



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAR 19 2015** Office: VERMONT SERVICE CENTER FILE:

IN RE: PETITIONER:
BENEFICIARY:

PETITION: Petition for a Qualifying Family Member of a U-1 Recipient Pursuant to Section 101(a)(15)(U)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(ii)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center (director), denied the petitioner's Form I-918 Supplement A, Petition for Qualifying Family Member of a U-1 Recipient (Form I-918 Supplement A), submitted on behalf of the beneficiary. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner, who was granted U nonimmigrant status, seeks nonimmigrant classification of the beneficiary under section 101(a)(15)(U)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U)(ii), as a qualifying family member of a U nonimmigrant.

The director denied the petition after determining that the petitioner had failed to establish that the beneficiary was a qualifying family member at the time the Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), was filed. On appeal, the petitioner submits a brief and additional evidence, and contends that his mother and the beneficiary were married under common law in Texas prior to the filing of the petitioner's Form I-918 U petition, and thus, the beneficiary was the petitioner's stepfather and a qualifying family member at that time.

Applicable Law

Section 101(a)(15)(U)(ii) of the Act, 8 U.S.C. § 1101(a)(15)(U)(ii), provides for derivative U nonimmigrant classification to qualifying family members of alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. *See also* 8 C.F.R. § 214.14(f)(1) ("An alien who has petitioned for or has been granted U-1 nonimmigrant status (*i.e.*, principal alien) may petition for the admission of a qualifying family member, . . . if accompanying or following to join such principal alien").

The term "qualifying family member," as used in U nonimmigrant visa proceedings, is defined at 8 C.F.R. § 214.14(a)(10) as follows:

in the case of an alien victim under the age of 21 who is eligible for U nonimmigrant status as described in section 101(a)(15)(U) of the Act, *qualifying family member* means the spouse, child(ren), parents, or unmarried siblings under the age of 18 of such an alien.

Pursuant to the regulation at 8 C.F.R. § 214.14(f)(4), except for certain specified exceptions inapplicable here, the relationship between the petitioner and the qualifying family member must exist at the time the Form I-918 U petition is filed. The regulation at 8 C.F.R. § 214.14(c)(4), prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by [United States Citizenship and Immigration Services (USCIS)]. USCIS shall conduct a *de novo* review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the

evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, "U Nonimmigrant Status Certification."

Facts and Procedural History

The beneficiary is a native and citizen of Mexico who claims to have last entered the United States in August 2004 without admission, inspection or parole. The petitioner filed a Form I-918 U petition on July 2, 2012,¹ which was subsequently approved on February 3, 2014. The petitioner filed the instant Form I-918 Supplement A on behalf of the beneficiary, as his stepfather, on July 2, 2012, as well. The beneficiary then formally married the petitioner's mother on [REDACTED] 2012. On September 20, 2013, the director issued a Request for Evidence (RFE), including, among other things, the petitioner's mother's and the beneficiary's marriage certificate. The petitioner responded to the RFE with the requested evidence. However, the director ultimately denied the Form I-918 Supplement A, finding that the beneficiary was not a qualifying family member, because the petitioner's mother and the beneficiary were not married at the time the petition was filed. The petitioner filed the instant appeal of the denial of his petition on behalf of the beneficiary.

Analysis

We conduct appellate review on a *de novo* basis. Upon review, we withdraw the director's decision to deny the petition on the stated grounds.

Based on the record at the time, the director correctly concluded that the petitioner and beneficiary did not have the requisite familial relationship, as defined at 8 C.F.R. § 214.14(a)(10), when the petition was filed, because at the time of adjudication, the record showed that the petitioner's mother and the beneficiary did not formally marry until [REDACTED] 2012, after the Form I-918 U petition had already been filed.

The petitioner now contends on appeal that the beneficiary was a qualifying family member well before the filing date of the Form I-918 U petition because his mother and the beneficiary have been married since [REDACTED] 2004 under common law in Texas.

Texas recognizes marriages contracted without formal ceremony, otherwise known as common law marriages. The statutory provisions on informal marriages in Texas are codified at section 2.401(a)(2) of the Texas Family Code Annotated, which provide, in pertinent part, the following:

§ 2.401. Proof of Informal Marriage

(a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:

* * *

(2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

¹ The petitioner was 17 years old at the time of filing of his Form I-918 petition.

* * *

Tex. Fam. Code Ann. § 2.401 (West. 2003). Texas courts have held that an informal or common law marriage exists where all three elements codified at Tex. Fam. Code Ann. § 2.401(a)(2) are present, namely that: (1) the parties agreed to be married; (2) they lived together in Texas as husband and wife after the agreement; and (3) they represented to others that they were married. *See Burden v. Burden*, 420 S.W.3d 305, 308 (Tex. Crim. App. 2013); *see also Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex. 1981) (same, but addressing Tex. Fam. Code Ann. § 1.91, the predecessor to Tex. Fam. Code Ann. § 2.401(a)(2)); *Ex Parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960). Evidence of a common-law marriage may be shown by the conduct of the parties; their reference to each other as husband and wife; acknowledgment of their children as legitimate; conveyances or property deeds entered into as spouses; and joint residence of the parties. *Claveria*, 615 S.W.2d at 166. The existence of a common-law marriage is a fact question, and the party seeking to establish its existence bears the burden in demonstrating the three statutory elements by a preponderance of the evidence. *Burden*, 420 S.W.3d at 308.

