

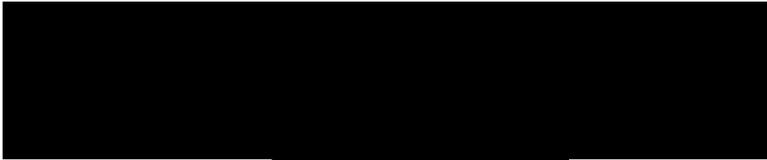


U.S. Citizenship  
and Immigration  
Services

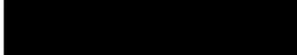
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FILE:



Office: ST. PAUL, MN

Date: APR 03 2007

IN RE:



APPLICATION: Application for Permanent Residence Pursuant to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied and a subsequent motion to reopen/reconsider was dismissed by the District Director, St. Paul, Minnesota. The matter is now before the Administrative Appeals Office (AAO) on certification. The AAO finds that the legal arguments in the motion to reopen/reconsider regarding whether the marriage at issue is a valid marriage under South Dakota law present a basis for reconsideration and grants the motion to reopen/reconsider. After a review of the applicable law and the evidence provided by the applicant, the AAO affirms the district director's decision to deny adjustment of status. The district director's decision is affirmed and the application is denied.

The record reflects that the applicant, [REDACTED] also known as [REDACTED], is a native and citizen of Guatemala who was found to be ineligible to adjust her status to lawful permanent resident pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255, based on a finding that she entered the United States on a K-1 fiancée visa under section 101(a)(15)(K)(i) of the Act, 8 U.S.C. § 1101(a)(15)(K)(i), and did not legally marry her fiancé, [REDACTED] as required.

Based on this finding, the district director denied the applicant's adjustment of status application. *Decision of the District Director*, dated August 3, 2006. The district director dismissed the subsequent motion to reopen/reconsider, finding that the applicant had failed to provide evidence from the State of South Dakota establishing that the state recognized her marriage to [REDACTED] or that the district director's original decision was based on an incorrect application of law and policy; the district director certified the decision to the AAO. *Second Decision of the Acting District Director*, dated December 12, 2006.

The U.S. Code of Federal Regulations at Title 8 (8 C.F.R.), section 245.1(c) lists the categories of applicants who are ineligible for adjustment of status to that of a person admitted for permanent residence under section 245 of the Act, including,

[a]ny alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless: (i) In the case of a K-1 [fiancé(e)] under section 101(a)(15)(K)(i) of the Act . . . the alien is applying for adjustment of status based upon the marriage of the K-1 [fiancé(e)] which was contracted with-in 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 [fiancé(e)] pursuant to § 214.2(k) of this chapter. *8 C.F.R. § 245.1(c)(6)*.

The Regulations further provide that “[u]pon contracting a valid marriage to the petitioner within 90 days of his or her admission as a nonimmigrant pursuant to a valid K-1 visa . . . the K-1 beneficiary . . . may apply for adjustment of status to lawful permanent resident under section 245 of the Act” (emphasis added). *8 C.F.R. § 214.2(k)(6)(ii)*.

The sole issue in this case is whether [REDACTED] have a valid marriage. It is the applicant's or petitioner's burden to establish eligibility for a benefit. Thus, the failure to provide necessary evidence may result in denial of a petition if this burden has not been met. *See 8 C.F.R. 103.2(b)(1)*. As with other relative petitions, documentation must be submitted to establish both the standing of the petitioner (evidence of U.S. citizenship or lawful permanent residence) and validity of relationship (evidence of the lawful marriage of the

petitioner and beneficiary and of the termination of any and all prior marriages of both parties). 8 C.F.R. § 204.1(f).

8 C.F.R. § 103.2 further provides in pertinent part:

- (i) The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, and applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue . . .
- (ii) Where a record does not exist, the applicant or petitioner must submit an original written statement on government letterhead establishing this from the relevant government or other authority.

In this case, the applicant and [REDACTED] assert in a letter in support of their motion to reopen/reconsider that their marriage is legal, as they were married on September 10, 2005 in a religious ceremony conducted by their pastor; and that because of their religious convictions they did not apply for a marriage license, but instead signed a "Private Party Marriage Contract" (*Marriage Contract*, September 10, 2006, included in the record) which would "provide the State of South Dakota a legally binding contract enforcing our marriage." *Letter in Support of Motion to Reopen/Reconsider*, at 1, August 28, 2006. They also assert that "[e]very State agency that has been presented with the Marriage Contract has recognized our marriage as valid." *Id.* They include a copy of a South Dakota identification card for [REDACTED] and refer to it as proof that the State recognizes their marriage. Also included in support of the motion to reopen/reconsider are affidavits from family and friends confirming that they attended the couple's marriage ceremony and that the marriage is "an undisputed fact in the community"; a copy of the birth certificate and passport of the couple's daughter; and copies of U.S. Supreme Court decisions and citations to numerous state court decisions regarding, *inter alia*, marriage licenses and common law marriages. The record also contains a letter, dated August 27, 2006, signed by [REDACTED] the applicant's father-in-law and pastor of Christ's Tabernacle, confirming that he performed the couple's marriage ceremony on September 10, 2005, that they have continually resided together since that time, and that "[n]o State official has questioned the validity of the marriage between [REDACTED] *Letter from [REDACTED]*, August 27, 2006.

The record reflects that a Request for Applicant to Appear for Initial Interview was sent to the applicant on March 6, 2006, advising her of the requirement to appear and bring a number of documents to the interview, including, "a certified copy of [her] Marriage document issued by the appropriate civil authority." The applicant did not provide this document at the interview on April 26, 2006, but instead provided a copy of the "marriage contract" noted above. At that time the applicant was given a written Request for Evidence (Form I-72) allowing her an additional 12 weeks to "[f]urnish evidence from the state of South Dakota establishing that [her] marriage is considered legal." The applicant responded with an "Affidavit of Recognized Marriage" completed by her husband, [REDACTED] asserting that under South Dakota statutes, her marriage is valid. She also states that due to religious convictions, no marriage certificate has been issued, and she neither applied for a marriage license nor registered the marriage.

