



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-H-

DATE: NOV. 5, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129F, PETITION FOR ALIEN FIANCÉ(E)

The Petitioner, a citizen of the United States, seeks to classify the Beneficiary as a fiancé(e) of a United States citizen. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K). The Director, Vermont Service Center, denied the petition. We dismissed a subsequently filed appeal. The matter is now before us on a motion to reopen and a motion to reconsider. The motion will be granted.

The Director denied the petition because (1) agency records indicated the Petitioner and the Beneficiary were half-siblings or at least first cousins prohibited from marriage under Iowa law and (2) the International Marriage Broker Regulation Act of 2005 (IMBRA) prohibits the marriage because the Petitioner has had a K-1 petition approved within two years of the filing of the current petition and (3) the Petitioner has not sought or received a waiver of the limitation.¹

We previously dismissed the Petitioner's appeal, determining that the Petitioner had not established at the time of filing the petition that he and the Beneficiary would have been able to conclude a valid marriage in the United States. We found that DNA test results submitted on appeal did not establish that the Petitioner and Beneficiary were not siblings or cousins because the identities of the persons tested and the procedures followed were not established. We determined that the Petitioner had not established that he and the Beneficiary were not siblings or cousins. We also determined that even if they established they were first cousins rather than siblings, the Petitioner and Beneficiary were not able to conclude a valid marriage in Iowa, the intended state of residence, because Iowa prohibits marriage between first cousins. We also found that the Petitioner was subject to the limitations of IMBRA and he had not requested a waiver of the limitation.

The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen "must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence."

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of

¹ The provisions of IMBRA apply to all petitions filed on or after March 6, 2006.

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law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). On motion, the petitioner submits additional evidence.

Section 214(d)(2)(A) of the Act, which was added as part of IMBRA, prohibits the approval of a fiancé(e) petition where the petitioner has previously petitioned for two or more alien fiancé(e)s or had a prior fiancé(e) petition approved that was filed less than two years of filing the current petition. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, waive these limitations if justification exists for such a waiver. Section 214(d)(2)(B) of the Act, 8 U.S.C. § 1184(d)(2)(B). The burdens of proof and persuasion lie solely with the petitioner.

The Petitioner asserts that we erred in failing to consider the DNA testing results from [REDACTED] an [REDACTED] accredited testing facility, and refers to USCIS memoranda and U.S. Department of State guidelines concerning parentage testing procedures for family-based immigrant visa petitions and the use of [REDACTED] accredited facilities. The Petitioner submits a list of [REDACTED] Accredited Relationship (DNA) Testing Facilities dated December 19, 2014, which indicates that [REDACTED] is an accredited facility.

Results of parentage testing conducted by [REDACTED] establish that [REDACTED] identified as [REDACTED] in the test results, is the Beneficiary's mother with a probability of 99.9995%. Further testing indicates that the [REDACTED] the Beneficiary's mother, is excluded as the Petitioner's mother and also indicates it is unlikely that she is his aunt (second degree relative). Additional test results indicate that it is "very unlikely" that the Petitioner and Beneficiary are half-siblings. Based on the DNA test results submitted, which were conducted by an [REDACTED] accredited facility, the Petitioner has established by a preponderance of the evidence that he and the Beneficiary do not have the same mother and it is very unlikely they are half-siblings.

On motion, the Petitioner states that although DNA testing also indicates he and the Beneficiary are not first cousins, he and the Beneficiary intend to get married in another state that permits marriage between cousins and then return to Iowa to reside. The Petitioner asserts that Iowa recognizes marriage between first cousins when performed in states which permit such marriage. In support of his assertion, the Petitioner refers to two opinions of the Iowa Attorney General on the subject published shortly after marriages between first cousins were prohibited in 1909. In one opinion, the attorney general stated that "marriage. . . valid and binding in the state where celebrated will be held valid [in the state], and whether one or both parties were residents of this state prior to the marriage, and left for the manifest purpose of evading the provisions of our statute, such fact could not affect the status of the rights and privileges incident to an resulting from the relation of marriage. . . ." See Op.Atty.Gen.1919-20, p. 822.

Based on the evidence submitted on motion, the Petitioner has established that he and the Beneficiary could legally marry in the United States even if they were first cousins. The Petitioner has therefore overcome the basis of the director's decision and our dismissal of the appeal based on the Petitioner's failure to establish that he and the Beneficiary can legally marry in the United States.

We concurred, however, with the Director's decision that the petition cannot be approved because the Petitioner is subject to the limitations of Section 214(d)(2)(A) of the Act, which provides:

Subject to subparagraphs (B) and (C), the Secretary of Homeland Security may not approve a petition under paragraph (1) unless the Secretary has verified that--

- (i) the petitioner has not, previous to the pending petition, petitioned under paragraph (1) with respect to two or more applying aliens; and
- (ii) if the petitioner has had such a petition previously approved, 2 years have elapsed since the filing of such previously approved petition.

If a petitioner has filed K-1 visa petitions for two or more aliens at any time in the past, or had a K-1 visa petition approved within two years prior to the filing of the current petition, the petitioner must request a waiver. Pursuant to section 214(d)(2)(B) of the Act, a discretionary waiver is available to waive the applicable time and/or numerical limitations if justification exists.

