When the Wedding Bells Toll After the NTA Has Been Issued

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Bona Fide Marriage Exemption

Non-citizens who marry U.S. citizens or lawful permanent residents while in removal proceedings must show by *clear and convincing evidence* that the marriage was entered into in good faith. *INA § 245(e)(3).* What is commonly called, "the bona fide marriage exemption" must be requested in writing and submitted with Form I-130. *8 C.F.R. § 204.2(a)(1)(iii)(A).*The request must state the reason for seeking the exemption, and must be supported by documentary evidence establishing eligibility for the exemption. *Id.* A sentence in the attorney's cover letter such as, "the beneficiary, who is in removal proceedings, requests the bona fide marriage exemption based on the enclosed documents which show by clear and convincing evidence that the marriage is bona fide," will suffice to meet the requirement under 8 C.F.R. § 204.2(a)(1)(iii)(A).

Practitioners must be prepared to deal with the bona fide marriage exemption very early in a removal case. At the first meeting with the client and the future or current spouse, the attorney must emphasize the necessity for the couple to document their relationship. Evidence of the relationship will be critical to the removal proceedings and to obtaining approval of the visa petition. Attorneys should advise clients to keep all documents that show both names and provide them to counsel in order to prepare and file the visa petition.

Documents such as the following should be included with the visa petition the attorney must file with the U.S. CIS: wedding photo; pictures of the couple in a variety of settings and times; joint utility bills; leases or deeds to property; car insurance or other insurance bills or policies with both names; driver's licenses with the same address; health insurance cards; joint phone bills for land lines or cellular phones; joint income tax returns; joint bank statements; birth certificates for any children; letters from friends and family members; and any other evidence to show the couple shares assets and liabilities.

Regulations list the documents which should be submitted with the visa petition. *8 C.F.R. § 204.2(a)(1)(i)(B).*

The attorney must review all documents carefully to ensure consistency between the documents and the forms filed by the couple. Petitioners and beneficiaries of visa petitions must be prepared to discuss the documents filed with the visa petition either before the U.S. CIS or an Immigration Judge. Finally, attorneys are well advised to discuss use of publically accessible websites such as Facebook to ensure that clients are not posting information that contradicts the documents and testimony they provide to either the CIS or an immigration judge. Often people say things about themselves on the Internet, yet state contradictory things to the CIS in interviews. The CIS uses publically accessible information during investigations of visa petitions.

Attorneys should file a complete copy of the visa petition, as filed with the CIS, with the immigration court in connection with a motion to continue the removal proceedings to allow the CIS time to adjudicate the petition. Some Immigration judges will hold hearings to determine the bona fides of the marriage before granting a continuance of the removal proceedings for "good cause." *Matter of Hashmi, 24 I&N Dec. 785 (BIA 2009).* Attorneys must prepare petitioners and beneficiaries extensively for either the CIS interview or the hearing before the Immigration Judge. If the CIS denies the petition, the beneficiary in removal proceedings must seek other relief from removal or leave the United States. Thus, success at the I-130 stage for non-citizens in removal proceedings is critical to their future in this country.

EOIR Issues

Before the advent of *Matter of Hashimi*, 24 I&N Dec. 785 (BIA 2009) and the 2011 Morton memos on prosecutorial discretion, it was procedurally difficult for an documented respondent who married a United States citizen or lawful permanent resident after proceedings had already commenced to coordinate the urgency of his removal proceedings with the more leisurely USCIS adjudicatory processes. Some Immigration Judges were not willing to grant continuances to a respondent awaiting the results of an immigrant visa adjudication, and would insist on going forward with the removal proceedings. In those situations, a respondent otherwise eligible for adjustment of status, but for the approved immigrant visa petition, would be forced to leave the United States before the immigrant visa petition filed on his behalf would be adjudicated. The respondent's departure not only would delay adjudication of the I-130 petition, but would also frequently result in his inadmissibility under INA § 212(a)(9)(B)(i); (3/10 year bars), and/or INA § 212(a)(9)(A) (previous removal). The respondent would then find himself separated from his spouse for long periods of time.

In *Matter of Hashimi, supra*, the BIA following the reasoning in 8 C.F.R. §§ 1003.29, 1240.6 and *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), determined that a respondent's unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted if approval of the visa petition would render him *prima facie* eligible for adjustment of status. The BIA set forth

factors to be examined in determining whether such good cause exists. Those factors include: DHS's response to the motion to continue; whether the underlying visa petition is prima facie approvable; whether the respondent is eligible for adjustment of status; whether the respondent's application for adjustment will merit a favorable exercise of discretion; and the reason for the continuance. The *Hashimi* decision helped alleviate the problems set forth above, in that more respondents were granted the time necessary to have their I-130 petitions adjudicated, so that they could proceed to adjust their status and avoid having to leave the United States, with all of the attendant delays and difficulties such departure brings about. In some jurisdictions, the courts held *Hashimi* hearings, while in other jurisdictions the Immigration Judges dispensed with the need for a *Hashimi* hearing, and just granted the necessary continuances upon respondent's application, with or without the assent of counsel for DHS. Once the petition was adjudicated, the parties could then continue with the adjustment application before the Court or agree to remand the proceedings to USCIS for adjudication.

