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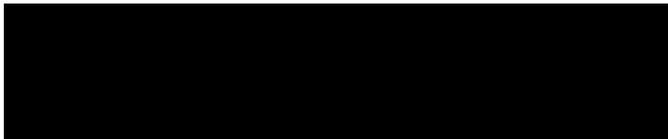
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
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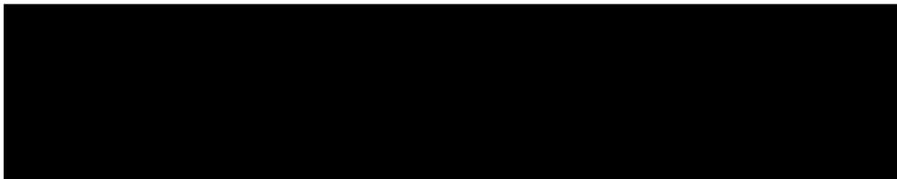
Office: VERMONT SERVICE CENTER

Date: FEB 01 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for further consideration.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of Tunisia, as the fiancé 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 Form I-129F, Petition for Alien Fiancé(e), because, at the time of adjudication, no Form I-130, Petition for Alien Relative, was pending or approved on behalf of the beneficiary. Accordingly, the director concluded that the beneficiary could not benefit under section 101(a)(K)(ii) of the Act as the spouse of a U.S. citizen. *Decision of the Director*, dated October 3, 2005.

On appeal, counsel contends that the director's finding regarding the petitioner's marriage to the beneficiary misapplied Pennsylvania state law. He asserts that the petitioner and beneficiary are not married and that a valid fiancée relationship exists on which to base an approval of the Form I-129F. *Form I-290B, Notice of Appeal to the Administrative Appeals Unit*, received November 4, 2005.

The AAO notes that in his October 3, 2005 denial, the director informed the petitioner that she could not appeal the denial of the Form I-129F. In response to the petitioner's Form I-290B, the director reiterated that federal regulation does not provide for the appeal of a denied Form I-129F when the petitioner and beneficiary are married and terminated the appeal. The AAO finds the director to have erred in terminating the appeal as he lacks such authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

As the Citizenship and Immigration Services (CIS) official who reached the unfavorable decision, the director is authorized only to review the appeal to decide whether favorable action is warranted. Within 45 days of receiving the appeal, the reviewing official may treat it as a motion to reopen or reconsider in order to take favorable action or may decide to reopen or reconsider a proceeding *sua sponte* in order to make a new decision favorable to the affected party. However, in cases where the reviewing official decides favorable action is not warranted, as in the present matter, he or she must forward the appeal and related record of proceeding to the AAO for its decision. See 8 C.F.R. § 103.3(a)(2). Therefore, the director erred in terminating the petitioner's appeal in the present matter.

Further, the director's denial and his August 15, 2007 response to the petitioner's appeal indicate that regulation does not provide for the appeal of a denied Form I-129F when the petitioner and beneficiary are married. The AAO is aware of no regulatory provision that would prevent the petitioner from appealing the director's decision. As the AAO has authority over the Form I-129F, it will accept and consider the petitioner's appeal on its merits.

The AAO first turns to the issue of whether the beneficiary is the spouse or the fiancé of the petitioner. It notes that the record indicates that on the date he married the petitioner, November 28, 1999, the beneficiary was still married to [REDACTED]. This first marriage was not legally terminated until July 23, 2001.

In his denial, the director determined that the petitioner and beneficiary, despite the beneficiary's first marriage, were legally married in the State of Pennsylvania as of the date of his divorce, citing to title 23, section 1702 of the Pennsylvania Consolidated Statutes, which states in pertinent part:

- (a) General rule.—If a married person, during the lifetime of the other person with whom the marriages is in force, enters into a subsequent marriage pursuant to the requirements of this part and the parties to the marriage live together thereafter as husband and wife, and the subsequent marriage was entered into by one or both of the parties in good faith in the full belief that the former spouse was dead or that the former marriage has been annulled or terminated by a divorce, or without knowledge of the former marriage, they shall, after the impediment to their marriage has been removed by the death of the other party to the former marriage or by annulment or divorce, *if they continue to live together as husband and wife in good faith on the part of one of them* [emphasis added], be held to have been legally married from and immediately after the date of death or the date of the decree of annulment or divorce.