In this case, the Petitioner filed the Form I-129F with USCIS on August 21, 2012. On question #11 of the petition, the Petitioner indicated that he had not filed for the Beneficiary or any other alien fiancé(e) or husband/wife before. The record, however, contains a prior petition the Petitioner filed for the same Beneficiary on July 1, 2011, which was approved on January 9, 2012. Based on this evidence, the Petitioner is required to request a waiver prior to filing the current petition.

On motion, the Petitioner claims that the provisions of IMBRA do not apply to him because the provision is intended for those filing multiple petitions for multiple beneficiaries. He claims since he is filing the current petition for the same beneficiary, he should not and be required to file a waiver. However, the IMBRA filing limitation is applicable whenever a petitioner has an approved petition less than two years prior to filing another petition, regardless of whether the petition is for the same beneficiary. If the petitioner has filed two or more K-1 visa petitions at any time in the past, or previously had a K-1 visa petition approved within two years prior to the filing of the current petition, the petitioner must request a waiver. See Memorandum from Michael Aytes, Associate Director for Domestic Operations, USCIS, HQOPRD 70/6.2.11, *International Marriage Broker Regulation Act Implementation Guidance* (July 21, 2006).

The petitioner may request a waiver by attaching a signed and dated letter, requesting the waiver and explaining why a waiver would be appropriate in his or her circumstances, together with any evidence in support of the waiver request. Aytes Memorandum, *supra*, at p. 2-3. In adjudicating a waiver, factors to be considered include:

- Whether unusual circumstances exist (e.g. death or incapacity of prior beneficiary(ies));
- Whether the petitioner appears to have a history of domestic violence;
- Whether it appears the petitioner has a pattern of filing multiple petitions for different beneficiaries at the same time, of filing and withdrawing petitions, or obtaining approvals of petitions every few years.

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On August 27, 2015, we issued a Notice of Intent to Deny (NOID) the Petitioner's motion based on the fact that he had not requested a waiver as required by section 214(d)(2)(B) of the Act. The Petitioner timely responded, requesting a waiver of the two-year bar on filing successive K-1 visa petition. The Petitioner submits additional evidence in support of the waiver.

Based on the evidence submitted in response to the NOID, the Petitioner merits a favorable exercise of discretion for a waiver under section 214(d)(2)(B) of the Act. The first petition filed on behalf of the Beneficiary was approved by the Director on January 9, 2012, but was returned to USCIS following the Beneficiary's interview at the U.S. Embassy in [REDACTED] Laos, on May 12, 2012. The Department of State consular officer who conducted the interview determined that the Petitioner and the Beneficiary were related and not legally able to marry upon the Beneficiary's admission into the United States. The officer concluded that the relationship was entered into to circumvent U.S. immigration laws. The consular officer denied the Beneficiary a K-1 visa and recommended that the petition be revoked. The Petitioner filed a second petition on behalf of the same Beneficiary. The Director denied the petition, finding that because they were related, the Petitioner had not established that he and the Beneficiary could legally marry in the United States.² On motion, the DNA evidence supports the Petitioner's assertion that he and the Beneficiary are not siblings and likely not cousins, and the Petitioner has further established that even if they are cousins, they could still legally marry in the United States. As such, the Petitioner has overcome the basis of the Director's decision and our dismissal of the appeal based on the fact that the Petitioner and the Beneficiary cannot legally marry in the United States.

In this matter, the only reason the Beneficiary did not obtain a visa and travel to the United States on the first approved petition was because she was denied a visa by the U.S. Embassy in Laos based on their assessment that the Petitioner and the Beneficiary are related and cannot legally marry in the United States. This finding has been overcome by the Petitioner on motion. The Petitioner does not have a history of domestic violence or other criminal record nor does he have a history of filing multiple petitions for multiple Beneficiaries. The Beneficiary of the prior approved petition and the current petition is the same person. There are no other adverse factors against a grant of the waiver. Therefore, the waiver will be approved.

Based on the evidence of record, the Petitioner has now overcome the basis of the Director's decision to deny the petition and our prior decision to dismiss the appeal. The motion will be granted.

² The finding that the Beneficiary and Petitioner were first cousins was based on statements on the Form I-129F as well as other statements that their mothers were sisters. The Director later concluded that, as [REDACTED] was the name of the mother of both the Petitioner and Beneficiary, they were actually half siblings with the same mother. DNA test results establish that the Beneficiary's mother is not the Petitioner's mother, and they are most likely not half siblings. It is unclear from the record, however, whether they are first cousins, as there is no DNA testing to establish the identity of the Petitioner's mother. A test indicating that [REDACTED] (the Beneficiary's mother) and [REDACTED] are unlikely to be siblings does not resolve the question of whether the Petitioner and Beneficiary are first cousins because [REDACTED] is not the Petitioner's mother. As noted above, test results do indicate that the Beneficiary's mother is unlikely to be the Petitioner's aunt.

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In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has met that burden.

ORDER: The motion to reopen and reconsider is granted and the appeal is sustained.

Cite as *Matter of K-H-*, ID# 11349 (AAO Nov. 5, 2015)