

10-2396-ag
Boluk v. Holder

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

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7
8 (Argued: April 11, 2011 Decided: June 7, 2011)

9
10 Docket No. 10-2396-ag

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13
14 NEDIM BOLUK,

15
16 Petitioner,

17
18 - v.-

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20 ERIC H. HOLDER, JR., United States
21 Attorney General,

22
23 Respondent.

24
25 - - - - -x

26
27 Before: JACOBS, Chief Judge, LEVAL and KATZMANN,
28 Circuit Judges.

29
30 Petitioner Nedim Boluk seeks review of a final order of
31 removal, issued after a determination that he is ineligible
32 for a "hardship waiver" of the requirements for filing a
33 joint petition with his citizen spouse to lift the
34 conditions on his residency. See Immigration and
35 Nationality Act ("INA") § 216(c)(4)(B), 8 U.S.C.
36 § 1186a(c)(4)(B). Boluk argues on appeal that the agency
37 erred as a matter of law by placing upon him the burden of

1 establishing that his qualifying marriage (which failed) was
2 entered in good faith; that the wrong standard was applied
3 for assessing eligibility for a hardship waiver; and that an
4 erroneous assessment was made in weighing the evidence. The
5 petition for review is denied.

6 GLENN T. TERK, Wethersfield,
7 Connecticut, for Petitioner.

8
9 SARAH VUONG, Trial Attorney (Emily
10 Anne Radford, Assistant
11 Director, *on the brief*), Office
12 of Immigration Litigation, *for*
13 Tony West, Assistant Attorney
14 General, Civil Division, U.S.
15 Department of Justice,
16 Washington, District of
17 Columbia, for Respondent.

18
19 DENNIS JACOBS, Chief Judge:

20
21 Petitioner Nedim Boluk, who became a conditional
22 permanent resident after marriage to a United States
23 citizen, sought a hardship waiver of the procedures for
24 lifting the conditions of his residency after his marriage
25 dissolved. The immigration judge and the Board of
26 Immigration Appeals (the "BIA") denied relief. Boluk seeks
27 review of those decisions by this Court.

28 Ordinarily, the alien spouse and the citizen spouse
29 must jointly petition for removal of the conditions on the
30 alien spouse's residency. However, a hardship waiver of the

1 joint petition requirements is available if the marriage,
2 though entered in good faith, ends in divorce prior to the
3 point at which the alien must seek to lift the conditions on
4 his residency. Boluk argues on appeal that the immigration
5 judge and the BIA erred as a matter of law in placing upon
6 him the burden of proving eligibility for a hardship waiver,
7 in articulating the standard for demonstrating a good faith
8 marriage, and in weighing the evidence of good faith that
9 Boluk presented to the immigration judge.

10 We conclude that the allocation of the burden of proof
11 was proper, that the agency articulated the proper legal
12 standard for demonstrating a good faith marriage, and that
13 the agency properly determined that Boluk was ineligible for
14 the relief he sought. Accordingly, the petition for review
15 is denied.

16 **BACKGROUND**

17 We recite the facts underlying this petition for review
18 as recounted by Petitioner. In 1986, Boluk, a then-16-year-
19 old native and citizen of Turkey, traveled to Canada to
20 visit a relative. In Canada, he rented a boat that
21 accidentally crossed the border and landed him in the United
22 States "by mistake." J.A. at 100. Boluk recalls being

1 detained by immigration officials who "left [him] in some
2 motel," where he remained for two days. J.A. at 101. He
3 then took a bus to New York, roomed with his brother in West
4 Haven, Connecticut, and began working at the Blue Sky Diner.
5 J.A. at 102-03. Also employed by the diner was Ms. Karen
6 Colangelo. J.A. at 79, 103, 106.

7 At first sight, Boluk "fe[lt] like [he was] in love
8 with" Ms. Colangelo. J.A. at 79. Six or seven months
9 later, they started dating. J.A. at 80. Boluk communicated
10 with Ms. Colangelo with his "little English," hand gestures,
11 and the drawing of pictures. J.A. at 106. Boluk confided
12 his love for Ms. Colangelo, J.A. at 80, and knew she cared
13 because she told him she "like[d]" him and "love[d]" him.
14 J.A. at 80, 81.

