U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16187705

Date: JAN. 13, 2022

Appeal of a California Service Center Decision

Form I-129F, Petition for Alien Fiancé(e)

The Petitioner, a U.S. citizen, seeks the Beneficiary's admission to the United States under the fiancé(e) visa classification. See Immigration and Nationality Act (the Act) section 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i) (the "K-1" visa classification). A U.S. citizen may petition to bring a fiancée to the United States in K-1 status for marriage.

The Director of the California Service Center denied the Form I-129F, Petition for Alien Fiancé(e) (fiancé(e) petition) and then affirmed her decision in response to a subsequent motion to reopen. On appeal, the Petitioner submits a brief and contends that the petition should be approved.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 214(d)(1) of the Act states that a fiancé(e) petition can be approved only if the petitioner establishes that the parties have previously met in person within two years before the date of filing the fiancé(e) petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of 90 days after the beneficiary's arrival. U.S. Citizenship and Immigration Services (USCIS) maintains the discretion to waive the requirement of an in-person meeting between the two parties if compliance would either result in extreme hardship to the petitioner or violate strict and long-established customs of the beneficiary's foreign culture or social practice. Id.; 8 C.F.R. § 214.2(k)(2).

The concept of a "sham divorce" is settled doctrine and has long held a place in the administration of the immigration laws of the United States. For example, American Jurisprudence describes a sham divorce as follows:

> An alien's divorce is a sham, making the alien not "unmarried" when the petition is filed on the alien's behalf, if the evidence shows that the alien's sole intention in

> seeking a divorce was to obtain immigration benefits, and the alien continues to live with the former spouse, still files tax returns, and continues to own their property jointly (footnote omitted).

3A Am. Jur. 2d Aliens and Citizens § 355 (2021). See also Steel on Immigration Law § 5:18 (2021 ed.) ("A divorce for immigration purposes, that is so that a person can become "unmarried" even though the marriage will continue as a matter of fact, has not been recognized."); 2 Immigration Law Service 2d § 7:20 (2021); Immigration Law & Family § 4:14 (2021 ed.). The Board of Immigration Appeals first described the doctrine by name in 1983. Matter of Aldecoaotalora, 18 I&N Dec. 430 (BIA 1983).

II. PERTINENT FACTS AND PROCEDURAL BACKGROUND

The Petitioner filed this petition in August 2017. As part of the petition's processing, immigration officers contacted the Petitioner and met with him in February 2019. He told them that although he and his ex-wife share a residence, they occupy separate bedrooms. However, when the officers asked to visit the residence, the Petitioner changed his story and told them that he and his ex-wife share a bed because her bedroom was in a state of disrepair due to damage sustained when Hurricane Harvey made landfall.[1] Later that day, the officers accompanied the Petitioner to his residence, and he showed them photographs of his ex-wife, the Beneficiary, and himself having intimate relations with one another.

All of this led the officers to ask several follow-up questions. Of note, the Petitioner stated that: (1) he, his ex-wife, and the Beneficiary maintain intimate relations with each other; (2) he would still be married to his ex-wife if the Beneficiary were able to live in the United States without having to marry him; (3) his lawyer advised him that divorcing his ex-wife would be the best way to bring the Beneficiary into the United States considering she has not been allowed to re-enter the United States;[2] (4) he, the Beneficiary, and ex-wife plan to live in the same residence once the Beneficiary is admitted; (5) he plans to marry the Beneficiary and stay married to her since all three are in a relationship and it does not matter to whom he is married; and (6) his ex-wife did not petition for the Beneficiary because first, Romania does not recognize same-sex relationships, and second, it would be easier for him to file because his doing so would not "mess up" his ex-wife's benefits.

The Petitioner then signed the following statement:

> My attorney advised the best way to make my family whole is to divorce [my ex-wife] and marry [the Beneficiary]. The three of us have a sexual and emotional relationship and my lawyer is aware of this fact. Our intention is to continue to live together after my union with [the Beneficiary].

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[1] Hurricane Harvey made landfall in Texas in August 2017. National Weather Service, Hurricane Harvey Info, Hurricane Harvey & Its Impacts on Southeast Texas (August 25-29, 2017) https://www.weather.gov/hgx/hurricaneharvey (last visited Jan. 13, 2022).

[2] Immigration records indicate the Beneficiary attempted to enter the United States in June 2016 but was found inadmissible.

As a result of this derogatory information, the Director issued a notice of her intent to deny (NOID) the petition in August 2019. Specifically, the NOID stated the Petitioner and ex-wife were maintaining a common law marriage and requested evidence of the Petitioner's and Beneficiary's bona fide intent to marry. In response, the Petitioner stated that he and his ex-wife are not in a common-law marriage according to Texas law. The Petitioner asserted that he and his ex-wife were sharing a residence to provide support for his ex-wife's disability and to help care for their son. The response included, in part, statements by the ex-wife and her father; pictures of the Beneficiary's engagement ring and wedding dress; evidence of the Petitioner's trips to see the Beneficiary; and instant messages exchanged between the Petitioner and the Beneficiary.

