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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: [Redacted] Office: VERMONT SERVICE CENTER

Date: 15 NOV 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for Alien Fiance(e) Pursuant to Section 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(K)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of India, as the fiancé(e) of a United States citizen pursuant to section 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(K).

The director denied the petition after determining that the petitioner and the beneficiary were currently married. On appeal, the petitioner states that the statutory definition of fiancée was amended on December 21, 2000 by Public Law 106-553 to include a spouse of a United States citizen who is the beneficiary of a petition for an immigrant visa that was filed by the petitioner under section 204 of the Act. Accordingly, the petitioner states that the beneficiary is still entitled to visa classification as a fiancée even though she is currently married to the petitioner.

Section 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(K), states that an alien may be classified as a fiancé(e) if he or she:

- (i) is the fiancée or fiancé of a citizen of the United States and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission; or
- (ii) has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa * * *

The petitioner is correct in asserting that the statutory definition of fiancée now includes a spouse of United States citizen petitioner who is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 of the Act by petitioner, and who seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa. The director erred in not considering the new statutory amendment in his determination of whether the beneficiary was entitled to nonimmigrant classification as the fiancée of a United States citizen. Despite this error, however, the petition may not be

approved, as the beneficiary did not meet the statutory definition of a fiancée as of the date of the I-129F petition filing.

8 C.F.R 103.2(b)(12) states:

Effect where evidence submitted in response to a request does not establish eligibility at the time of filing. An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the petition was filed.

The record indicates that the Service received the petitioner's I-129F petition on March 9, 2001. The record also indicates that on April 9, 2001, the Service received the petitioner's I-130 petition to accord the beneficiary a status under section 201(b)(2)(A)(i) that was filed under section 204 of the Act.

The filing dates associated with each petition indicate that at the time the I-129F petition was filed, the petitioner's spouse was not yet a beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner. Therefore, as of the filing date of the I-129F petition, the beneficiary did not meet the statutory definition of a fiancée found in section 101(a)(15)(K)(ii) of the Act. Had the Service received the I-130 petition prior to the filing date of the I-129F petition, the petition could have been approved. However, since this did not occur, the director's decision must be affirmed.

Now that the petitioner has filed a Form I-130 with the Service on the beneficiary's behalf, the petitioner may file a new I-129F petition to accord the beneficiary status as the fiancée of a United States citizen pursuant to section 101(a)(15)(K)(ii) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.