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RHYME & REASON

Spousal Sponsorship: Basic Issues and Recent Change

In this so-called month of love, it may be appropriate to review some basic issues and a recent change in Canada's immigration laws and regulations relating to spousal sponsorship applications.

Types of Relationship Eligible Under a Spousal Sponsorship Application

There are three different types of partnerships that could qualify under the spousal sponsorship class: spouses, common-law partners and conjugal partners.

Spouses are couples who are validly married in the jurisdiction where the marriage was celebrated. To prove the genuineness of the marriage, the sponsor and applicant must provide documentary evidence such as wedding photos, invitations, reference letters, love letters to each other, etc.. The Canadian or permanent resident can sponsor the spouse even a day after getting married so long as the genuineness of the marriage is adequately proved.

Common-law partners refer to couples living together in a committed relationship without getting married. They can be considered common-law partners from day one. For purposes of immigration sponsorship however, common-law partners must have lived together for at least a year to qualify. This must be proven by a declaration of common-law union, joint documents (bank accounts, apartment lease, insurance beneficiary designation, income tax returns, etc.). The burden of proving common-law status for at least a year is on the applicants so the more evidentiary documents are submitted, the better.

Conjugal partners refer to couples in a committed relationship, at the same level of commitment as spouses and common-law partners, but who are prevented from marrying or living together by some compelling circumstances - e.g. laws prohibiting same sex union in ultra-conservative countries, war, detention, etc.. This is much more difficult to prove and is thus rarely approved as basis for an immigration sponsorship.

Any of the above relationships can be a heterosexual or a homosexual partnership.

Recent Regulatory Change

The main issue in a spousal sponsorship application has been and still is, the genuine and continuing nature of a marital, common-law or conjugal relationship. The previous immigration regulations provided that a person will not be considered a spouse if the marriage, common-law or conjugal partnership is not genuine AND entered into primarily to acquire an immigration privilege. The recent regulatory change (which took effect in September 2010) provides that a person will not be considered a spouse if the relationship was entered into primarily to acquire an immigration privilege OR is not genuine. While

seemingly innocuous, the simple change of the conjunctive word from "and" to "or" could actually have a significant impact on spousal sponsorship applications. That is, applicants will have an even greater burden of proving both the genuineness and the lack of a primary intent to obtain an immigration privilege. Previously, if a marriage or relationship is found to be genuine, the conclusion necessarily follows that it was not entered into primarily for an immigration purpose. Now, a sponsorship applicant in a genuine relationship may still be refused if the reviewing officer concludes that the primary purpose of the marriage or partnership was to obtain an immigration privilege.

Overseas versus Inland Applications

There are two avenues for spousal sponsorships. The first is the overseas sponsorship whereby after the approval of the sponsor's eligibility at the case processing centre in Mississauga, the permanent resident application of the partner is processed at the appropriate overseas visa office. If the person being sponsored needs to be interviewed, he or she will have to attend at the visa office in person. One advantage of this type of application is that there is a right of appeal with the Immigration Appeal Division (IAD) of the Immigration Refugee Board in case the sponsorship application is eventually refused. Aside from being able to submit new evidence on appeal, the IAD also has jurisdiction to consider evidence of any relevant humanitarian and compassionate factors.

The other avenue is via the Spouse or Common-law Partner in Canada class. As the name implies, this sponsorship is allowed only for spouses and common-law partners (and not for conjugal partners). This type of application assumes that the spouses or common-law partners are already living together in Canada and that it will create undue hardship if the application is processed overseas. Out of status spouses may also be sponsored under this category. Please note however, that in case the application is refused, there is no right of appeal. The only remedy after a refusal is the filing of an Application for Leave and Judicial Review with the Federal Court. A positive decision in the Federal Court application can only, at best, result in a quashing of the decision but that the matter will be sent back to CIC for a redetermination by another visa officer. There have been instances where the redetermination still led to a negative decision.

Please note that the above are meant for informational purposes only and not to provide specific legal advice. To discuss your specific questions and concerns in these matters, please consult a trusted immigration counsel.

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