3 I. & N. Dec. 33 (BIA), Interim Decision 93, 1947 WL 7017

United States Department of Justice

Board of Immigration Appeals

IN THE MATTER OF O-----

In VISA PETITION Proceedings

A-6345409
VP-374571

Decided by Central Office September 23, 1947
Decided by Board April 1, 1948
Decided by Board September 1, 1949
Decided by Acting Attorney General September 16, 1949

****1 *33 Marriage–Validity of "second" marriage, in cases arising under section 9 of the Immigration Act of 1924–Validity of divorce in absentia, "terminating" prior marriage–Applicable law. (See Interim Decision No. 350 for change in rule.)**

(1) In visa petition cases under section 9 of the Immigration Act of 1924, where the validity of divorces are involved, such validity is to be determined hereafter in accordance with the prevailing law of the country in which the subject is domiciled and physically present at the time the divorce is granted. (See *Matter of McG-----*, 6308586, 2, I. & N. Dec. 883. Also see 3, I. & N. Dec. 227.)

(2) No divorce obtained in absentia shall be valid for immigration purposes if such divorce is obtained while either party is domiciled or physically present in the United States. (See *Petition of Taffel*, U. S. D. C., S. D. N. Y., 1941, 49 F. 227 Supp. 109, for rule in naturalization cases.)

BEFORE THE CENTRAL OFFICE

(September 23, 1947)

Discussion: The petitioner, who alleges he was born in the United States on November 20, 1887, has submitted a visa petition wherein it is alleged that he and the beneficiary were married in the United States on October 10, 1946, the petitioner and the beneficiary both having been previously married. The question presented is whether or not the beneficiary is entitled to a nonquota status under section 4 (a) of the Immigration Act of 1924, as to the wife of the petitioner.

The evidence of record shows that the petitioner was born in the United States on November 20, 1887, as alleged, and that his former wife died on September 22, 1922. The evidence further shows that the beneficiary obtained a "mail order" divorce from her prior husband in the First Civil Court of First Instance of the Bravos District, State of Chihuahua, Mexico, on October 3, 1946, and that she and the petitioner were married in Auburn, N. Y., on October 10, 1946.

***34** The beneficiary was recently interrogated by a representative of this Service and stated that neither she nor her former husband had ever resided in Mexico, and that it was her own idea to obtain a Mexican divorce because of expediency.

It is well settled that jurisdiction to render a divorce rests upon domicile (*Williams* v. *North Carolina*, 322 U. S. 725). It is the view of this Service that if a person who is residing in this country obtains a "mail order" divorce in Mexico, such divorce is not recognized as valid in this country for the reason that the Mexican court did not have jurisdiction of the matrimonial *res* (A-7696414, July 11, 1945). The Board of Immigration Appeals recently affirmed the aforementioned Service view (VP-348487, March 12, 1947).

****2** From the foregoing, it is clear that the Mexican "mail order" divorce obtained by the beneficiary on October 3, 1946, may not be regarded as valid and that it did not effect a termination of the beneficiary's former marriage. Accordingly, the beneficiary's "marriage" to the petitioner on October 10, 1946 was invalid and cannot be the basis for the approval of a visa petition submitted in her behalf. Therefore, it must be concluded that the beneficiary is not entitled to a nonquota section 4 (a) immigration status as the wife of the petitioner.

Recommendation: It is recommended that the submitted petition be denied.

So ordered.

BEFORE THE BOARD

(April 1, 1948)

Discussion: This case is before us on appeal from an order of the Acting Commissioner denying a petition filed to establish status in behalf of the petitioner's wife. The issue raised by the appeal is whether the beneficiary is lawfully married to the petitioner. The answer to this question depends in turn on whether a Mexican divorce obtained by the beneficiary to terminate her first marriage should be recognized under our laws.

The beneficiary is a native of New Zealand and a British subject. She was first married in New Zealand in 1930. In 1933 she left her husband and went to England to live. Her husband, also a native of New Zealand and a British subject, continued to live in New Zealand.

In 1945 the beneficiary consulted her solicitor in London with respect to terminating her first marriage. Her solicitor advised her that if she obtained a Mexican divorce her marriage would be lawfully terminated so far as British law was concerned. Because of currency restrictions the beneficiary came to the United States in May 1946 to make final arrangements for obtaining a divorce in Mexico. She was admitted to the United States as a visitor for a period of 3 months on ***35** May 17, 1946. The file shows that her stay in this country as a visitor was extended until at least February 17, 1947. In the meantime on May 25, 1946, she filed the necessary papers in the Mexican court. On October 3, 1946, while she was still here under the status of a visitor, she was granted a Mexican divorce. Her husband, who apparently agreed to the divorce, was still living in New Zealand.

One week after the beneficiary obtained her Mexican divorce, she married the petitioner, a native-born American citizen, in Auburn, N. Y. The Acting Commissioner, in his decision of September 23, 1947, concluded that the Mexican court had no jurisdiction to award the beneficiary a divorce and that consequently she was lawfully married to the petitioner.