Counsel contends that the section of Pennsylvania law cited by the director does not apply to the relationship between the petitioner and the beneficiary as neither had the required “good faith” that they were married, even after the beneficiary's 2001 divorce. Counsel further states that the petitioner and beneficiary did not live together in Pennsylvania after the date of beneficiary's divorce and that the petitioner's two trips to Tunisia do not establish the husband-wife relationship. Counsel's reasoning is persuasive.

The record indicates that the beneficiary, last placed in immigration custody as of June 1, 2001, was removed from the United States on July 31, 2001 and has resided in Tunisia since that date. As the beneficiary's marriage to his first wife was not legally terminated until July 23, 2001, the record's documentation of the beneficiary's detention and removal from the United States¹ demonstrates that the petitioner and beneficiary did not live together as husband and wife after the date of his divorce. The AAO does not find the petitioner's trips to Tunisia in 2001 and 2002 to satisfy the co-residency requirement set forth above. Accordingly, the section of Pennsylvania law cited by the director does not establish the 1999 marriage of the petitioner and

¹ The AAO notes that the beneficiary was removed from the United States, in part, as a result of his fraudulent marriage to a U.S. citizen through which he acquired lawful permanent residency in 1986. Accordingly, the beneficiary may be ineligible for issuance of an immigrant visa pursuant to section 204(c) of the Act, which states that no immigrant visa petition shall be approved for an alien if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

beneficiary as a legal marriage in the State of Pennsylvania and the director's decision will be withdrawn. As the petitioner and beneficiary are not married, the petitioner may file for the beneficiary as the fiancé of a U.S. citizen under section 101(a)(15)(K)(i) of the Act.

Section 214(d) of the Act, 8 U.S.C. § 1184(d), states, in pertinent part, that a fiancé(e) petition:

. . . shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within two years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival. . . .

Pursuant to 8 C.F.R. § 214.2(k)(2), the petitioner may be exempted from this requirement for a meeting if it is established that compliance would:

- (1) result in extreme hardship to the petitioner; or
- (2) that compliance would violate strict and long-established customs of the beneficiary's foreign culture or social practice, as where marriages are traditionally arranged by the parents of the contracting parties and the prospective bride and groom are prohibited from meeting subsequent to the arrangement and prior to the wedding day. In addition to establishing that the required meeting would be a violation of custom or practice, the petitioner must also establish that any and all other aspects of the traditional arrangements have been or will be met in accordance with the custom or practice.

The regulation does not define what may constitute extreme hardship to the petitioner. Therefore, each claim of extreme hardship must be judged on a case-by-case basis taking into account the totality of the petitioner's circumstances. Generally, a director looks at whether the petitioner can demonstrate the existence of circumstances that are (1) not within the power of the petitioner to control or change, and (2) likely to last for a considerable duration or the duration cannot be determined with any degree of certainty.

The petitioner filed the Petition for Alien Fiancé(e) (Form I-129F) with CIS on May 29, 2003. Therefore, the petitioner and the beneficiary were required, by law, to have met during the period that began on May 29, 2001 and ended on May 29, 2003.

The petitioner has claimed that she traveled to meet the beneficiary in Tunisia in 2001 and 2002. While both of the trips reported by the petitioner fall within the specified time period, the record offers no documentary evidence to support the applicant's claims and her statements alone are insufficient proof of compliance with section 214(d) of the Act. Going on record without supporting documentary evidence is not sufficient to meet the petitioner's burden of proof in this proceeding. *See 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)). Accordingly, the current record does not establish the applicant's compliance with the meeting requirement.

In that the petitioner has not been afforded the opportunity to submit additional evidence to establish her compliance with the requirements of section 214(d) of the Act, the AAO will remand the present matter to the director for further action consistent with the preceding discussion.

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 met that burden with regard to her relationship to the beneficiary.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action.