After John Morton issued his memo, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* on 6/11/2011[i], ICE began exercising its discretion more often by agreeing to long adjournments and/or administrative closure for purposes of adjudication of the I-130 and termination of proceedings. In the New York, NY and the Newark, NJ courts, for example, DHS attorneys routinely agree to termination of proceedings before the I-130 petition has been adjudicated for respondents who are married to a United States citizen, who are *prima facie* eligible for adjustment of status, and who do not have serious negative factors. It is not unusual for DHS to agree to terminate the proceedings even if the respondent needs a waiver of inadmissibility. DHS most likely reasons that in such situations USCIS has the ability to issue a new NTA against the individual if the adjustment application and waiver are denied[ii]. In situations where the respondent has a serious criminal conviction or there are other serious adverse factors, DHS may agree to a long adjournment or administrative closure, pending the adjudication of the immigrant visa petition. Even if the DHS does not agree to order of administrative closure, under the recent BIA precedent, *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the Immigration Judge may order that a removal proceeding be administratively closed under circumstances closely approximating those set forth in *Matter of Hashimi*., *supra*.

Attorneys representing a respondent before the Immigration Court who will be prima facie eligible to adjust status once an immediate relative immigrant visa petition is approved should do the following:

- Prepare a complete I-130 package with bona fides documents and a "good faith marriage exemption waiver," and a complete adjustment package, including an affidavit of support, supporting documents, and a waiver of inadmissibility, if required. Do not pay for the applications at this point.

- Contact the DHS District Counsel's office by telephone or by email to discuss the case and to request that the proceedings be terminated. It may be possible to have the proceedings terminated or administratively closed before the next hearing date.

- If possible before the Master Calendar hearing, serve a written request and a copy of the I-130 and adjustment packets on the DHS attorney. Serve a courtesy copy on the IJ.

- If the matter is not resolved before the next Master Calendar hearing, appear at the hearing with the I-130 and adjustment packages. Serve a copy on the DHS attorney and a courtesy copy on the IJ.

Options if the Visa Petition is Denied

If USCIS denies the visa petition, there are two primary options if the clients wish to proceed- refile the petition, or appeal to the BIA. USCIS will generally adjudicate a newly filed visa petition faster than the BIA will adjudicate an appeal, and a new petition will allow for the introduction of new evidence as well as a second interview. The main drawback, however, is that new petitions are usually filed with the same office which already found the petitioner and beneficiary do not have a bona fide marriage.

Therefore, a good suggestion is to assess whether a new petition will be appreciably better than what was submitted previously. Is there new evidence, or perhaps was the visa petition poorly prepared *pro se* or by a notary? If so, then perhaps a new filing is advisable. If, however, the new petition would be largely duplicative of what was already denied, then an appeal is likely a better option.

It is vital to keep in mind that the BIA handles visa petition appeals differently than removal cases. The notice of appeal is filed with the USCIS office that issued the denial, not the BIA itself. 8 C.F.R. § 1003.3(a)(2). Also, the Notice of Appeal should be accompanied by a Notice of Appearance for the petitioner, not the beneficiary in removal proceedings. Additionally, regulations require both sides to file the brief be filed within 21 days, unless USCIS specifies a shorter time, again with the briefs sent to USCIS, not the BIA. 8 C.F.R. § 1003.3(c)(2). After briefing, the Service can either reopen the case on its own motion, or it should forward the briefs and record to the BIA for adjudication.

Unfortunately, many USCIS offices do not file briefs in time, and may not promptly forward the record to the BIA either. This can be especially common for beneficiaries in removal proceedings, where ICE may have the A file instead of USCIS. Attorneys should therefore be careful to monitor the status of any BIA appeals filed with USCIS. USCIS should issue a transfer notice if it forwards the record. Additionally, you can call the BIA clerk's office to confirm if they have the appeal.

If the BIA denies the appeal, it may be possible to seek judicial review in district court. This is a remedy which is generally rare, and beyond the scope of this article. Nonetheless, it is an option which practitioners should keep in mind.

[i] See John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Immigration and Customs Enforcement (June 17, 2011), *www.ice.gov/doclib/secure_communities/pdf/prosecutorial_discretion_memo.pdf*

[ii] See Revisited Guidance for Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, U.S. Citizenship and Immigration Services (November 7, 2011): *http://cis.org/sites/default/files/new%20guidance.pdf*