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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

A,

[Redacted]

File:

EAC 07 258 53493

Office: TEXAS SERVICE CENTER

Date:

**OCT 29 2009**

IN RE:

Applicant:

[Redacted]

Petition:

Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for the continued processing of the applicant's adjustment of status application.

The applicant is a native and citizen of India who filed this application for adjustment of status to that of a lawful permanent resident under section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255. The applicant is seeking to adjust her status as a derivative spouse; her husband is the beneficiary of an approved I-140 petition and is seeking to adjust his status to that of a lawful permanent resident as well. A review of the record reveals the following facts and procedural history.

On the applicant's Form I-485, filed July 9, 2007, she indicated that she had last entered the United States on May 20, 2007 in H-4 classification. On February 5, 2009, counsel for the applicant informed United States Citizenship and Immigration Services (USCIS) that he had been informed that the marriage between the applicant and her husband had been dissolved. The record includes a Notice of Entry of Judgment in case number [REDACTED] dissolving the marriage between the applicant and her husband. The Notice of Entry of Judgment is dated January 13, 2009 and is stamped as filed in the Superior Court, County of San Bernardino, Rancho Cucamonga District, in California. The record also includes a document filed January 13, 2009 in the same Superior Court indicating that Judgment of Dissolution is entered and that the marital or domestic partnership status is terminated and the parties are restored to the status of single person on March 1, 2009.

On February 10, 2009, counsel for the applicant informed USCIS that a new hearing had been set for March 23, 2009 regarding the dissolution of the applicant and her husband's marriage. Counsel asserted that the scheduling of the new hearing date would postpone the final termination of the marriage to a future date to be determined by the Superior Court of California, County of San Bernardino. Upon request by the director for an update on the status of the applicant's "marital" situation, counsel provided, in a May 12, 2009 response, a copy of a case status search regarding case number [REDACTED]. The case status search reveals that on February 4, 2009, "certificate and order vacating documents filed" and that the "notice of entry of judgment and judgments are vacated." A review of the results of a current case status search shows that a demurrer to a complaint had been submitted to the court by the applicant's husband on August 4, 2009 and that a case management conference and a family law short cause trial have been set for January 15, 2010.

The director determined that as the derivative applicant and the principal applicant were no longer residing together and the principal applicant had withdrawn his Affidavit of Support on behalf of the derivative applicant, a non-viable marriage existed between the derivative applicant and the principal applicant. The director noted that although a decree of dissolution had not been ordered by a legal authority, USCIS had not been given any evidence that the principal and the derivative applicants had effected or intended to effect a reconciliation. The director found, however, that the adjudication of the derivative applicant's Form I-485 involved a novel issue and certified the matter to the AAO. The record does not include further documentation from the applicant; thus the record in this matter is considered complete.

A marriage that is viable at its inception but subsequently becomes unviable remains a valid marriage for purposes of the immigration laws if there is no legal separation or divorce. *See Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980); *Matter of Peirce*, 17 I&N Dec. 456, 456 (BIA 1980). *See also Hernandez v. Ashcroft*, 345 F.3d 824, 848-49 (9<sup>th</sup> Cir. 2003). Physical separation after marriage is a relevant factor only insofar as it bears upon the intent of the parties at the time of marriage, e.g., whether it is a “sham” marriage. *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980).

The record in this matter does not include the necessary evidence of a legal separation or legal dissolution of the marriage; thus, the marriage is still considered viable. Furthermore, there is nothing in the record to show that the applicant and her husband’s physical separation is evidence that, at the time they married, they did not intend to establish a life together as husband and wife.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the applicant to establish that she is eligible for adjustment of status. Here, the applicant has met her burden. Accordingly, the AAO withdraws the director’s denial of the Application for Adjustment of Status and remands the matter for further processing of the applicant’s Form I-485.

**ORDER:** The director’s decision is withdrawn. The matter is remanded for the director to continue processing the applicant’s Form I-485.