15 In 1988, they married in Turkey. J.A. at 81. After
16 the wedding, the couple stayed in Turkey for about a month,
17 until Ms. Colangelo returned to Connecticut; Boluk stayed on
18 in Turkey for about a year as he had a "hard time" procuring
19 a visa. J.A. at 82. Upon Boluk's return to the United
20 States in 1989 as a lawful conditional resident, J.A. at
21 143, Ms. Colangelo met him at the airport and was very happy
22 to see him. J.A. at 83-84. But a "couple of days later"

1 Boluk realized Ms. Colangelo was "not happy," and she
2 expressed resentment that he had remained so long in Turkey.
3 J.A. at 84. At this point, Boluk learned Ms. Colangelo was
4 using drugs; she sometimes "stayed [out] all night,"
5 sometimes never came home at all, and sometimes did not come
6 to work. They began to have "big arguments." J.A. at 85,
7 86. Ms. Colangelo left Boluk in 1989, J.A. at 86-87, 93-94,
8 and he took up with a Turkish woman (with whom he has a
9 child who was born in the United States). J.A. at 115-16.

10 In 1994, Boluk filed an I-751 Petition with United
11 States Citizenship and Immigration Services ("USCIS") to
12 remove the conditions of his residence. J.A. at 116-17.
13 Absent some specified ground of waiver, an I-751 Petition
14 must be signed by both spouses attesting to a bona fide
15 marriage. Boluk's I-751 Petition was signed jointly by
16 himself and Ms. Colangelo, and it indicated that they were
17 living together notwithstanding that their relationship had
18 ended in 1989. J.A. at 119. Following submission of the
19 Petition, an interview was scheduled by USCIS. Ms.
20 Colangelo failed to appear. J.A. at 118. In 1998, the
21 (purportedly) joint petition was denied by USCIS. J.A. at
22 143.

1 During the pendency of his I-751 Petition, Boluk had
2 filed for divorce in 1996. In 2002, his divorce became
3 final. J.A. at 118-19. That year, he again filed an I-751
4 Petition to remove the conditions of his residence, this
5 time requesting a waiver of the joint filing requirements on
6 the ground that his marriage, though ended in divorce, had
7 been entered in good faith. J.A. at 143.

8 In 2006, Boluk was served with a Notice to Appear for
9 removal proceedings, which charged him as an alien whose
10 conditional resident status had expired. J.A. at 184. In
11 2007, Boluk's request for a waiver of the joint filing
12 requirement of the I-751 Petition was denied on the ground
13 that he failed to provide evidence to support his claim that
14 his marriage was entered into in good faith. J.A. at 144.

15 Boluk appeared before an immigration judge and conceded
16 removability, but requested relief in the form of review of
17 the USCIS decision denying his 2002 I-751 Petition to remove
18 the conditions on his residency. J.A. at 17-18. The
19 immigration judge held a hearing at which Boluk testified.
20 At this hearing, the immigration judge also received the
21 testimony and affidavits of two individuals who had worked
22 with Boluk, along with an affidavit of a third individual

1 who had occasion to observe the relationship between Boluk
2 and Ms. Colangelo. After the hearing, the immigration judge
3 denied Boluk's application for review of the USCIS decision
4 and ordered Boluk's removal to Turkey. J.A. at 26. The
5 immigration judge ruled that, pursuant to INA
6 § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B), and its
7 implementing regulation, 8 C.F.R. § 1216.5(e)(2), Boluk had
8 the burden of establishing that his marriage was entered
9 into in good faith and that he failed to submit sufficient
10 evidence of his commitment to the marriage to sustain his
11 burden. J.A. at 24-26.

12 As the immigration judge observed, Boluk presented no
13 "documentary evidence of his commitment to his wife either
14 before or after he immigrated to the United States." J.A.
15 at 24. The immigration judge cited facts that raised
16 "general questions" about the bona fides of the
17 relationship: Boluk was only sixteen when he met Ms.
18 Colangelo; they lived together only briefly; and Boluk "did
19 not really speak much English," making it "very unclear to
20 the Court how [Boluk was] able to . . . effectively
21 communicate" with Ms. Colangelo. J.A. at 24, 25. Moreover,
22 the joint I-751 Petition submitted in 1994 presented a

1 "serious issue" and cast "serious doubt on [Boluk's] overall
2 credibility"; Boluk could not explain how this document came
3 to be filed when he and Ms. Colangelo were separated or why
4 the form indicated that they were living at the same
5 address. J.A. at 25.

