4 I. & N. Dec. 610 (U.S.Atty.Gen.), Interim Decision 350, 1952 WL 7282

United States Department of Justice

Board of Immigration Appeals

IN THE MATTER OF P-----

In VISA PETITION Proceedings

56324/762

Decided by Board February 18, 1952
Decided by Acting Attorney General March 18, 1952
Decided by Board March 27, 1952

1 *610 **Marriage-Validity of (for immigration purposes)-Applicable law.

(1) The mere fact that a prior marriage in the United States was terminated by the first wife's procurance of a Mexican *in absentia* divorce while both spouses were residents in the United States, does not bar the application of the generally accepted rule that the validity of a marriage (the second here) is governed by the law of the place of celebration (Germany), and such general rule will be applied in this case.

(2) The decision in *Matter of O*----- (3, I. & N. Dec. 33), is expressly overruled to the extent inconsistent with the decision of the Acting Attorney General in this case.

BEFORE THE BOARD

(February 18, 1952)
This case comes to us on appeal from an order by the Acting Assistant Commissioner, entered January 22, 1952, denying a petition (Form I-133) by C----- P----- for a nonquota status in behalf of his wife H----- M----- P-----, a native of Germany, whom he married on April 28, 1951.

The issue is the validity of the marriage. The question arises by reason of his having been married on a previous occasion, which earlier marriage was terminated by a divorce procured in Mexico under the circumstances related below.

He was first married on December 27, 1943. As the parties thereto mutually agreed later that the marriage should be terminated, the hubsand (the petitioner herein), signed a nolo contendere, and the wife, after consulting a lawyer in Los Angeles and receiving his assurance that a Mexican divorce was valid, went to Tijuana, Mexico, and there engaged a lawyer, signed certain papers, paid him his fee, and returned to the United States. She was in Mexico on February 27-28, 1947. Shortly thereafter she received documents evidencing ***611** that divorce proceedings had been instituted in the civil court of the District of Morelos, State of Tlaxcala, Mexico, on March 3, 1947, and judgment was entered on March 8, 1947. Neither she nor her husband was in Mexico on March 3-8, 1947, and neither of them was ever in the State of Tlaxcala. Relying on the validity of that decree she has remarried, as had the petitioner.

We heard the petitioner in oral argument on February 12, 1952. He is a sergeant in the United States Air Force, stationed in Alabama. He stated that before he entered into his present marriage he presented the divorce papers to his superior

officers, who examined them and assured him that they were legal, and he was permitted to proceed with the marriage, which was had under German law. There are now two children of that marriage and his present wife and their two children are in Germany, and he expressed great concern at the possible necessity of his having to incur the delay and expense of further proceedings to legalize their status, including his procurement of a divorce and thereafter returning to Germany to remarry his wife.

**2 The question of the validity of so-called Mexican mail-order divorces has arisen in numerous cases which have come before us. The most recent, and controlling, case is *Matter of O*----- (3, I. & N. Dec. 33), wherein the Attorney General on September 16, 1949, held that no divorce obtained in absentia shall be valid for immigration purposes if obtained while either party is domiciled or physically present in the United States.

We are impressed with the evident good faith of the parties immediately concerned herein. The petitioner's long military service-8 years in the Army Air Force, including service overseas-is an additional factor which presents strong appeal. Evidently such is his contemplated career. Seemingly he is apprehensive that an adverse decision on his present application may affect his future. Obviously it will interrupt his domestic life and entail him tremendous expense. These circumstances suggest that most careful consideration be given all factors of the case.

We note that the applicant's wife went personally to Mexico and there signed the documents which were the basis for the divorce proceeding. To this extent, the case may be distinguished from the typical mail-order divorce where neither party departed from the United States.

Furthermore, we are cognizant of the fact that before a member of our Armed Forces serving overseas is permitted to marry a local resident, the proposed marriage is the subject of a scrupulous investigation by American officials stationed abroad, and it is only when the investigation leads to official approval that the marriage is permitted. The applicant assures us that such was the proceeding in his case and *612 that the investigation included his submitting to the military authorities the documents evidencing his Mexican divorce. He also informs us that such authorities advised him that his divorce was valid and his marriage was authorized.

Summarizing, it appears that his first wife consulted a lawyer in Los Angeles and on his advice proceeded to Mexico, where she engaged a Mexican attorney and signed papers initiating the divorce proceeding; that the resulting divorce decree was examined and approved by the constituted authorities of the United States in Germany, and it was only after receiving their approval that the marriage involved in the application now before us was entered into.

