admission* to the United States.[14]

Multiple Filing Restriction and Adam Walsh Act Cases

Although the INA is primarily concerned with the character and actions of the noncitizen beneficiary, there are two instances in which the character and actions of the U.S. citizen are scrutinized. In 2005, the International Marriage Broker Regulation Act (IMBRA) brought about new rules for the K-1 process, primarily limiting multiple filers and those who use the services of international marriage brokers.[15] Most commonly triggered is the ″multiple filing requirement'': If the K-1 petitioner has previously filed a K-1 petition for two or more beneficiaries, or if a K-1 petition was approved and less than two years has passed since the *filing* date of that petition, then the petitioner must file for a waiver of the filing limitation imposed by the IMBRA with Form I-129F. USCIS requests that evidence supporting a waiver request show proof of the death or incapacity of the prior K-1 beneficiary along with a written explanation.

In addition, a background check is performed by USCIS on every petitioner. If the petitioner has committed certain offenses and is a multiple filer, the K-1 petition may not be approved unless he or she requests a waiver and demonstrates extraordinary circumstances or that he or she was abused or subject to extreme cruelty at the time the offense was committed. These offenses include:

1. Domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, stalking;
2. Homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to commit any of these crimes; and
3. Crimes relating to a controlled substance or alcohol on three or more occasions, where such crimes did not arise from a single act.

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[11] INA § 101(a)(15)(K)(iii), ***8 U.S.C. § 1101(a)(15)(K)(iii)***.

[12] 8 C.F.R. § 214.2(k)(6)(ii).

[13] Matter of Le, 25 I. & N. Dec. 541 (BIA 2011).

[14] *Id.*; Regis v. Holder, 769 F.3d 878 (4th Cir. 2014).

[15] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-834, Subtitle D of Title VIII (§§ 831-834), ***119 Stat. 2960***, 3066-3077 (codified at 8 U.S.C. § 1375a(d)).

Waivers for multiple filers who have committed one or more of the above offenses must include a written request for the waiver explaining the circumstances of the offense and why discretion is merited.[16] Criminal records, including arrest reports, trial transcripts, and probation reports, as well as evidence of the petitioner's rehabilitation, must be submitted with the waiver request. If the petitioner has multiple criminal convictions and can demonstrate that the offenses resulted from battery or extreme cruelty, then the petitioner may obtain a waiver of the multiple-filing requirement. Criminal information that USCIS obtains after running a background check on the petitioner may be disclosed to the beneficiary by the Department of State.

In addition to the IMBRA, petitioners with certain criminal convictions must be aware of the restrictions to K-1 and I-130 petitions contained in the Adam Walsh Child Protection and Safety Act (AWA). On July 27, 2006, the AWA was signed into law by President Bush. AWA § 402 amends INA § 204[17] to

> prohibit U.S. citizens and lawful permanent resident aliens who have been convicted of any 'specified offense against a minor' from filing a family-based immigrant petition … on behalf of any beneficiary, unless the Secretary of Homeland Security determines in his sole and unreviewable discretion that the petitioner poses no risk to the beneficiary. [T]he Adam Walsh Act also amends section 101(a)(15) of the INA to remove spouses or fiancés of U.S. citizens convicted of these offenses from eligibility for "K'' nonimmigrant status (Form I-129F).[18]

"Specified offense against a minor'' is defined as a criminal conviction that involves any of the following:

1. An offense (unless committed by a parent or guardian) involving kidnapping.
2. An offense (unless committed by a parent or guardian) involving false imprisonment.
3. Solicitation to engage in sexual conduct.
4. Use in a sexual performance.
5. Solicitation to practice prostitution.
6. Video voyeurism as described in 18 U.S.C. § 1801.
7. Possession, production, or distribution of child pornography.
8. Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
9. Any conduct that by its nature is a sex offense against a minor.[19]

If a petitioner has committed any of the above offenses either prior to filing or during the pendency of an I-129F or I-130 petition, he or she will receive a Request for Evidence (RFE) or a Notice of Intent

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[16] USCIS, Instructions to Form I-129F, http://www.uscis.gov/sites/default/files/files/form/i-129finstr.pdf (last visited June 24, 2015).

[17] INA § 204(a)(1)(A)(viii) and (B)(i), 8 U.S.C. § 1154(a)(1)(A)(viii) and (B)(i).

[18] Michael Aytes, USCIS, Associate Dir., Domestic Ops., No. 70/1-P, *Adam Walsh Child Protection and Safety Act of 2006* 1 (July 28, 2006), *reprinted at* 11 Bender's Immigr. Bull. 1043, 1077 (App. H) (Sept. 1, 2006).

