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DISTURBING TREND OF K VISAS BEING RETURNED FOR REVOCATION AT US CONSULATES

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By Cyrus D. Mehta

My distinguished colleague, Paul Parsons, in Austin, Texas, has justifiably complained to Jeff Gorsky, Chief, Legal Advisory Opinions Section, Visa Office, State Department, http://bit.ly/bl44VO, about the arbitrary manner in which consular posts administratively close K-1 or K-3 visa cases, and recommend revocation of the petition visas when they suspect the bona fides of the relationship. The K-1 visa allows a US citizen to sponsor a fiancé or fiancée. The K-3 visa allows the spouse of a US citizen to enter the US after the I-130 petition to sponsor the spouse for permanent residence has been filed.

If the consul has doubts about the relationship or a bona fide intent to marry, the case is quickly dispatched to the USCIS for revocation even before the attorney has a chance to intervene on behalf of the hapless client. It would be one thing if the USCIS acted quickly, by issuing a Notice of Intent to Revoke (NOIR), and allowing the petitioner to respond to any allegations of fraud or the alleged lack of a genuine relationship. Unfortunately, the USCIS takes its own sweet time, and it usually takes in excess of a year, and sometimes even in excess of two years, before the petitioner receives a NOIR. To add insult to injury, the K-1 approval has a validity date of only 4 months pursuant to 8 CFR § 214.2(k)(5). If the USCIS does not act quickly by issuing a NOIR within the 4 month period, which it most likely will not do, then the DHS never provides an opportunity to the petitioner to rebut the allegations on the ground that the 4 month validity period of the K-1 has lapsed. Another distinguished colleague, Brent Renison, in Portland, Oregon, has filed a class action suit complaining against this procedure and also challenging the validity of 8 CFR § 214.2(k)(5), http://www.entrylaw.com/tranclassaction.html. This is a most worthy law suit

challenging a very arbitrary practice, and affected K-1 visa applicants may seek to join as class members. Details on the class action are provided in the link above.

A careful reading of 8 CFR § 214.2(k)(5), however, reveals that there is authority to extend the validity of the K-1 petition for an additional 4 months:

Validity . The approval of a petition under this paragraph shall be valid for a period of four months. A petition which has expired due to the passage of time may be revalidated by a director or a consular officer for a period of four months from the date of revalidation upon a finding that the petitioner and K-1 beneficiary are free to marry and intend to marry each other within 90 days of the beneficiary's entry into the United States. The approval of any petition is automatically terminated when the petitioner dies or files a written withdrawal of the petition before the beneficiary arrives in the United States.

The State Department's Foreign Affairs Manual at 9 FAM 41.81 Note 6.2 provides further authority to extend the K-1 any number of times:

An approved K-1 visa petition is valid for a period of four months from the date of Department of Homeland Security (DHS) action and may be revalidated by the consular officer any number of times for additional periods of four months from the date of revalidation, provided the officer concludes that the petitioner and the beneficiary remain legally free to marry and continue to intend to marry each other within 90 days after the beneficiary's admission into the United States. However, the longer the period of time since the filing of the petition, the more the consular officer must be concerned about the intentions of the couple, particularly the intentions of the petitioner in the United States. If the officer is not convinced that the U.S. citizen petitioner continues to intend to marry the beneficiary, the petition should be returned to the approving office of DHS with an explanatory memorandum.

Notwithstanding this authority in the 8 CFR and the FAM, it makes no sense for the USCIS to refuse to give the petitioner an opportunity to respond on the ground that the K-1 has a limited validity of only 4 months. If that is indeed the policy, it also makes no sense for a US Consulate to even return a K-1 petition for revocation. It is a waste of time, government expense, and falsely raises the expectations of the affected parties who may be looking forward to challenge the illusory revocation.

When a K-1 petition is sent for revocation, it is also not prudent to file a new

I-129F petition for a new K-1 visa. Consuls can be quite cynical, and will most likely instruct the K-1 visa applicant to wait for a resolution of the prior petition, which was recommended for revocation, before they will adjudicate the new K-1 visa. The love birds may decide that enough is enough, and one may pop the question to the other, and they get married. This ends the fiancé or fiancée relationship, and the I-129F petition is now rendered moot, even though it has been sent for revocation. The US citizen files a well documented I-130 petition establishing the bona fides of the marriage so that the foreign national spouse can apply for an immigrant visa at the US Consulate upon the approval of this petition. Surely, the consul should not be able to say that the post is still awaiting the outcome of the resolution of the K-1 petition. There is no longer an intent to get married, the parties are now married! The petitioner cannot possibly fight the NOIR, if at all it is issued, on the I-129F. It is hoped that a consul will independently look at the bona fides of the marriage de novo without asking the spouse to wait for the outcome of the K-1 visa petition.

On the other hand, it should not be assumed that the marriage of the couple and the subsequent filing of an I-130 petition would provide the panacea to the problem of the K-1 being sent for revocation. The consul may also hold up the immigrant visa processing on the ground that there was fraud or misrepresentation in the K-1, and this would provide an independent ground of inadmissibility under INA § 212(a)(C)(6)(i) to deny the immigrant visa application. Under such circumstances, in the event that a belated NOIR is issued on the K-1, it may be well worth it to respond to the allegations even though there is no longer a fiancé or fiancée relationship, and Marc Ellis in an insightful article also suggests a similar strategy, http://www.ilw.com/articles/2006,0323-ellis.shtm. Here too, it makes no sense for the consul to find prior fraud during the K-1 visa interview (if the consul suspected their bona fide intention to marry) when the couple have further reaffirmed their bona fides after marrying, but as we know, a lot of things do not make sense in K-1 visa processing these days. In my opinion, the K-3 may not be worth it as the I-130 petition is being approved quite quickly, and if both the I-130 and the I-129F get approved simultaneously, the National Visa Center will process the I-130 and not the K-3 for consular processing.

Given the risks of K-1 revocations, and all the complications accompanying such revocations, it behooves an I-129F petitioner to thoroughly document the relationship with the fiancé or fiancée, including trips together or meetings,

exchange of correspondence, gifts to each other, and affidavits from others, such as friends and relatives, attesting to the relationship. Moreover, although an engagement ceremony is not required, if such an engagement ceremony did indeed take place, it should be thoroughly documented and explained within its cultural or religious context. The petitioner and his or her fiancé (e) should also include a detailed statement about how they first met, their contacts with each other, and about their clear plans to get married in the US.

Finally, it is extremely important to note that the parties should not be married prior to the grant of the K-1 visa as that would vitiate the I-129F. Even an unregistered marriage ceremony, so long as it is recognized as a marriage in the country, such as a Hindu marriage in India, will be considered a marriage and would invalidate the I-129F petition. Under those circumstances, the petitioner should withdraw the I-129F, and instead, file an I-130 petition. Even if a marriage has occurred, it should not be assumed that it would be considered bona fide. Similar documentation must be submitted with the I-130 petition, including proof of the wedding, to further establish the bona fides of the marriage so as to ensure a smooth and quick grant of the immigrant visa at the consular post.