

Marriage In The New Decade: Marriage Brokers, Disclosure Duties, And Numeric Limitations Imposed By IMBRA

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The International Marriage Broker Regulation Act (“IMBRA”) was promulgated in January 2006, and applies to all I-129F petitions for K status filed on or after March 6, 2006.¹ The genesis of the legislation began with two high-profile cases in which foreign women were abused and eventually murdered by their husbands, who retained the services of international marriage brokers to bring the women to the United States.² Following wide-spread public outcry in response to these tragic cases, Congress enacted IMBRA as a means of policing would-be petitioners and assisting foreign beneficiaries in making informed decisions prior to immigrating on a K visa.³

¹ 18-4 Foreign Affairs Manual - Visas 9 FAM 41.81

² See, Timothy Egan, *Mail Order Marriage, Immigrant Dreams, and Death*, N.Y. Times (online ed. May 26, 1996), available at <http://www.nytimes.com/1996/05/26/world/mail-order-marriage-immigrant-dreams-and-death.htm?pagewanted=all>. (last visited April 19, 2010) (discussing the case of Susanna Blackwell, a Filipina woman brought to the United States on a K visa, abused, and eventually shot to death by her soon-to-be ex-husband shortly prior to closing arguments at their divorce hearing.) See also, David Fisher, *Indle King Found Guilty of Killing Mail-Order Bride*, Seattle Post Intelligencer (February 22, 2002) available at http://www.seattlepi.com/local/59387_king22.shtml (last visited April 19, 2010) (describing the conviction of a man who brought his Russian wife to the United States and strangled her to prevent her from divorcing him.)

³ See, 151 Cong. Rec. S13, 752 (daily ed. Dec. 16, 2005) (statement of Sen. Brownback) (“A simple but incredibly powerful premise drives [the IMBRA] provisions: that this information can help a woman help herself, help her save herself or her child from becoming the next victim of a predatory abuser. Through this information and other safeguards, this important legislation will help prevent those intent on doing women harm from perverting and subverting both the institution of marriage and the immigration process to find new victims overseas.”). Despite these good faith intentions, it is critical to note that IMBRA covers K visa petitions only. Thus, a predatory Petitioner could circumvent IMBRA by traveling overseas to marry the Foreign Beneficiary and subsequently filing an I-130 petition upon return to the United States. Because I-130 petitions are only subject to the requirements imposed by the Adam Walsh Child Protection and Safety Act (“AWA”) and are not within the scope of IMBRA, a Petitioner’s criminal background could remain undisclosed so long as it did not trigger AWA. This makes the disclosure requirements of IMBRA arguably toothless.

While not uniformly enforced, IMBRA contains provisions that have far-reaching implications for family based immigration. The law imposes a duty to disclose if the petitioner and beneficiary met through an international marriage broker and requires that the petitioner disclose their criminal history if they have ever been convicted of a statutorily enumerated offense, including domestic violence, assault and battery, elder abuse, child abuse or neglect, stalking, or multiple (three or more) convictions for offenses related to alcohol/controlled substances or have a history of violent offenses.⁴ Further, IMBRA imposes multiple petition limits on the number of I-129F petitions a single petitioner may file without requiring a waiver and mandates enrollments in a petitioner tracking database maintained by USCIS, as well as disclosure of previously filed petitions to all beneficiaries, both past and present.⁵

Practitioners must understand the scope of IMBRA to mitigate consequences that the legislation may trigger in the course of K visa cases. Without awareness of the IMBRA's impact, a practitioner's ability to provide competent legal services is significantly hindered. The first portion of this article delineates IMBRA disclosure requirements and discusses ways to counsel clients to ensure compliance with IMBRA disclosure standards. This article covers IMBRA's multiple petition limitations and concludes by discussing strategies for preparing successful written waivers of the criminal history and multiple petition limits requirements.

⁴ International Marriage Broker Regulation Act of 2005, Subtitle D of Pub. L. No. 109-162, 110 Stat. 2960.
⁵ *See*, IMBRA § 832(C)(iii)(4)(B)(ii). In addition to these requirements, IMBRA also mandates that Consular officers provide K-visa applicants with an informational pamphlet regarding the legal rights and resources available to immigrant victims of domestic violence, the illegality of marriage fraud, and U.S. child support requirements.

