U.S. Department of Justice
Executive Office for Immigration Review

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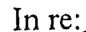
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A76 967 987 - Boston

Date: SEP 30 2003

In re: 

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Harvey Kaplan, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Adjustment of status

The respondent now appeals from a March 4, 2002, decision in which an Immigration Judge denied his request for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255. The appeal will be sustained and the record remanded to the Immigration Judge.

The following facts are undisputed: The respondent, who is a native and citizen of Commonwealth of Dominica, entered the United States on or about March 2, 1998, as a visitor, but remained longer than permitted. These removal proceedings commenced after the Immigration and Naturalization Service (the "Service") issued a Notice to Appear to the respondent on January 31, 2000 (Exh. 1). Subsequent to the commencement of removal proceedings, the respondent married a United States citizen on March 4, 2000. The respondent's wife filed a visa petition on his behalf. Although the respondent was in removal proceedings, the Service approved the visa petition on January 3, 2001 (Exh. 3).

In proceedings before the Immigration Judge, the respondent conceded his removability, but sought to adjust his status based on the approved visa petition. *See* section 245(a) of the Act. The respondent, however, was statutorily ineligible for adjustment as the result of his marriage occurring while he was in removal proceedings, *see* section 245(e) of the Act, and the Immigration Judge considered the respondent's evidence regarding the bona fides of the marriage. The Immigration Judge then concluded that the respondent failed to establish, by clear and convincing evidence, that the marriage was entered into good faith (I.J. at 3), and he denied the request for adjustment of status.

On appeal, the respondent contests the denial of relief under section 245(a) of the Act. He asserts that the Immigration Judge incorrectly interpreted the provisions of section 245(e) of the Act. While emphasizing that he is the beneficiary of an approved visa petition, the respondent specifically argues that only the Service is authorized to determine under section 245(e) of the Act whether a marriage was entered into in good faith. We agree.

An alien who seeks to receive an immigrant visa on the basis of a marriage which was entered into during removal proceedings must obtain an exemption as provided in section 245(e)(3) of the Act. To obtain the exemption the respondent must establish, by clear and convincing evidence, that the marriage was entered into good faith. *See* section 245(e)(3) of the Act. Although the Service approved the visa petition in the present case, it is nevertheless unclear if the visa petition was approved under the bona fide marriage exemption. *See* 8 C.F.R. § 1204.2(a)(1)(iii) (February 28, 2003). The approval notice (Exh. 3) indicates that the petition was approved pursuant to section 201(b) of the Act, 8 U.S.C. § 1151(b). There is no reference, however, to any exemption from the Service, even though such an exemption would have been required. *See* 8 C.F.R. § 1204.2(a)(1)(iii)(C) (providing that a visa petition filed on behalf of an alien who was married during proceedings shall be denied, unless the alien qualifies for the bona fide marriage exemption). Moreover, we note that an approved visa petition under the bona fide marriage exemption is primary evidence of eligibility for the bona fide marriage exemption under section 245(e)(3) of the Act. *See* 8 C.F.R. § 1245.1(c)(9)(v).

Based on our reading of section 245(e) of the Act and the accompanying regulations, we find that an Immigration Judge does not have jurisdiction to grant or deny a bona fide marriage exemption as provided in section 245(e)(3) of the Act under the circumstances presented here. In this regard, we first note that the regulations provide that a request for an exemption must be made in writing and submitted with the Application for Permanent Residence (Form I-485). *See* 8 C.F.R. § 1245.1(c)(9)(iv). Although the regulations do not specify where the request for the exemption must be filed, we note that, with respect to the bona fide marriage exemption under section 245(e) of the Act and under the regulations at 8 C.F.R. § 1245.1(c)(9)(iii)(F), the statute and the regulations state that there shall be only one level of administrative appellate review for aliens seeking an exemption. The regulations further declare that this single level of appellate review is with the Associate Commissioner, Examination. *See* 8 C.F.R. § 1245.1(c)(9)(viii). Thus, it is apparent that a request for the bona fide marriage exemption must be made with the Service (now the Department of Homeland Security, of the "DHS").

In sum, we find that the Immigration Judge erred in reviewing the bona fides of the respondent's marriage with regard to a determination of the respondent's eligibility for an exemption under section 245(e) of the Act. Rather than adjudicating the section 245(e) exemption, the Immigration Judge should have inquired as to whether the respondent had requested the exemption from the Service and the status of his exemption. If necessary, the Immigration Judge could have again continued proceedings pending the adjudication of the respondent's bona fide marriage exemption. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) keeping in mind the regulatory mandate that an approved I-130 under the bona fide marriage exemption is primary evidence of eligibility for the exemption under section 245(e)(3).

We note that the record does not establish that the respondent requested an exemption under section 245(e) of the Act, and it is unclear that the visa petition was approved under the bona fide marriage exemption. *See* section 204(g) of the Act, 8 U.S.C. § 1154(g). Since there was confusion as to who had authority in this case to adjudicate the exemption under section 245(e) of the Act, we find it appropriate to remand the record to the Immigration Judge to enable the respondent to have an opportunity to present evidence that he has obtained a bona fide marriage exception. Accordingly, the appeal will be sustained in part, and the record will be remanded to the Immigration Judge for further proceedings.

We will enter the following orders.

ORDER: The Immigration Judge's March 4, 2002, decision denying the respondent's request for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision including adjudication of the respondent's request for adjustment of status.

FOR THE BOARD