The law of the place of the marriage, in this case South Dakota, governs whether the marriage is lawful. For example, where a state recognizes common law marriage, the marriage would be valid for immigration

purposes. *U.S. Gomez-Orozco*, 28 F. Supp.2d 1092, 1095-98 (C.D. Ill. 1998) *reversed on other grounds*, *U.S. v. Gomez-Orozco* 188 F.3d 422 (7<sup>th</sup> Cir. 1999). Also, a religious marriage is considered a valid marriage for immigration purposes if it is recognized by the sovereign in that country or state as a valid marriage. *See, e.g., Matter of Coletti*, 11 I&N Dec. 551 (BIA 1965) (under Italian law a religious marriage to be effective must be recorded, but once recorded it is retroactive to the date of the religious ceremony).

Under the law of South Dakota, “[p]revious to any marriage within [South Dakota], a license shall be obtained from the county register of deeds of any county, the fee for which is forty dollars.” *South Dakota Codified Laws (SDCL) § 25-1-10*. “Marriage must be solemnized, authenticated, and recorded as provided in [chapter 25] provided, however, that noncompliance with its provisions does not invalidate any lawful marriage consented to and subsequently consummated prior to July 1, 1959.” *SDCL § 25-1-29*. Marriage may be solemnized by certain judges or other officials or “any person authorized by a church to solemnize marriages” (*SDCL § 25-1-30*); however, solemnization of a marriage without a license is a misdemeanor. *SDCL § 25-1-31*.

When considering the validity of certain marriages in South Dakota, however, courts have not interpreted these statutory provisions to be strict requirements. For example, in a case where a marriage license was void because the marriage ceremony was not performed until more than 20 days after the license was issued, the marriage was nevertheless considered valid. *Starrett v. Tyon*, 392 N.W.2d 94, 95 (S.D.1986). Also, under provisions prescribing the essentials and formalities of marriage contracts, the court found that a marriage license was not an essential to a lawful marriage, though it is notable that the case was decided before 1959, when common law marriages were recognized by the state. *In re Svendsen's Estate*, 37 S.D. 353, 158 N.W. 410 (1916). Failure to record a marriage license does not invalidate a marriage in South Dakota. *Accounts Management, Inc. v. Litchfield*, 576 N.W.2d 233 (S.D., 1998) (marriage is valid and widow is responsible for her deceased husband's medical bills despite her contention that her marriage was void for lack of recording with the register of deeds). The court in *Litchfield* construed the state's licensing statutes to favor validation of marriages even when a statutory formality was overlooked, stating,

We aspire to preserve the sanctity of marriage and family, so when the validity of a marital union is challenged, we examine the pertinent legislative enactments with respectful care. SDCL ch. 25-1 (governing conditions for marriage). *See Carabetta v. Carabetta*, 182 Conn. 344, 438 A.2d 109, 111 (1980). “The cardinal principle of judicial construction is to save and not to destroy.” *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 392 (1939). These statutes should be construed to favor validation even when full compliance with statutory formalities may be deficient. *Starrett v. Tyon*, 392 N.W.2d 94, 95 (S.D.1986); *Carabetta*, 438 A.2d at 112 (a marriage remains valid “[i]n the absence of express language in the governing statute declaring a marriage void for failure to observe a statutory requirement”); 52 Am.Jur.2d *Marriage* § 38 (1970) (“Compliance with license statutes is not generally essential to the validity of a marriage, at least in the absence of statutory provisions making it so essential...”). Only two states, Alaska and Oklahoma, have statutes which appear to provide that noncompliance with licensing requirements will render a marriage invalid [footnote and citation omitted].

*Accounts Management, Inc. v. Litchfield*, *supra* at 235.

There is every indication in the record that [REDACTED] view their marriage as valid, that they hold themselves out to the community to be married and live as a married couple, and that they intended to establish a life together at the inception of their marriage and have conducted themselves consistent with their intentions. In light of judicial interpretations of the relevant South Dakota statutes, if the Astins can meet certain requirements, regardless of the lack of a license or registration, it is not unreasonable to conclude that the appropriate authorities in South Dakota would recognize their marriage as a valid marriage in that state. However, despite numerous requests to the applicant for proof of such recognition and the applicant's assertion that "[e]very State agency that has been presented with the Marriage Contract has recognized our marriage as valid," no such evidence has been submitted. A state identification card is not proof that the state recognizes a marriage as valid.

Regarding the evidence submitted by the Astins to support their claim that their marriage is legal, the AAO notes that no primary evidence was submitted. All petitions must be supported by primary evidence, if available, which in this case would be a marriage certificate issued by South Dakota or an official recognition by the appropriate South Dakota state agency that the marriage is recognized as valid in the state. Where primary evidence is unavailable, it gives rise to a presumption of ineligibility, which is the applicant's burden to overcome. Lacking the primary evidence of a marriage certificate issued by South Dakota, and lacking any evidence that the state has officially recognized the marriage, the applicant's assertions that her marriage is valid do not meet her burden of proof. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record in this case does not reflect that South Dakota recognizes the Astin's marriage as a valid marriage, and without such official recognition, the marriage is not valid for immigration purposes.

In proceedings for an application for adjustment of status under section 245 of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met her burden. She is statutorily ineligible for adjustment of status.

**ORDER:** The district director's decision is affirmed and the application is denied.