Upon reading the decision of the Supreme Court in *Moser* v. *United States,* 341 U. S. 41, we note that when one had sought information and guidance from the highest authority to which he could turn there was "justifiable reliance" in acting on such advice. Because of that decision and the factual elements present herein as set out above, we would sustain the appeal as an exception to the rule were it not for the broad rule enunciated in *Matter of O*----- *(supra);* but that rule seems to admit of no exception, and inasmuch as the decision is binding on us we feel we have no alternative to an affirmance of the order of the Commissioner. We will, however, refer the case to the Attorney General for review and consideration of possible modification of the broad rule heretofore adopted.

3 **Order: It is ordered that the appeal be dismissed:

In accordance with the provisions of section 90.12, title 8 C. F. R., the Board refers the case to the Attorney General for review of its decision.

BEFORE THE ACTING ATTORNEY GENERAL

(March 18, 1952)

This case is before me for review of a decision of the Board of Immigration Appeals, dismissing the petitioner's appeal from an order of the Acting Assistant Commissioner of Immigration and Naturalization, denying a petition dated May 22, 1951 (Form I-133), by Sergeant C----- P-----, U. S. A. F., for a nonquota status in behalf of H----- M----- P-----, a native of Germany, whom he married in Germany on April 28, 1951.

The issue presented on review is whether H----- M----- P----- is the wife of the petitioner within the meaning of section 4 (a) of the Immigration Act of 1924, as amended (8 U. S. C. 204 (a)). Section 4 provides, in material part, as follows:

When used in this chapter the term "nonquota immigrant" means-

(a) An immigrant who is the unmarried child under 21 years of age, or the wife, or the husband of a citizen of the United States: *Provided,* That the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to January 1, 1948.

***613** The facts are not in issue. Petitioner, who has been in the military service since 1944, was first married on December 24, 1943, at Los Angeles, Calif. His first wife was 17 and he 22 when married. After a short period together, he was sent overseas. Upon his return to the United States at the end of 1945, he and his first wife found that they were strangers and soon agreed to separate. Thereafter, his first wife consulted a Los Angeles lawyer, and was advised that a Mexican divorce was valid in California. She obtained petitioner's written consent to a divorce, and on February 27, 1947, went to Tijuana, Mexico, consulted a Mexican lawyer, executed the necessary papers, furnished her husband's written consent, paid a $95 fee, and returned to Los Angeles on February 28, 1947. Petitioner did not go to Mexico. Suit was instituted before the district court of Morelos, State of Tlaxcala, Mexico, on March 3, 1947, and judgment of divorce was rendered on March 8, 1947. Petitioner's first wife remarried at Los Angeles, Calif., on March 13, 1947, and has a child by her second husband.

Petitioner was transferred to Germany in 1948. He was married in Germany to the beneficiary on April 28, 1951. He had shown his papers evidencing his Mexican divorce to his superior officers, and had been advised that they were legal. The Air Force has recognized the marriage for allotment purposes. In an appearance before the Board of Immigration Appeals, petitioner stated:

In applying for marriage over in Germany, I had to file a copy of the divorce, with other papers, and nothing was said there at that time about the Mexican decree. They allowed me to go ahead and get married, under German law.

****4** Petitioner has two children by the beneficiary, who were legitimated under German law by marriage. He has declared both children, born in Germany, to be American citizens. He now applies for nonquota status for entry of their mother as his wife.

The Congress has provided in the Immigration Act of 1924, as amended, for the grant of nonquota status to an immigrant who is the "wife" of a citizen of the United States. The status of "wife" is necessarily dependent upon the validity of the marriage which created it. Section 28 of the Immigration Act of 1924, as amended, provides in subdivision (n), as follows:

The terms "wife" and "husband" do not include a wife or husband by reason of a proxy or picture marriage.

But, apart from saying that picture and proxy marriages will not create the status of "wife" for immigration purposes, the Congress has not said what will. In the absence of such legislative provision, the generally accepted rule is that the validity of a marriage is governed by the law of the place of celebration, (Beale, *The Conflict of Laws* (1935 Ed.), vol. 2, p. 669, and cases there cited; *Cosulich Societa Triestina di Navigazione* v. *Elting,* 66 F. (2d) 534, 536.) That is the ***614** rule to be applied here, and the verified petition alleges a marriage which created the status of "wife" under German law.