This Board and the Immigration and Naturalization Service have always held that under the principles of comity a foreign divorce would be recognized, so far as the immigration laws are concerned, in those cases where neither party to the divorce had ever been domiciled in the United States. *Matter of McG-----*, 6308586 (October 21, 1947) (2, I. & N. Dec. 883); *Matter of B-----*, V-317053 (Central Office, July 21, 1945). In this case it is clear that the beneficiary's first husband has always been domiciled in New Zealand. It is also clear that if the beneficiary was not domiciled in New Zealand, at least until May 1946, she must have had her domicile in England. When the beneficiary came to the United States in May 1946, she was admitted as a visitor. The Immigration and Naturalization Service, in so admitting her and

in extending her stay as a visitor until February 1947, must necessarily have found that she was not domiciled in this country. We think that this finding was proper, at least on the present record. Accordingly, it follows that the beneficiary was not domiciled in the United States either in May 1946 when she submitted herself to the jurisdiction of the Mexican court for the purpose of obtaining a divorce or in October 1946 when the divorce decree was entered. That being so, under the principles of comity and under past administrative decisions, we conclude that she was lawfully divorced from her husband. Her present marriage to the petitioner is, so far as the immigration laws are concerned, valid. The petition will be approved.

****3** **Order:** The Acting Commissioner's order is reversed, and

It is ordered that the petition for nonquota status be approved.

BEFORE THE BOARD

(September 1, 1949)

Discussion: On April 1, 1948, this Board reversed the order of the Acting Commissioner of Immigration and Naturalization and approved a petition for nonquota status filed by D----- M. O----- on behalf of his wife, J-----. The Department of State was duly notified. ***36** Nevertheless, that Department refuses to issue a nonquota immigration visa to the beneficiary of the petition on the ground that she is not a non-quota immigrant and not the wife of the petitioner. Counsel files a motion with us asking for such relief as may be granted because of this situation.

A petition (Form I-133) was filed by O----- under section 9 of the Immigration Act of 1924 (8 U. S. C. 209) asking for recognition of a nonquota status under section 4 (a) of the act for his wife, J----- M----- O-----, whom he married October 10, 1946 in Auburn, N. Y. The difficulty in the case arose because of the conditions under which Mrs. O-----'s prior marriage was terminated. She was first married in New Zealand in 1930 to a British subject. In 1933 she left her husband and went to England to live. In 1945 she consulted her solicitor in London concerning a divorce and was advised a Mexican divorce would terminate her marriage legally under British law. Because of currency restrictions, the present Mrs. O----- came to the United States in May 1946 to make final arrangements for a divorce in Mexico. On May 25, 1946, the necessary papers were filed in the Mexican court. On October 3, 1946, while still in the United States as a visitor, Mrs. O----- was granted a Mexican divorce. One week later in Auburn, N. Y., she married D----- M. O-----, a citizen of the United States and the petitioner in this case. In approving the petition of D----- O-----, on April 1, 1948, this Board said:

This Board and the Immigration and Naturalization Service have always held that under the principles of comity a foreign divorce would be recognized, so far as the immigration laws are concerned, in those cases where neither party to the divorce had ever been domiciled in the United States. *Matter of McG-----*, 6308586 (October 21, 1947); *Matter of B-----*, V-317053 (Central Office, July 21, 1945). In this case it is clear that the beneficiary's first husband has always been domiciled in New Zealand. It is also clear that if the beneficiary was not domiciled in New Zealand, at least until May 1946, she must have had her domicile in England. When the beneficiary came to the United States in May 1946 she was admitted as a visitor. The Immigration and Naturalization Service, in so admitting her and in extending her stay as a visitor until February 1947, must necessarily have found that she was not domiciled in this country. We think that this finding was proper, at least on the present record. Accordingly, it follows that the beneficiary was not domiciled in the United States either in May 1946 when she submitted herself to the jurisdiction of the Mexican court for the purpose of obtaining a divorce or in October 1946 when the divorce decree was entered. That being so, under the principles of comity and under past administrative decisions, we conclude that she was lawfully divorced from her husband. Her present marriage to the petitioner is, so far as the immigration laws are concerned, valid.

****4** The Chief of the Visa Division, Department of State, in a letter of April 27, 1949, addressed to Samuel V. Kennedy, Jr., of Auburn, N. Y., gave the following as the reasons why the State Department refused to recognize the approval of the visa petition filed by Mrs. O-----:

***37** The Department has consistently held that "mail order divorces" or divorces in absentia obtained in Mexico, where the court did not have jurisdiction of either party in the divorce proceedings may not be considered valid for immigration purposes.

Therefore, as Mrs. O----- desires to enter the United States for the purpose of residing permanently with Mr. D-----M. O----- with whom she entered into a purported marriage, the issuance of an immigration visa to her would appear to be improper until such time as she is able to establish that she has obtained a valid divorce terminating her first marriage, and that she has subsequently entered into a valid marital agreement with Mr. O-----.