On appeal, the petitioner submits his personal statement indicating that the beneficiary has lived with him since he was nine years old and that the beneficiary is his stepfather; statements of his mother and stepfather that they have resided together as husband and wife since 2004; a statement from the petitioner's mother's and stepfather's landlord; a contract for deed executed by both the petitioner's mother and stepfather; numerous references from the petitioner's siblings, other family members, and friends acknowledging that they viewed the petitioner's mother and stepfather as spouses; and joint tax returns for the petitioner's mother and stepfather from 2003 through 2012 which they jointly filed as a married couple. Additionally, the Form I-918 Supplement A petitions for the petitioner's mother and stepfather both indicate they were married, even though the petitions were filed before their formal marriage.

Upon review of the record, the petitioner has demonstrated that his mother and the beneficiary were already married under common law in Texas at the time he filed the Form I-918 U petition in July 2012, as all three statutory requirements for such a marriage were concurrently present as required before the filing of the petition. Here, both the petitioner's mother and stepfather concur they considered themselves married well before July 2012. *Burden*, 420 S.W.3d at 308-9 (cohabitation and representation as married insufficient to establish an agreement to be married where the parties *did not* agree there was an agreement to marry). Their agreement to be married prior to the filing of the petition is also evidenced by their joint tax returns filed as a married couple and their designation as married on their respective Form I-918 Supplement A petitions filed before their formal marriage in [REDACTED] 2012. Lastly, the record also provides ample evidence that the petitioner's mother and stepfather have resided together in Texas ever since their agreement to marry, and that they have consistently represented themselves to the public as husband and wife, as evidenced by their joint tax returns as a married couple from 2003 through 2012, and the numerous reference letters in the record from family and friends. Thus, as the statutory requirements of Tex. Fam. Code Ann. § 2.401 were satisfied prior to the July 2012 filing of the Form I-918 U petition, the petitioner has demonstrated his mother and the beneficiary were in a common law marriage under Texas law and that the beneficiary was his stepfather at the time the petition was filed. Accordingly, the beneficiary meets the definition of a qualifying family member as required by 8 C.F.R. § 214.14(a)(10). *See also* 8 C.F.R. § 214.14(f)(4).

Admissibility

Although the petitioner has established the beneficiary's statutory eligibility for derivative U nonimmigrant classification, the petition may not be approved because the beneficiary remains inadmissible to the United States and his waiver application was denied. Section 212(d)(14) of the Act, 8 U.S.C. § 1182(d)(14), requires USCIS to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 U petition, and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The regulation at 8 C.F.R. § 214.1(a)(3)(i) provides the general requirement that all nonimmigrants must establish their admissibility or show that any grounds of inadmissibility have been waived at the time they apply for admission to, or for an extension of stay within, the United States. For U nonimmigrant status in particular, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in order to waive a ground of inadmissibility. We have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

In this case, the director denied the beneficiary's Form I-192 waiver application solely on the basis of the denial of the Form I-918 Supplement A, without noting applicable ground(s) of inadmissibility. Section 212(a)(6)(A)(i) of the Act renders inadmissible any alien present in the United States without admission or parole. 8 U.S.C. § 1182(a)(6)(A)(i). The beneficiary stated on the Form I-918 Supplement A that he last entered the United States in August, 2004, at [REDACTED] Arizona and that he is currently out of status. In a written statement, he indicated that he "crossed over" into the United States after "[immigration authorities] caught [him] and gave [him] voluntary departure." The beneficiary, who bears the burden of demonstrating his admissibility, has proffered no evidence that he entered the United States after having been inspected, admitted or paroled. At a minimum, the beneficiary appears inadmissible under section 212(a)(6)(A)(i) of the Act for being present in the United States without inspection, admission or parole. However, the director did not assess the beneficiary's inadmissibility and denied his waiver request based solely on the denial of his Form I-918 Supplement A. Because the petitioner has overcome this basis for denial on appeal, we will remand the matter to the director for reconsideration of the beneficiary's Form I-192 waiver application.

Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has been met as to the beneficiary's statutory eligibility for derivative U nonimmigrant classification. The petition is not approvable, however, because the beneficiary remains inadmissible to the United States and his waiver application was denied. Because the sole basis for denial of the beneficiary's waiver application has been overcome on appeal, the matter will be remanded to the director for further action and issuance of a new decision.

ORDER: The decision of the Vermont Service Center is withdrawn. The matter is remanded to the Vermont Service Center for reconsideration of the Form I-192 waiver application and issuance of a new decision on the Form I-918 Supplement A, which if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.