The Acting Assistant Commissioner and the Board of Immigration Appeals, however, felt constrained to deny the petition on the authority of a decision of the Acting Attorney General, dated September 16, 1949, In the *Matter of O-----* (Interim Decision No. 93). That decision sought to lay down the following rule of general application:

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.

The Congress has neither said, nor implied, that in all circumstances a foreign marriage of a citizen of the United States is invalid for immigration purposes, although valid under the law of the place where contracted, unless a prior divorce satisfies the particular jurisdictional concepts laid down in that administrative decision. (For divergence of views expressed with respect to the concepts of domicile and jurisdiction see *Williams* v. *North Carolina,* 325 U. S. 226.) If the Congress had wished to make such provision, it could have done so as it did in the instance of picture and proxy marriages (Cf. 37 Op. A. G. 102, 110-111). But, it has not, although the issue has been a recurrent one over the years. Moreover, the introduction of such conceptual rigidity into the administration of section 4 (a) scarcely seems consonant with its beneficent purpose. A plain congressional purpose in providing preferential status for entry of immigrants closely related to American citizens was to facilitate and foster the maintenance of families, such as here involved. Consistent with that purpose it seems reasonable to believe that the Congress intended that the marriage of a citizen, valid where contracted, be accorded validity for immigration purposes.

****5** For the reasons herein discussed, the decision In the *Matter of O-----* to the extent inconsistent herewith is overruled.

The decision and order of the Board of Immigration Appeals, dated February 18, 1952, is hereby disapproved and set aside and the matter remanded for appropriate action in accordance with this opinion.

BEFORE THE BOARD

(March 27, 1952)

The Attorney General has remanded to us for reconsideration the appellant's petition for a nonquota status in behalf of his wife. [1] Briefly, the appellant, a native and citizen of the United States, a sergeant in ***615** the United States Air Force, was first married on December 27, 1943. On March 8, 1947, a judgment was entered by the civil court of the District of Morelos, State of Tlaxcala, Mexico, purporting to terminate that marriage. At that time the appellant and his then wife were residents of the United States. Relying on the validity of that judgment, the appellant on April 28, 1951, married his present wife, the beneficiary of the petition now under consideration, at Wiesbaden, Germany. The Acting Assistant Commissioner denied the petition on January 22, 1952, based upon the conclusion that the aforesaid judgment did not effectively terminate the earlier marriage. We dismissed appeal from that decision on February 18, 1952, and certified our decision to the Attorney General for review.

The basis for the denial of the petition was a ruling by the Attorney General on September 16, 1949, in *Matter of O-----,* Interim Decision No. 93, that no divorce obtained *in absentia* shall be valid for immigration purposes if obtained while either party thereto is domiciled or physically present in the United States. That decision seemed to admit of no alternative.

In remanding the case to us for consideration the Attorney General states that the rule to be applied here is "that the validity of a marriage is governed by the law of the place of celebration." Thus it appears that the rule to be applied is not the narrow one applied in the first instance, but that consideration is to be given to the law of the jurisdiction where the subsequent marriage occurs. If that law gives full faith and credit to the decree of termination of the prior marriage, for the purpose of immigration enforcement we likewise may give effect thereto.

It remains, therefore, in the present case, as in any similar case, to determine local law on the issue of whether the judgment is there, viz, where the subsequent marriage takes place, recognized as effecting its stated purpose.

We have very limited access to German law but we have consulted Dr. Vladimir Gsovski and Dr. Fred Kerpf, the chief and a member, respectively, of the Foreign Law Section of the Library of Congress, who inform us that the general rule is that foreign judgments are recognized in Germany provided that they are not in conflict with the jurisdiction of German courts, and that Mexican divorce decrees appear to have been accepted as valid by German authorities. [2]

****6** Thus no impediment has been found in German law to recognition of the Mexican divorce decree. Furthermore, it appears that the ***616** German licensing authorities have given recognition to the decree by authorizing the marriage, as have our military authorities in Germany by sanctioning the marriage.

This leads to the conclusion that the validity of the applicant's marriage in Germany should be recognized, and the appeal may be sustained.

Order: It is ordered that the appeal from the order denying the petition be sustained.

Footnotes

1 The facts are stated in great detail in our decision of February 18, 1952.

2 Authority: Reichagemetablatt, pt. 1, p. 654; see 4th Decree Implementation of the Marriage Law of October 10, 1941, sec. 24. Commentaries: Konentar, Stein Das Jonas, 17th Ed. 1949, sec. 328, and German Marriage Law by Edgar Hoffman and Walter Stephan, 1950, pp. 159-160.

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