

Genco Opinion 93-39

HQ 214K-C

HQ 216-C

June 4, 1993

Legal Opinion: Applicability of Sec. 216 of the INA to a K-1 nonimmigrant who adjusts more than two years after marriage to petitioner [HQADN #8.YSK]

R. Michael Miller

Deputy Assistant Commissioner

Office of Adjudications

I. QUESTION PRESENTED Whether a K-1 nonimmigrant is eligible for adjustment of status if he/she enters the United States based on a K-1 petition, concludes a valid marriage with the citizen who filed the petition within the requisite 90-day period, and then files for adjustment of status more than two years after the marriage to the petitioner? Similarly, may the Service adjust the status of the K-1 alien if he/she files for adjustment within two years of the marriage to the petitioner but the Service does not adjudicate the application for adjustment until more than two years after the marriage?

II. SUMMARY CONCLUSION A proper interpretation of Sec. 245(d) of the Immigration and Nationality Act, as amended, (the Act) would allow a K-1 nonimmigrant whose valid marriage was more than two years old to adjust his or her status to that of a lawful permanent resident (LPR) without conditions.

III. ANALYSIS What is the proper interpretation of Sec. 245(d) of the Act? The purpose of the Immigration Marriage Fraud Act (IMFA) is to deter marriage fraud. H.R. Rep. No. 99-906, 99th Cong., 2d Sess., reprinted in 1986 U.S. Cong. & Admin. News 5978, 5978 [hereinafter H.R. Rep.]. To that end, the Act imposes a

conditional residency status on alien spouses¹ whose marriages are less than two years old. See Sec. 216 of the Act. This provision was designed to address the problem of fraudulent marriages by imposing a two-year condition on such marriages, since, in the opinion of the drafters of the Act, it is difficult to sustain the appearance of a bona fide marriage over a long period of time. H.R. Rep., at 5981-82. The IMFA also imposes the conditional residency status on aliens who marry following entry on a nonimmigrant fiance visa (K-1 visa). Id. at 5980-81. In light of the legislative history of the IMFA, the conditional residency restrictions do not apply to a K-1 nonimmigrant who is married for more than two years before applying for adjustment of status, and the immigration benefits granted on the basis of such marriage are unconditional. Immigration Law and Procedure Sec. 42.02[1] (Charles Gordon & Stanley Mailman, eds., 1991) citing INS cable to all officers, file CO 216-P, dated Nov. 19, 1986, par. 2 [hereinafter Gordon & Mailman]. According to Gordon & Mailman, couples who wish to obtain unconditional residence status for the alien spouse are counseled to defer the application for such residence status until the anticipated acquisition of such status, which will occur after the second anniversary of the marriage. In such cases, the date of the application for residence status is immaterial, and the critical date for determining whether the residence status is conditional is the date of actual grant of residence--through admission to the United States with an immigrant visa or by adjustment to LPR status. Gordon & Mailman, Sec. 42.02[1], citing Comprehensive 1990 INS Responses to Marriage Fraud Act Inquiries, reproduced in 67 Interpreter Releases 334, Responses 1, 2, 11, 18. Therefore, of the two alternative interpretations of Sec. 245(d) of the Act offered by the Office of Adjudications, the second interpretation appears to be the correct one. If the marriage is less than two years old, a K-1 nonimmigrant is only eligible for adjustment of status to a conditional permanent resident (CPR). The K-1 nonimmigrant may adjust to lawful permanent resident status without conditions if the marriage is more than two years old. The language in Sec. 245(d) appears, at first glance, to preclude the K-1 nonimmigrant from

adjusting to anything but CPR status (i.e., if a K-1 nonimmigrant fails to adjust status within two years of the marriage he or she is barred from adjusting at all).² However, this language has been interpreted to mean only that a K-1 currently holding CPR status cannot adjust to unconditional status under Sec. 245(d) on the basis of, for example, a third preference petition, because that would contravene the purpose of the Act. Gordon & Mailman, Sec. 51.04[6] n.77. See also Matter of Stockwell, Interim Decision #3150 May 31, 1991, at 4. The regulations also support the interpretation that a K-1 whose marriage is more than two years old may adjust status to an LPR without conditions under Sec. 245(d) of the Act on the basis of a valid marriage to the U.S. citizen who petitioned for the K-1 visa.³

IV. CONCLUSION Therefore, in maintaining the integrity of the legislative intent and the regulations promulgated to implement the IMFA, Sec. 245(d) of the Act should be interpreted to allow a K-1 nonimmigrant whose marriage is more than two years old to adjust status to that of an LPR without conditions. This would also apply to the adjustment of status of alien spouses whose applications were filed before the two-year anniversary of the marriage even though the Service did not adjudicate the application until after the second anniversary of the marriage. If the marriage is more than two years old and is a bona fide union, the legislative intent underlying CPR status -- to prevent fraudulent marriages -- is met, and there is no need to place the alien spouse in conditional residency status.

/s/Paul W. Virtue for
GROVER JOSEPH REES III
General Counsel

fiancee or fiancé of a citizen of the United States, or (C) under Section 203(a)(2) as the spouse of an alien lawfully admitted for permanent residence, by virtue of a marriage which was entered into less than 24 months before the date the alien obtains such status by virtue of marriageSec. 216(g)(1)(A)-(C) of the Act.

FN 2. " . . . (t)he Attorney General may not adjust . . . the status of a nonimmigrant alien described in Section 101(a)(15)(k) . . . except to that of an alien lawfully admitted to the United States on a conditional basis under Section 216" Sec. 245(d) of the Act.

FN 3. The regulations state:(b) Ineligible aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under Section 245 of the Act:(12) Any alien who is already an alien lawfully admitted to the United States for permanent residence on a conditional basis pursuant to Section 216 or 216A of the Act, regardless of any other quota or non-quota immigrant visa classification for which the alien may otherwise be eligible.(13) Any alien admitted to the United States as a nonimmigrant **fiance** as defined in Section 101(a)(15)(K) of the Act, unless the alien is applying for **adjustment** of status based upon a marriage which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the alien pursuant to Sec. 214.2(k) of this chapter. 8 C.F.R. Sec. 245.1(b)(12)-(13) (emphasis added).

FN 1. The Act defines alien spouse as: . . . an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise)- (A) as an immediate relative (described in Section 201(b)) as the spouse of a citizen of the United States, (B) under Section 214(d) as the

Genco Opinion 91-56

CO 245-C

Legal Opinion

Fiances or fiancées who marry later than 90 days after entry
1991

James A. Puleo

Associate Commissioner

Examinations ATTN: Yolanda Sanchez-K.
Senior Immigration Examiner

I. QUESTION

This Legal Opinion addresses the following question: If the marriage between an alien **fiance** or fiancée 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 fiancée 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 fiancée 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 fiancée's failure to marry the petitioner within three months of entry renders the alien fiance or fiancée, 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 fiancée 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 fiancée 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 fiancée, 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/fiancée 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 fiancées 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.

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.

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

FN 1. Unless the Service approves a visa petition

according to 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).