The Director denied the petition in January 2020, concluding that (1) the Petitioner was not eligible to petition for the benefit because he was in a common law marriage with his ex-wife; (2) the Petitioner and his ex-wife divorced for immigration purposes; and (3) the Petitioner intended to commit fraud by maintaining a common law marriage with his ex-wife and marrying the Beneficiary and living in a "quasi-polygamous" union.

The Petitioner filed a joint motion to reopen and reconsider, claiming once again he and his ex-wife are not in a common law marriage and do not intend to be in a polygamous union. In addition, the brief stated that while the Petitioner, his ex-wife, and the Beneficiary may have an open or polyamorous relationship, there had been no "sham divorce" between the Petitioner and ex-wife. The Petitioner also submitted, in relevant part, letters from the Petitioner, ex-wife, and other individuals providing insight to the Petitioner's relationship with the parties; and the Petitioner's and ex-wife's tax returns from 2017.

The Director found the additional evidence submitted on motion insufficient to overcome the initial denial. Although the Director agreed the Petitioner and the ex-wife were not in a common law marriage according to the Texas laws, the Director concluded nonetheless (1) the Petitioner contradicted his previous statements to the immigration officers and (2) the termination of his and the ex-wife's marriage was a sham divorce conducted solely to bring the Beneficiary to the United States. As a result, the Director affirmed the petition's denial.

On appeal, the Petitioner provides a brief arguing that the Director's conclusion of a sham divorce is akin to concluding that the Petitioner is still married to the ex-wife. The brief further states that the Petitioner's common interests with the ex-wife does not reach the level of a sham divorce in which the party's intention for a divorce was to obtain immigration benefits. The Petitioner also emphasizes that he and the ex-wife are not in a common law marriage and states the Director did not disclose the "public records" showing the parties maintained a common law marriage. As such, the Petitioner asserts there are no legal grounds for the Director's denial, and the petition should be approved.

III. ANALYSIS

For the reasons discussed below, we conclude that the Petitioner has not satisfied the statutory and regulatory requirements for classifying the Beneficiary as a K-1 nonimmigrant.[3] Before we begin our

[3] The Petitioner submitted multiple documents to support the fiancé(e) petition. While we may not discuss every document submitted, we have reviewed and considered each one.

analysis, however, we find it useful to reiterate the commons points of agreement we share with the Petitioner. First, we agree with the Petitioner that he, his ex-wife, and the Beneficiary are not in a polygamous relationship. At this point, none of them are legally married to one another. We also agree that the Petitioner and his ex-wife do not appear to be in a common law marriage. Common law marriage is a state-by-state issue, and the Petitioner's relationship with his ex-wife does not appear to satisfy the requirements of the State of Texas. There is consequently no need to address any of the Petitioner's arguments regarding either of those issues.

However, we nonetheless agree with the Director that this petition cannot be approved. First, and most importantly, the record does not establish by a preponderance of the evidence that the Petitioner is "unmarried" for immigration purposes: we agree with the Director that the termination of his marriage to his ex-wife was a sham divorce for purposes of the immigration laws of the United States. Second, and as we will very briefly discuss at the end of this decision, the record of proceeding lacks the requisite passport photographs.

As indicated, the bulk of our discussion will be devoted to the "sham divorce" concept, and there are two questions that we will consider as we conduct that analysis. While the first question will involve homing in on the Petitioner specifically, as we consider the second question we will "zoom out" and consider a broader legal issue. The first question we will consider is whether the Petitioner's termination of his marriage to his ex-wife constituted a sham divorce for immigration purposes. Next, we will consider the broader issue of whether the consequences of a "sham divorce" finding, which is generally applied to foreign nationals, also applies to the Petitioner.

As will be discussed, we have concluded that the answer to both questions is yes.

A. For Immigration Purposes, the Termination of the Petitioner's Prior Marriage was a Sham Divorce

As noted, the Board recognized the modern "divorce sham" doctrine in 1983. Aldecoaotalora, 18 I&N Dec. at 430. The petitioner in that case was a lawful permanent resident of the United States who had filed an immigrant petition on behalf of his daughter, a citizen of Spain. Specifically, he sought to accord her an immigration benefit as his unmarried daughter. Though the marriage between his daughter and her husband had been legally terminated, the Board nonetheless determined that it was a sham divorce because she had obtained the divorce for the sole purpose of receiving an immigration benefit:

> There can be no doubt that the beneficiary's sole intention in seeking a divorce was to obtain immigration benefits because she has admitted as much. She has nevertheless continued to live with her former husband in what by all appearances is a marital relationship. In so doing she is clearly attempting to thwart the statutory purpose of the Act to unite unmarried children with their lawful permanent resident parents. We therefore agree with the District Director's conclusion that the beneficiary's divorce is a sham and that it should not be recognized for immigration purposes as qualifying her for preference status under section 203(a)(2) of the Act.