A. Disclosure requirements mandated by IMBRA.

IMBRA mandates the disclosure of certain specified crimes, any history of violent offenses, and whether an international marriage broker (“IMB”) facilitated the relationship. The specific provisions of each disclosure requirement will follow.

1. Criminal Conviction Disclosures:

The 2006 Aytes Memorandum, serving as the controlling USCIS memorandum on IMBRA, states that a petitioner for a K visa for an alien fiancé(e) (K-1) or alien spouse (K-3) must submit with the Form I-129F information on any criminal convictions of the petitioner for any “specified crimes” expressly enumerated in the statute, including domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, and stalking.⁶ IMBRA precludes a petitioner from filing an I-129F petition if they have a history of “violent offenses” defined by statute as offenses that have an element of use, attempted use, or threatening to use physical force against another person or their property. This includes any of the statutorily specified crimes, including crimes involving a controlled substance or alcohol if the offense included an element of intentional conduct that resulted in serious bodily injury or death.⁷

If a petitioner indicates that they have been convicted of any statutorily specified crimes or has a history of violent offenses by checking one or more of the boxes in Part C, question 2 of Form I-129F, the Petitioner must submit “certified copies of all court and police records showing the charges and dispositions” for every conviction.⁸ Further, the Petitioner will be required to

⁶ Michael Aytes, *Interoffice Memorandum Re: International Marriage Broker Regulation Act Implementation Guidelines* at 2 (July 21, 2006), available at <http://www.aiala.org/content/default.aspx?docid=12666&RedirectURL=%2fcontent%2fdefault.aspx%3fdocid%3d28662> (last visited April 19, 2010). As noted in the Memorandum, the statutory definitions for the statutorily enumerated crimes specified in IMBRA may be located in Section 3 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (Jan 5, 2006).

⁷ IMBRA § 832(C)(iii)(3); *See also*, Aytes Memorandum, *supra* note 7 at 3.

⁸ Aytes Memorandum, *supra* note 7, at 2. Note that if the Petitioner fails to disclose a prior conviction by checking the requisite box on Form I-129F, USCIS may still ascertain notice of the conviction by conducting background checks on the Petitioner at their discretion.

submit a written waiver request with respect to their criminal history along with their I-129F petition.

2. Practice Pointers Regarding Criminal Conviction Disclosures

Given the criminal conviction disclosure requirements mandated by IMBRA, it is critical as a practitioner to determine from the outset whether a potential K visa petitioner has been convicted of any IMBRA triggering offenses. If yes, the petitioner must obtain certified copies of the police report, arrest record, court record, and final disposition for each triggering conviction prior to filing the I-129F petition. This is required even if the records were sealed, expunged, or otherwise cleared.⁹ The criminal records will become part of the I-129F petition and, if the petition is approved, will be provided to the Department of State and disclosed to the foreign beneficiary at the consular interview.¹⁰ If the petitioner does not disclose their criminal history as required by IMBRA and it later comes to light, their failure to disclose could serve as potential grounds for denial of the K visa or revocation of the I-129F petition. Thus, if the petitioner has IMBRA triggering convictions or a history of violent offenses, it is critical as a practitioner to (1) check the requisite box on Form I-129F; (2) obtain and submit all relevant records to USCIS; and (3) submit a written waiver request along with their I-129F petition.

3. International Marriage Broker Disclosure Requirements:

In addition to mandating disclosure of certain criminal offenses, IMBRA requires that petitioners disclose whether they met the Foreign Beneficiary through an international marriage broker (“IMB”). With two notable exceptions to this definition,¹¹ IMBRA expressly defines such an entity as:

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Id.

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Id.

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See, text, supra note 11.

