Genco Op. No. 91-56 (INS), 1991 WL 1185167

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Legal Opinion Fiances or fiancees who marry later than 90 days after entry

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CO 245-C
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I. QUESTION

This Legal Opinion addresses the following question: If the marriage between an alien fiance or fiancee and a citizen petitioner does not occur until more than 90 days have elapsed since the alien's admission, is there any basis upon which the alien may obtain permanent residence through adjustment of status?

II. SUMMARY CONCLUSION

The alien may not adjust, on the basis of his or her admission under Section 101(a)(15)(K), if the alien marries the citizen petitioner more than 90 days after entry. The citizen may, however, file an alien relative visa petition (Form I-130) after the untimely marriage. Once the petition is approved, the alien may then apply for adjustment of status.

III. ANALYSIS

The Immigration and Nationality Act of 1952, as amended, creates a nonimmigrant classification for the alien fiance or fiancee of a United States citizen. INA 101(a)(15)(K), 8 U.S.C. 1101(a)(15)(K). In order to qualify for entry, the alien fiance or fiancee must be seeking to enter the United States "solely to conclude a valid marriage with the petitioner within ninety days after entry." Id. The alien's minor children may also be admitted, if they accompany or follow to join the alien. Id. The aliens are precluded from changing to a different nonimmigrant classification. Id. 248(1), 8 U.S.C. 1258(1). The alien fiance or fiancee's failure to marry the petitioner within three months of entry renders the alien fiance or fiancee, and any alien minor children, amenable to deportation from the United States. Id. 214(d), 8 U.S.C. 1184(d).

The Service may not adjust the status of an alien fiance or fiancee to permanent residence, except on the basis of the alien's subsequent marriage to the citizen petitioner. Id. 245(d), 8 U.S.C. 1255(d). The regulation implementing this provision is codified at 8 C.F.R. 245.1(b)(13). As currently written, Section 245.1(b)(13) appears to bar adjustment entirely, unless the alien fiance or fiancee and the citizen petitioner marry within 90 days of the alien's entry. Section 245(d) of the INA, on which Section 245.1(b)(13) is based, does not include this 90-day time limit. The alien may not be admitted as a fiance or fiancee, however, unless the alien and the citizen petitioner intend to marry within 90 days of the alien's entry. INA 101(a)(15)(K), 8 U.S.C. 1101(a)(15)(K). The alien becomes deportable if the couple does not marry within three months of entry. Id. 214(d), 8 U.S.C. 1184(d). Section 245.1(b)(13), therefore, is a reasonable interpretation of the fiance/fiancee provisions read as a whole.

The Service has recently become aware of cases in which the alien and citizen married, but the marriage took place more than 90 days after the alien's entry. In one case, for example, the couple delayed their marriage after the death of one of their parents. Another potential problem involves alien fiances and fiancees of members of the Armed Forces deployed abroad for Operations Desert Shield and Desert Storm. The situations raise the question of whether an alien fiance's untimely marriage constitutes an insurmountable bar to the alien's adjustment.

***2** Moss v. INS, 651 F.2d 1091 (5th Cir. 1981), presents a possible solution to this dilemma. In Moss, the alien and citizen had married 92 days after the alien's admission. In deportation proceedings, the alien attempted to present before the immigration judge evidence that illness intervened to delay the scheduled marriage. The immigration judge refused to admit the evidence, and the Board affirmed the resulting deportation order. The court held that the alien was entitled to present the evidence, and that Section 214(d) would not apply if the alien was successful in establishing a reasonable explanation for the failure to marry within the prescribed period. The court of appeals based its decision on the imprecise language of Section 214(d). 651 F.2d at 1093, n. 4. Under the statute, the couple must marry within "90 days," but the alien is deportable only if the marriage does not occur within "three months." The court noted that almost any "three month" period will exceed "90 days." Id.

The court, however, cited no authority that supports its creation of an "unforeseen circumstances" exception to the requirement that an alien fiance and citizen petitioner marry within 90 days of the alien's entry. 651 F.2d at 1093. The court did refer to Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979), but this case did not involve the legal consequence of an alien fiance's failure to marry within the time allowed by law. Since courts lack authority to alter deadlines set by Congress, INS v. Pangilinan, 485 U.S. 875 (1988), we conclude that an alien fiance or fiancee may not adjust, based on his or her admission under sections 101(a)(15)(K) and 214(d), if the alien marries the citizen petitioner more than 90 days after the alien's admission.

An untimely marriage, however, need not be an insurmountable bar to the alien's adjustment. The Service may not adjust the alien's status "except to that of an alien lawfully admitted to the United States on a conditional basis . . . as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under Section 101(a)(15)(K)." INA 245(d), 8 U.S.C. 1255(d). The alien clearly may not seek adjustment under the preference system, nor on the basis of a marriage to a different citizen. Id. Section 245(d) of the Act, however, does not clearly preclude the citizen petitioner from filing a new visa petition on the alien's behalf after the untimely marriage. Approval of the citizen spouse's alien relative visa petition would qualify the alien spouse as an "immediate relative." Id. 204, 8 U.S.C. 1184. [1] The alien could then apply for adjustment, notwithstanding the fact that the failure to marry within the time allowed by Section 214(d) renders the alien's status unlawful. Id. 245(c)(2), 8 U.S.C. 1255(c)(2). Since the alien's adjustment would still be based upon his or her marriage to the citizen petitioner, Section 245(d) would not clearly bar the alien's adjustment.

***3** Section 245.1(b)(13) of the regulations would not prohibit the adjustment either. As noted, this regulation appears to prohibit the alien's adjustment absolutely if the marriage is untimely. This aspect of Section 245.1(b)(13), however, is not strictly required by the text of Section 245(d) of the Act. We recommend, therefore, that the Service interpret Section 245.1(b)(13) narrowly, so that it applies to the alien's adjustment as a now-married fiance or fiancee, but does not preclude the alien's adjustment based on a new visa petition (Form I-130) filed by the citizen spouse after the untimely marriage. Since the alien may only be adjusted as a conditional permanent residence under Section 216 of the Act, INA 245(d), 8 U.S.C. 1255(d), the alien would have to apply for adjustment within two years of his or her marriage, see id. 216(a)(1) and (g)(1), 8 U.S.C. 1186a(a)(1) and (g)(1).

Our conclusion involves an interpretation of an existing regulation. It is not, strictly speaking, necessary to amend Section 245.1(b)(13) in order to implement this interpretation. If the Service decides to adopt our recommendation, however, it would be prudent to amend Section 245.1(b)(13) accordingly. Doing so will help ensure uniformity of practice. We have, therefore, enclosed a draft amendment to this regulation that conforms to our recommendation.

/s/ Grover Joseph Rees, III
General Counsel

Enclosure

Footnotes

1 Unless the Service approves a visa petition according the alien the status of an "immediate relative," the alien's unlawful status would create an additional bar to adjustment. See INA 245(c)(2), 8 U.S.C. 1255(c)(2).

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