

Genco Opinion 90-3

CO 216-C

LEGAL OPINION

Your CO 216-C Memorandum of May 23,
1989: Interpreting the definition of 11 Jan 1990
son/daughter and qualifying marriage
under the Immigration Marriage Fraud
Amendments

James A. Puleo Office of the
Assistant Commissioner General Counsel
COADN

ATTN: Yolanda Sanchez-K.
Senior Immigration Examiner

I QUESTION

In the subject memorandum, you present the following situation:

An alien and citizen marry after November 10, 1986. The alien acquires permanent resident status, but this status is not based on the alien's marriage to the citizen (for example, the alien obtains permanent residence under the sixth preference). The citizen spouse then files a petition to accord immediate relative status to the child of the alien spouse. This petition is approved, since the child qualifies as the stepchild of the citizen spouse. The child of the alien spouse then acquires permanent resident status on the basis of the petition filed by the citizen spouse. When the child obtains permanent resident status, less than 24 months have elapsed since the alien and citizen spouses married 1.

You then request a legal opinion concerning the following question:

Is the child's permanent resident status subject to the conditions imposed by INA 216, 8 U.S.C. 1186a?

II. SUMMARY CONCLUSION

We conclude that an alien qualifies as an "alien son or daughter" only if his or her alien parent qualifies as an "alien spouse," as defined in INA [216\(g\)\(1\)](#), 8 U.S.C. 1186a(g)(1). In the situation you describe, the child's alien parent is not an "alien spouse," since she did not acquire permanent residence on the basis of her marriage to the United States citizen. Since the parent is not an "alien spouse," the child is not an "alien son or daughter." The child, therefore, is not properly classified as a conditional permanent resident.

III. ANALYSIS

A. Only Aliens Who Are "Alien Spouses" or "Alien Sons or Daughters" Are Subject to the Conditions of Section 216

The INA imposes conditions on the status of certain aliens who acquire permanent resident status through marriage. INA [216\(a\)](#), 8 U.S.C. 1186a(a). Failure to satisfy these conditions can result in termination of permanent resident status, id. [216\(c\)\(2\)](#), 8 U.S.C. 1186a(c)(2), and deportation, id. 241(a)(9)(B), 8 U.S.C. 1251(a)(9)(B). The conditions apply, however, only to aliens who qualify as "alien spouse[s]" or as "alien son[s] or daughter[s]." Id. 216(a), 8 U.S.C. 1186a(a).

B. An Alien Qualifies as an "Alien Son or Daughter" Only if His or Her Alien Parent Qualifies as an "Alien Spouse"

The INA defines the term "alien son or daughter." Id. 216(g)(2), 8 U.S.C. 1186a(g)(2). Section 216(g) is not a model of clear writing. A careful reading of section 216(g), however, shows that the only reasonable reading of section [216\(g\)\(2\)](#) is that an alien qualifies as an "alien son or daughter" only if his or her alien parent qualifies as an "alien spouse," as defined in INA 216(g)(1), 8 U.S.C. 1186a(g)(1). Thus, although section 216(g) is not artful, it is not ambiguous. See *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

In its entirety, section [216\(g\)](#) reads:

(1) The term "alien spouse" means 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) of this Act) as the spouse of a citizen of the United States,

(B) under section [214\(d\)](#) of this Act as the fiance or fiancée of a citizen of the United States, or

(C) under section [203\(a\)\(2\)](#) of this Act 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 such marriage, but does not include such an alien who obtains such status as a result of section [203\(a\)\(8\)](#) of this Act.

(2) The term "alien son or daughter" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the son or daughter of an individual through a qualifying marriage.

(3) The term "qualifying marriage" means the marriage described to [sic] in paragraph 1.

(4) The term "petitioning spouse" means the spouse of a qualifying marriage, other than the alien.

Id. 216(g), 8 U.S.C. 1186a(g). The lack of clarity of section 216(g)(2) is rooted in the "definition" of "qualifying marriage" provided by section [216\(g\)\(3\)](#). Depending on how much of "paragraph 1" applies to the definition of "qualifying marriage," id. 216(g)(3), 8 U.S.C. 1186(g)(3), section 216(g)(2) can arguably be made to support directly contradictory propositions. The first proposition is that the alien partner to the marriage does not have to obtain an immigration benefit based on the marriage in order for that partner's offspring to be classified as an "alien son or daughter." The second is that an alien may be considered an "alien son or daughter" and may be classified as a conditional permanent resident only if his or her parent qualifies as an "alien spouse."