A corporation, partnership, business, individual, or other legal entity, whether or not organized under any law of the United States, that charges fees for providing dating, matrimonial, matchmaking services, or social referrals between United States citizens or nationals or aliens lawfully admitted to the United States as permanent residents or foreign nation clients by providing personal contact information or otherwise facilitating communication between individuals.^{12 13}

If an IMB facilitated the relationship between the petitioner and the foreign beneficiary, the petitioner must affirmatively disclose this information on Form I-129F, Part B, question 19. Further, the petitioner must disclose the name and location of the IMB.¹⁴ If USCIS finds that either the petitioner or the IMB itself were not compliant with the disclosure requirements of IMBRA, the K visa may be denied.

4. Practice Pointers Regarding IMB Disclosures

Given the prevalent role electronic mediums and the Internet play in facilitating modern relationships, it is not unexpected that many K visa petitioners will have met their future spouse using the services of a website or other electronic entity that may or may not be an IMB. If a

¹² IMBRA § 833(e)(4)(B). The statute provides for two critical exceptions to this definition: “Such term does not include (1) a traditional matchmaking organization of a cultural or religious nature that operates on a nonprofit basis and otherwise operates in compliance with the laws of the countries in which it operates, including the laws of the United States; or (2) an entity that provides dating services if its principal business is not to provide international dating services between United States citizens or United States residents and foreign nationals and it charges comparable rates and offers comparable services to all individuals it serves regardless of the individual’s gender or country of citizenship.”

¹³ See, Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minn. L. Rev. 1625, 1654 - 1660 (2007) (explaining in substantial detail the international marriage broker disclosure requirements of IMBRA, exceptions to the requirements, and policy considerations driving this provision of the legislation.)

¹⁴ See, Abrams 91 Minn. L. Rev. at 1654 – 1655. As Abrams notes, “The first disclosure provision of IMBRA is a requirement that international matchmaking companies gather and disseminate information about the U.S. citizen or resident to DHS and the potential foreign fiancé(e) before any contact occurs between the potential mates. This information is quite extensive. First, the company must, on its own, conduct a search of sex offender public registries. Then, it must obtain a signed certification from the U.S. client accompanied by documentation of his criminal history, including any arrests related to controlled substances or alcohol. Additionally, the U.S. client must provide information about his personal history, including how many previous marriages were terminated and the dates of the terminations, whether the client has previously sponsored an alien to whom he was engaged or married, the ages of his minor children, and all states and countries in which he has resided since he was eighteen years old. Under IMBRA, international matchmaking companies are now prohibited from giving their foreign clients' contact information to U.S. clients until after they have performed the sexual offender registry search, collected the information described above, given the information to the foreign client, and obtained the foreign client's written consent to release her contact information. Violation of the law carries substantial civil and criminal penalties. *And if a couple proceeds with a courtship through an international matchmaking organization without following the rules, the foreign fiancé(e) may subsequently be denied a visa.*” (emphasis added)

petitioner has used an IMB, it is critical to ensure that the IMB has complied with the IMBRA disclosure requirements prior to filing the I-129F petition. Generally, evidence of IMBRA compliance can be found in the site's membership agreement and terms of use.¹⁵ If a petitioner has used an entity that falls under an IMBRA disclosure exception, the petitioner should obtain evidence of the entity's qualification as an IMBRA exception. Evidence of this qualification can typically be found in the site's membership and terms of use.¹⁶ If the Petitioner is unsure if they have used an IMB, it is best to err on the side of caution and obtain verification from the entity regarding their status as an IMBRA-regulated entity or their qualification as an IMBRA exception.¹⁷ At the time of the K visa interview, consular officers may, at their discretion, ask whether an IMB facilitated their relationship, what the broker's name was, and whether the broker provided the information required by IMBRA.¹⁸ If the foreign beneficiary's response does not match the information provided in the I-129F petition, the visa may be denied.

B. Multiple Petition Limits Imposed By IMBRA

Finally, IMBRA imposes numerical limits on the number of K-1 visa petitions an individual petitioner may file. As noted in the July 21, 2006 Aytes Memorandum, "if the petitioner has filed two or more K-1 visa petitions at any time in the past, or previously had a K-1 visa petition approved within two years prior to filing of the current petition, the petitioner

¹⁵ E.g., Russian Dream Girls, "Notice" (2010), available at <http://russiandreamgirls.com> (last accessed April 19, 2010) (expressly indicating how its terms of use comply with IMBRA).