The issue is not whether the Mexican divorce of the beneficiary should or should not be recognized, but whether the State Department is bound by the determination of this Department. Section 9 of the Immigration Act of 1924 provides:

SEC. 9. (*a*) In case of any immigrant claiming in his application for an immigration visa to be a nonquota immigrant by reason of relationship under the provisions of subdivision (*a*) of section 4 * * * the consular officer shall not issue such immigration visa * * * until he has been authorized to do so as hereinafter in this section provided.

(*b*) Any citizen of the United States claiming that any immigrant is his relative, and that such immigrant is properly admissible to the United States as a nonquota immigrant under the provisions of subdivision (*a*) of section 4 * * * may file with the Commissioner of Immigration and Naturalization a petition in such form as may be by regulations prescribed * * *.

Then follows provisions relating to the execution of the petition and certain facts which are required to be set out in the petition.

The section continues:

(*c*) If the Commissioner of Immigration and Naturalization finds the facts stated in the petition to be true, and that the immigrant in respect of whom the petition is made is entitled to be admitted to the United States as a nonquota immigrant under subdivision (*a*) of section 4 * * * he shall, with the approval of the Attorney General, inform the Secretary of State of his decision, and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed to issue the immigration visa * * *.

It seems to us apparent that the statute contemplates that a determination of nonquota status under section 4 (a) shall be made in accordance with the provisions of section 9 and only in accordance with such provisions.

It is now firmly established that an American Consul may not issue a nonquota immigration visa under section 4 (a) without prior approval of a nonquota status in accordance with section 9. *Haff* v. *Tom Tang Shee*, 63 F. (2d) 191; 22 C. F. R. 61.208. That once an adjudication of a nonquota status under section 9 has been made, such adjudication must be accepted by the Department of State, to us seems equally clear. After minutely detailing the manner by which a nonquota status under section 4 (a) was to be established, it is hardly conceivable that Congress intended State Department officials to ***38** relitigate the issue. We conclude that a determination made by this Department under a section 9 visa is binding on the Department of State. In this case, that Department must recognize the beneficiary of the petition as entitled to a nonquota status as the wife of a citizen of the United States.

****5** Reorganization Plan No. V, transmitted to Congress May 22, 1940, pursuant to the provisions of the Reorganization Act of 1939 (54 Stat. 1238; 5 Federal Register 223) provides:

In the event of disagreement between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, final determination shall be made by the Attorney General.

The purpose of Reorganization Plan No. V, it is clear, is to resolve any differences of opinion between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality. The plan provides that in such cases final determination shall be made by the Attorney General. [1]

To the end that a final and binding determination on the question presented by this record may be reached, we shall certify the case to the Attorney General for his consideration.

Order: It is ordered that the order of this Board dated April 1, 1948 be affirmed, and that the case be referred to the Attorney General for review of the Board's decision.

*39 BEFORE THE ACTING ATTORNEY GENERAL

(September 16, 1949)

****6** The decision and order of the Board of Immigration Appeals dated April 1, 1948 are hereby disapproved and set aside.

The decision and order of the Acting Commissioner of Immigration and Naturalization dated September 23, 1947 are hereby approved.

The validity of divorces affecting cases arising under section 9 of the Immigration Act of 1924 (8 U. S. C. 209) shall hereafter be determined in accordance with the prevailing law of the country in which subject is domiciled and physically present at the time the divorce is obtained. No divorce obtained in absentia shall be valid for immigration purposes if such divorce is obtained while either party thereto is domiciled or physically present in the United States.

Footnotes

1 A similar problem was presented in the *Matter of G-----*, 56040/601 (March 21, 1941). There the facts disclosed that the alien on May 3, 1933, and January 28, 1937, pleaded guilty in New York City of being in possession of "policy slips" in connection with the "numbers game," received a sentence of 10 days in the workhouse, which was suspended, and a fine of $200 or 60 days in jail, respectively. The alien, whose legally resident alien wife and two American born children were residing in New York City, where he too had resided for many years, because he had originally entered this country legally, proceeded to Cuba to make application for an immigration visa in order that he could return to his family in this country for permanent residence. A visa was refused him by the American Consular officer there on the theory that because of said convictions in New York City he was inadmissible to the United States as one who had been convicted of offenses involving moral turpitude. Because of this, application was made to the Board for advance exercise of the discretion contained in the seventh proviso to section 3, Immigration Act of 1917, with reference to said convictions. The Board held that exercise of the discretion sought was unnecessary because of its determination that the offenses for which the alien was convicted did not involve moral turpitude, namely, section 3, Immigration Act of 1917, as amended. Because of the view taken by the Department of State, which was contrary to that of the Board, the matter was certified to the Attorney General for final review in accordance with Reorganization Plan No. V. The decision of the Board was approved by the Attorney General.

Note 1. *Editor's note.* Above overruled to extent inconsistent with *Matter of P -----*, Interim Decision No. 350.

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