The first reading of section [216\(g\)\(2\)](#) focuses on the marriage itself, not on whether the alien partner to the marriage obtained an immigration benefit based on the marriage. A qualifying marriage is one "described to [sic] in" INA 216(g)(1), 8 U.S.C. 1186a(g)(1). Id. 216(g)(3), 8 U.S.C. 1186a(g)(3). Under this reading, only so much of section [216\(g\)\(1\)](#) as actually describes a marriage is incorporated into the definition of "qualifying marriage." This first interpretation, however, depends on an unnatural reading of the statute. In effect, this first interpretation reconstructs section 216(g)(2) to read:

(2) The term "alien son or daughter" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the son or daughter of an individual through a marriage which was entered into less than 24 months before the date the alien obtains such status by virtue

of such marriage, but does not include such an alien who obtains such status as a result of section 203(a)(8) of this Act.

This reading does incorporate "the marriage described to [sic] in" section 216(g)(1) into the definition of "alien son or daughter." The manner in which it does so, however, wrenches the definition of "qualifying marriage" out of its statutory context. See *United States v. American Trucking Assns.*, 310 U.S. 534, 542 (1940) (words of statute must be read in context, not in isolation); *Matter of Lum*, 11 I & N Dec. 55, 56 (BIA 1964) (entire subsection, not just one subdivision, should be considered in discerning scope of the subsection). This is clear from a consideration of what meaning should be ascribed to "the alien" in the phrase "the alien obtains such status" In section 216(g)(1), "the alien" clearly refers to the alien spouse to the marriage. INA 216(g)(1), 8 U.S.C. 1186a(g)(1). In the "reconstruction" of section 216(g)(2), however, the phrase "the alien" appears to refer instead to the alien son or daughter.

The second possible reading of section [216\(g\)\(2\)](#), by contrast, considers all of section [216\(g\)\(1\)](#) in attempting to construe the reference in section [216\(g\)\(3\)](#) to "the marriage described to [sic] in" section 216(g)(1). See *Lum*, 11 I & N Dec. at 56. Under this interpretation, a qualifying marriage is a marriage on the basis of which an alien who is a party to the marriage obtains permanent residence, if the alien spouse obtains this status less than 24 months after the marriage. INA 216(g)(1), 8 U.S.C. 1186a(g)(1). The status of an "alien son or daughter," then, is a derivative status that exists only when the alien who is a party to the marriage qualifies as an "alien spouse," as defined by section 216(g)(1). *Id.*

We conclude that this second reading is the proper reading of section 216(g)(2). The section can be made to support the first reading, but only artificially. Because of this artificiality, it is our opinion that section 216(g)(2) does not reasonably support the first reading.

C. The Child in the Situation Described Was Not Properly Classified as a Conditional Permanent Resident

The alien in the situation described in your memorandum obtained permanent residence because of his alien parent's marriage to a citizen. The alien parent does not qualify as an "alien spouse," however, since the alien parent obtained permanent residence independently of the marriage. Since the parent is not an "alien spouse," the child is not an "alien son or daughter." Thus, the Service should not have made the child's permanent resident status subject to the conditions imposed by section 216.

If we may be of further assistance with this matter, please contact Michael J. Sheridan, Assistant General Counsel, FTS 633 1260.

/s/

WILLIAM P. COOK

General Counsel (Acting)

cc: Official file

COCOU Log

COCOU FILE: General Counsel's Opinions

COCOU FILE: 216 Conditional Permanent Residents

All Regional Counsels

All District Counsels

All Sector Counsels

All INS SAUSAs

COEXM

M. Sheridan

Clearances Initial Date

Section Head, J. London

Assoc. Deputy GC, R. Bullerdick

Deputy GC, P. Virtue

Acting General Counsel, W. Cook

INS:COCOU:SHERIDAN:IMFA.SON.DAUGHTER/CEwell:633-1260/1/8/90

Footnotes Genco Opinion 90-3

Footnote 1

1 You indicate that there is a deportation proceeding currently pending against an alien in this situation.