¹⁶ E.g. Match.com, "Terms of Use" (2010) available at <http://www.match.com/registration/membagr.aspx> (last accessed April 19, 2010) (expressly noting that it is a domestic matchmaking service and falls within an IMBRA exception.)

¹⁷ Due to legal reservations, most dating sites and similar entities will not expressly disclose information that is not provided on their website regarding IMBRA compliance and their operating procedures without a subpoena. This may complicate the Petitioner's efforts to obtain evidence of IMBRA compliance. In such circumstances, the Petitioner should obtain evidence of a good faith attempt to obtain evidence of compliance with IMBRA. See, United States Government Accountability Office, *Report to Congressional Committees: International Marriage Broker Regulation Act of 2005: Agencies Have Implemented Some, but Not All of the Act's Requirements* (August 2008)

must request a waiver” of the numerical limitations.¹⁹ USCIS has interpreted IMBRA’s multiple petition limits to mean that a petitioner who has filed one K-1 visa petition in the past two years or two or more at any time, and subsequently files an additional K-1 visa petition, regardless of whether it is for the same or a different foreign beneficiary, must submit a written waiver request along with their I-129F petition.²⁰ The waiver must be approved prior to USCIS approving the I-129F and forwarding the petition to the Department of State. In addition to a written waiver request, IMBRA mandates that a petitioner who has two or more *approved* I-129F petitions be entered into a tracking database maintained by USCIS. USCIS will also notify all foreign beneficiaries, both past and present, of the number of previously approved I-129F petitions.²¹

If a petitioner has previously filed an I-129F petition in the past, it may necessitate a written waiver request be submitted along with their new petition. This holds true even if the previous petition(s) expired or were returned by the Department of State for revocation and subsequently allowed to expire.^{22 23} Thus, it is extremely important to determine from the outset whether the petitioner has previously filed an I-129F petition and, if so, to ascertain the

¹⁹ See Aytes Memorandum, *supra* note 7, at 2. Note that the numerical filing limitations imposed by IMBRA apply to K-1 visa petitions *only*. There are no limitations imposed on the number of K-3 visa applications an individual Petitioner may file, nor on the number of I-130 petitions an individual Petitioner may file. This seemingly undermines the purpose belying IMBRA’s multiple petition limit, which is to frustrate the efforts of “career” I-129F Petitioners. See, Apa, “Beyond the Recall: The Lasting Effects of the International Marriage Broker Regulation Act,” 4 *Bender’s Immigration Bulletin* (September 15, 2006) .

²⁰ See, Ellis, “IMBRA Imroglio: The Multiple Petition Limit Math In the USCIS Regulation of IMBRA Doesn’t Add Up” (February 6, 2007), available at <http://ilw.com/articles/2007,0206-ellis.shtml> (last accessed April 19, 2010) (providing an insightful discussion regarding the discrepancies between the plain language of the IMBRA multiple petition limits and USCIS’ interpretation of such limits.

²¹ See, Aytes Memorandum, *supra* note 7, at 6. (providing a comprehensive discussion of the tracking system and notification protocol). Note that the tracking system and Foreign Beneficiary notification *apply to both K-1 and K-3 visa petitions*.

²² However, if the petition is returned for revocation, a Notice of Intent to Deny (NOID) letter is issued, and the NOID is overcome, the reaffirmed petition would constitute a reinstatement of the previous approval and no IMBRA concern is triggered

²³ See, Ellis, “IMBRA Imroglio: The Multiple Petition Limit Math In the USCIS Regulation of IMBRA Doesn’t Add Up” (February 6, 2007), available at <http://ilw.com/articles/2007,0206-ellis.shtml> (last accessed April 19, 2010) and Ellis, “Clash of the Titan Bureaucracies – The Sequel” (August 24, 2007), available at <http://www.ilw.com/articles/2007,1018-ellis.shtm> (last accessed April 20, 2010) (providing a full discussion of the revocation and expiration of I-129F petitions and the implications these different termination procedures have for IMBRA multiple petition limits.

complete genesis and current status of the previously filed petition to determine if a written waiver request is needed.