[19] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111(7), ***120 Stat. 587***, 592 (codified as amended at 42 U.S.C. § 16911(7)).

to Deny (NOID) the petition, requesting evidence that the petitioner poses no risk to the beneficiary of the petition. If a petitioner commits one of the listed offenses after the petition is approved, USCIS may revoke the petition.[20] Obtaining an evaluation of risk to the beneficiaries from a licensed psychologist, as well as any evidence of successful completion of counseling or treatment programs is helpful. However, USCIS is not generous in approving AWA petitions, even after the petitioner submits the requested evidence.

Making AWA cases more burdensome for petitioners, in *Matter of Aceijas-Quiroz*, the Board of Immigration Appeals (BIA) found that it lacks jurisdiction to review a ″no risk'' determination by USCIS, including the standard of proof applied in the determination.[21] That decision was the first in a trilogy of AWA decisions released by the BIA on May 20, 2014, none of them favorable to petitioners. In *Matter of Introcaso*, the BIA held that the petitioner bears the burden of proving that an offense was not a ″specified offense against a minor.''[22] Not only does the petitioner bear the burden in assessing whether or not he or she has been convicted of a specified offense, but the BIA also stated that USCIS adjudicators may apply the ″circumstance-specific'' approach, which permits an adjudicator to go beyond the record of conviction and look at the facts and conduct to determine whether it is for a disqualifying offense.[23] In the third decision published on the same day, the BIA held that the AWA applies retroactively.[24] Thus, a U.S. citizen with a conviction twenty-five years before the enactment of the AWA is subject to the burdens imposed by the AWA.

Since AWA-related cases require ″special handling,''[25] they often take longer to process. One way to determine what the processing delay is for is to watch out for a biometrics appointment notice — often USCIS schedules the petitioner for a biometrics appointment at a local Application Support Center if it suspects an AWA issue.

I-130, Consular Processing, and Immigrant Visa

If our hypothetical petitioner and beneficiary are able to marry prior to starting the process, the petitioner can file an I-130 Petition for Alien Relative with USCIS after the marriage. U.S.-citizen petitioners must file a separate I-130 for each immediate relative. Currently, I-130 processing times on behalf of immediate-relative spouses run at approximately eight months. Once the petition is approved, USCIS sends it to the National Visa Center for consular processing. As the National Visa Center is receiving higher volumes of petitions from USCIS, it takes about two months to receive the first notification from NVC, which has the fee bills — the invoices for the immigrant visa and affidavit of support fees. Once the fees are paid, either online or via mail, the NVC issues the instruction packet,

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[20] In some instances, USCIS has not revoked the I-129F after a K-1 has entered, stating that once the K-1 is used it cannot be revoked. Instead, USCIS has used its discretion to deny the AOS.

[21] 26 I. & N. Dec. 294 (BIA 2014).

[22] 26 I. & N. Dec. 304 (BIA 2014).

[23] *Id.*

[24] Matter of Jackson and Erandio, 26 I. & N. Dec. 314 (BIA 2014).

[25] USCIS, Policy Memorandum PM-602-0033, *Supplemental Guidance to USCIS Service Centers on Adam Walsh Act Adjudication-Centralization of Identified Adam Walsh Act Related Petitions at the Vermont Service Center for Adjudication and Review* (AFM *Update AD11-23*), at 2 (April 22, 2011), *reprinted at* 16 Bender's Immigr. Bull. 838, 861, 862 (App. F) (May 15, 2011).

which requests all of the documents to complete consular processing.[26] Once the documents are submitted and processed, which includes the DS-260 and the Affidavit of Support, the NVC will forward the file to the appropriate consulate as indicated by the first three letters of the case number.

The applicant will then receive an immigrant visa appointment. Consular processing time, which is calculated from the moment the I-130 is approved to the immigrant visa appointment, varies. For example, in Ciudad Juarez cases, it takes approximately four to six months. Many countries have higher rates of administrative processing, which can delay the process significantly for many applicants. Prior to the immigrant visa interview, the applicant will be fingerprinted and will need to obtain a medical exam. If the applicant requires a waiver of any ground of inadmissibility under INA § 212, the immigrant visa will be denied under the appropriate provision and the applicant will be given a visa refusal sheet listing the ground(s) of inadmissibility. If eligible for a waiver of the ground(s) of inadmissibility, the applicant may file the Form I-601 and/or Form I-212 with the visa refusal sheet and appropriate evidence with USCIS in the United States. If the waiver is approved, notice of the approval will be sent back to the consulate and the applicant will be notified of a new interview or of visa issuance. Once issued, the immigrant visa will be valid for up to six months. On the day the applicant enters with the visa, he or she is a permanent resident. USCIS now charges a fee for card production, which may be paid by the applicant before entry to the United States or after.[27] Once the card fee of $165 is paid, card production will be stimulated on or after the entry of the beneficiary to the United States.