Id. at 431-32.

A very similar situation presents itself here. We do not question whether the Petitioner and his ex-wife are legally divorced from one another. By all accounts, they certainly seem to be. The issue is whether the Petitioner's sole intention in pursuing that divorce was to obtain immigration benefits, and the answer to that question is undoubtedly yes.

First, there are the facts on the ground: he and his ex-wife share a residence, share a bedroom (the Petitioner changed his story on the shared bedroom only after the immigration officers asked to visit the house), are raising their child together, and engage in intimate relations (pictures of which the Petitioner showed the officers). While those facts alone do make a compelling case for a sham divorce, we need not focus on them because, as discussed previously, the Petitioner himself admitted, under penalty of perjury, that he divorced his ex-wife so that he could petition for the Beneficiary. In other words, by virtue of his statement dated February 7, 2019, the Petitioner effectively conceded that the termination of his marriage to his ex-wife was a sham divorce.

We acknowledge the many letters of record from the Petitioner, his ex-wife, the Beneficiary, and various family members regarding the alleged bona fides of the divorce. For example, both the Petitioner and his ex-wife claim they do not wish to be married to one another. The Petitioner is attempting via this collection of letters to demonstrate that he divorced his ex-wife for reasons unrelated to the Beneficiary's receipt of an immigration benefit. He does not, however, explain why, if that is the case, he attested otherwise in February 2019. Either the letters are untrue, or his 2019 statement was untrue. In any event, this evidence is not sufficient to overcome his February 2019 sworn statement.

The Petitioner's attempt to make polyamory, and the Director's alleged discomfort with polyamory, a central issue here, does not succeed. Polyamory is not relevant to our analysis of the "sham divorce" issue. The issue is whether the Petitioner's divorced his ex-wife to obtain an immigration benefit. By his own admission, he did.

The evidence of record therefore establishes that the Petitioner divorced his ex-wife so that he could file a fiancé(e) petition on behalf of the Beneficiary. As the marriage was terminated in order to obtain an immigration benefit, it was a sham divorce. We therefore will not consider the Petitioner unmarried for purposes of this petition, which consequently means he has not established by a preponderance of the evidence that he is free to conclude a valid marriage with the Beneficiary.

B. A "Sham Divorce" Finding may be Made Against the Petitioner

The next question before us today is whether a "sham divorce" finding may be made against the Petitioner. In Aldecoaotalora, as well as in similar case law where the issue of a sham divorce was discussed, such as in Bazzi v. Holder, 746 F. 3d 640 (6th Cir. 2013) (sham divorce can serve as basis for finding of immigration fraud and attendant inadmissibility under the Act), it was generally the foreign national who had engaged in the sham divorce. Here, it was the Petitioner. The question therefore becomes whether the reasoning underlying the sham divorce concept can be applied to the Petitioner, a citizen of the United States.

We conclude that it can. In Aldecoaotalora the Board looked to the intent of Congress in creating the immigration benefit the petitioner and beneficiary in that case were seeking, in that case classification

as an unmarried child of a lawful permanent resident, and it concluded that by engaging in the sham divorce the beneficiary was "clearly attempting to thwart the statutory purpose of the Act." Aldecoaotalora, 18 I&N Dec. at 431-32. The same is true of the Petitioner here: like the beneficiary in Aldecoaotalora, by engaging in a sham divorce, he was attempting to thwart the statutory purpose of the Act.

C. Passport Photos

Finally, every form, benefit request, or other document must be executed in accordance with the form instructions. 8 C.F.R. § 103.2(a)(1). The instructions to the Form 1-129F, Petition for Alien Fiancé(e), require a petitioner to submit one color passport-style photograph of themself and one-color passport-style photograph of the beneficiary. Although not addressed by the Director, we find no passport-style color photograph of either the Beneficiary or the Petitioner in the record of proceeding. The Petitioner therefore has not complied with the instructions on the form and has not submitted the required evidence, and he has not established eligibility for the benefit sought within the meaning of section 101(a)(15)(K) of the Act.

IV. CONCLUSION

Though legally divorced from his ex-wife, we have concluded that because he engaged in a sham divorce, the Petitioner is not "unmarried" for purposes of the immigration laws of the United States, and he therefore does not have the ability to conclude a valid marriage with the Beneficiary. Nor has the Petitioner submitted the required passport photos. As such, the Petitioner has not met the statutory and regulatory requirements for classifying the Beneficiary as a K-1 nonimmigrant and the petition must remain denied.

ORDER: The appeal is dismissed.