C. Waiver Requirements

IMBRA allows for written waivers of IMBRA triggering criminal histories and the multiple petition limits. These waivers may be approved or denied at the discretion of the adjudicator, and generally require a compelling justification supported by clear and convincing evidence in order to be approved. The requirements for these waivers will be discussed in turn.

1. Waivers of Multiple Petition Limits

To obtain a waiver of IMBRA's multiple petition limits, the petitioner must attach a "signed and dated letter, requesting the waiver and explaining why a waiver would be appropriate in [their] circumstances, together with any evidence in support of the waiver request."²⁴ This evidence may include affidavits from the petitioner, the former foreign beneficiary, family, and friends explaining why the prior I-129F did not come to fruition, a death certificate of the former foreign beneficiary, or medical records showing the former foreign beneficiary was incapacitated or otherwise could not immigrate to the United States.²⁵ The adjudicator reviewing the waiver will also consider "whether it appears the petitioner has a pattern of filing multiple petitions for different beneficiaries at the same time, of filing and withdrawing petitions, or obtaining approvals of petitions every few years."²⁶

2. Waiver of Criminal History

Petitioners having a history of violent offenses or who have been convicted of any of the specified crimes that qualify under IMBRA are precluded from filing an I-129F petition

²⁴ See, Aytes Memorandum, *supra* note 7, at 2 -3.

²⁵ See generally, *Id.* at 3. The Aytes Memorandum sets out in detail further examples of acceptable evidence, in addition to multiple factual scenarios where a waiver of the multiple petitions limit would likely or would likely not become approved.

²⁶ *Id.*

unless they successfully submit a waiver.²⁷ In such circumstances, an adjudicator may not approve a waiver unless extraordinary circumstances exist.²⁸ A successful waiver requires a signed and dated letter explaining the circumstances justifying granting the waiver, along with evidence that extraordinary circumstances exists. Examples of potentially approvable evidence include evidence of rehabilitation, police reports, court records, trial transcripts reflecting the nature of the offenses, ties to the community, records demonstrating good conduct, or exemplary service in the uniformed services.²⁹ Examples of potentially approvable extraordinary circumstances are if the petitioner was battered at the time they committed the offense, were not the primary aggressor, were acting in self defense, or their crime did not result in serious injury and was a result of being the victim of battery or cruelty.³⁰ Prior to approving a waiver involving violent offenses, adjudicators must obtain supervisory approval. The determination of what evidence is credible and the weight to be given to that evidence is within the sole discretion of the adjudicator.³¹

D. Conclusion

The duty to disclose criminal histories and use of an IMB, in addition to the multiple petition limits imposed by IMBRA, may have far-reaching consequences for family-based immigration practice. If a petitioner has used an IMB to facilitate their relationship with a foreign beneficiary, has been convicted of specified crimes, has a history of violent offense, or triggers

²⁷ See, IMBRA § 832(C)(iii)(3) and Aytes Memorandum, *supra* note 7. (defining violent offenses)

²⁸ See, Aytes Memorandum, *supra*, note 7 at 3.

²⁹ *Id.* at 4 (also providing in detail further examples of acceptable evidence, in addition to multiple factual scenarios where a waiver of the multiple petitions limit would likely or would likely not become approved)

³⁰ *Id.* at 5 – 6 (discussing extraordinary circumstances in further detail, including some circumstances so extraordinary that make waiver approval is mandatory)

³¹ *Id.* It is generally very difficult to get a criminal conviction waiver approved without evidence of extraordinary circumstances. Thus, an alternative option for would-be Petitioners with criminal records who are otherwise excluded from filing an I-129F petition would be to marry their future spouse overseas, file an I-130 upon return to the United States, and complete consular processing to obtain an immigrant visa. So long as the prior convictions do not trigger AWA, there are no prohibitions preventing Petitioners with criminal records from filing I-130 petitions.

the multiple filings provisions, they will need to complete a waiver of IMBRA's requirements prior to successfully proceeding with a K visa petition. As a practitioner, it is critical to know and understand the intricacies and scope of IMBRA with respect to its disclosure requirements in order to ensure favorable outcomes in K visa cases.