As explained in more detail above, if the petitioner and beneficiary have been married for less than two years by the time the residence is granted the beneficiary will receive a conditional permanent resident card with a validity of two years. In immigrant visa cases, permanent residence is granted the moment the beneficiary is admitted to the United States on the visa, not when the visa is issued. Thus, if the beneficiary went to the interview and obtained an immigrant visa indicating that he or she is a conditional resident, but then enters the United States on the visa after the marriage was more than two years old, he or she enters as a lawful permanent resident instead of a conditional permanent resident.[28]

Which One Is Appropriate for Your Client?

The way I pitch the options to the client starts with timing, as that is often the deciding factor. On average, it takes about ten months from the filing of the I-129F to the issuance of the K-1 visa. In contrast, the average time for an I-130/immigrant visa case on behalf of an immediate-relative spouse takes one year from filing of the I-130 to issuance of the immigrant visa. I ask the client or potential client which is more important: for the fiancé(E) to come in to the United States more quickly, or to wait a few months longer in order for him or her to enter as a permanent resident and be done with the process. Although most of our clients want their relatives in the United States yesterday, surprisingly, there are those who would rather be done with the process when their loved one enters the United States.

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[26] NVC processing steps can vary. For example, NVC sometimes issues the instruction packet with the fee bills.

[27] USCIS, USCIS Immigrant Fee, http://www.uscis.gov/uscis-elis/e-filing-using-uscis-elis/paying-uscis-immigrant-fee-uscis-elis/uscis-immigrant-fee (last visited July 27, 2015).

[28] 8 C.F.R. § 235.11(b).

The second factor that can help the client make a decision is cost. In practice, many attorneys charge more for the K-1/AOS process than for I-130/consular processing, as the I-129F, DS-160/interview package and subsequent AOS (with a possible interview) entail more labor and time out of the office. Also, traveling abroad in order to marry can be a significant cost to the couple.

Another relevant factor for the potential client to consider is the risk of not meeting the K-1 deadlines. If the beneficiary does not marry the petitioner within ninety days, consequences ensue. K-1 beneficiaries are not allowed to extend their status, change status, or adjust status based on any ground other than marriage to the K-1 petitioner.[29] Thus, if the K-1 beneficiary does not marry the K-1 petitioner, once his or her status expires the K-1 and K-2 children will be subject to removal.[30] Although USCIS often takes the stance that the marriage has to occur within ninety days, INA § 245(d) allows adjustment of status for a K-1 beneficiary who marries the petitioner and does not specify that the marriage had to occur within the ninety-day period. If the K-1 beneficiary marries a U.S. citizen other than the K-1 petitioner, he or she may not adjust status based on that marriage.[31] Also, if the K-2 beneficiary has an approved family- or employment-based petition with a current priority date, he or she may not adjust based on that petition.[32] Eligibility under INA § 245(i) does not waive the bar to adjusting status on any basis other than marriage to the K-1 petitioner.[33]

What About the K-3?

The K-3 visa is a nonimmigrant visa for beneficiaries who are already married to the U.S.-citizen petitioner. It was designed for the K-3 beneficiary to enter the United States to wait for the I-130 to be processed. The I-129F is filed with the I-130 receipt, and proceeds exactly like the K-1 except for the marriage requirement. K-3 dependents enter on K-4 nonimmigrant visas. I-130 processing times for immediate relatives have decreased over the last few years, which means that once the K-3 enters on the visa the I-130 has already been approved. Then the K-3 has to file for AOS and possibly attend another interview. The K-3 is currently an unpopular option when compared to the I-130/immigrant visa. If the beneficiary waits for the I-130 to be approved (which takes only a couple of months longer than the I-129F), he or she can obtain an immigrant visa and enter the United States as a permanent resident. He or she can then work and travel — and also be done with the process.

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29 INA § 245(d), 8 U.S.C. § 1255(d)

30 INA § 214(d)(1), 8 U.S.C. § 1184(d)(1).

31 Birdsong v. Holder, 641 F.3d 957 (8th Cir. 2011); Kalal v. Gonzales, 402 F.3d 948 (9th Cir. 2005).

32 Markovski v. Gonza*les*, 486 F.3d 108 (4th Cir. 2007).

33 *Id.*