6 Boluk's timely appeal to the BIA argued that the
7 immigration judge misplaced the burden of proof and had
8 applied the wrong standard for assessing eligibility for a
9 hardship waiver. J.A. at 10-11. As to burden, Boluk
10 maintained that the statutory allocation is ambiguous and
11 therefore should have been construed in his favor. As to
12 the standard for assessing eligibility, Boluk argued (in a
13 nutshell) that the immigration judge should have focused his
14 inquiry on the circumstances leading up to the marriage and
15 should not have considered whether Boluk was a committed
16 husband, or the unfortunate course of the marriage after the
17 wedding.

18 The BIA dismissed Boluk's appeal. In considering the
19 burden of proof issue, the BIA relied on In re Mendes, 20 I.
20 & N. Dec. 833 (BIA 1994), which ruled that "Congress chose
21 to shift the burden of proof onto the alien to show that
22 even though the marriage failed, it was entered into in good

1 faith." Id. at 838. The BIA agreed with the immigration
2 judge that Boluk failed to sustain his burden of proof.
3 J.A. at 4.

4 As to the standard for assessing eligibility for a
5 hardship waiver, the BIA framed the "central question" as
6 "whether the bride and groom intended to establish a life
7 together at the time they were married," and reasoned that
8 the level of commitment to the marriage thereafter had
9 bearing on that question. J.A. at 4. As support, the BIA
10 cited the regulation governing applications for waiver of
11 the joint filing requirement based upon an alien's claim
12 that a good faith marriage terminated in divorce. 8 C.F.R.
13 § 1216.5(e)(2).

14 Boluk's timely petition for review renews his arguments
15 that the immigration judge erred in placing on him the
16 burden of establishing a good faith marriage and in
17 articulating the standard for demonstrating a good faith
18 marriage. Boluk also maintains that the immigration judge
19 erred in weighing the evidence of good faith he presented.

1 circumstance, an alien bears the burden of establishing
2 eligibility for a hardship waiver. 8 U.S.C.
3 § 1252(a)(2)(D); see also Xiao Ji Chen v. U.S. Dep't of
4 Justice, 471 F.3d 315, 330-31 (2d Cir. 2006). The precise
5 issue presented here is the proper allocation of burden when
6 the relationship through which an alien's conditional
7 residency was obtained has ended in divorce.

8 Boluk contends on appeal that the INA is ambiguous as
9 to which party bears the burden of proof on the issue of
10 whether an alien's conditional status should be terminated
11 for failure to establish a good faith marriage, and that
12 this statutory ambiguity should have been resolved in his
13 favor. We disagree. The statutory provision at issue is
14 neither "silent [n]or ambiguous with respect to the specific
15 issue" presented by this appeal. Immigration &
16 Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 424
17 (1999) (internal quotation marks omitted). The statutory
18 wording requires that "*the alien demonstrate[] that . . .*
19 *the qualifying marriage was entered into in good faith by*
20 *the alien spouse, but the marriage has been terminated.*" 8
21 U.S.C. § 1186a(c)(4)(B) (emphasis added). Because "the
22 intent of Congress is clear, that is the end of the matter;

1 for the court, as well as the agency, must give effect to
2 the unambiguously expressed intent of Congress." Chevron,
3 467 U.S. at 842-43. The immigration judge and the BIA
4 committed no error of law in allocating the burden.

5 This allocation of burden represents a shift. When a
6 conditional resident petitions jointly with a citizen spouse
7 to remove the conditions on his residency and the Attorney
8 General determines that petition adversely, the conditional
9 resident may request review of that determination in a
10 removal proceeding. In such a proceeding, the burden of
11 proof is on the government "to establish, by a preponderance
12 of the evidence, that the facts and information [contained
13 in the petition] are not true with respect to the qualifying
14 marriage." 8 U.S.C. § 1186a(c)(3)(D). However, if an alien
15 (such as Boluk) "fails to meet the requirements for timely
16 filing a joint petition, or for jointly appearing for a
17 personal interview, the alien may seek a waiver of these
18 requirements," in which event the alien bears the "burden of
19 establishing eligibility for a removal of the conditional
20 status." Hammad v. Holder, 603 F.3d 536, 539, 543 (9th Cir.
21 2010); see also Hijazi v. Dep't of Homeland Sec., 239 F.
22 App'x 629, 631 (2d Cir. 2007) (summary order) ("While the

1 [Department of Homeland Security] had the burden to show
2 that [the petitioner] failed to meet the requirements for
3 removal of conditions in the face of a jointly filed
4 application, it was petitioner who bore the burden of
5 proving his eligibility for a good-faith waiver of the joint
6 filing requirement."). This shift in burden helps to ensure
7 that the marriage that provided the basis for the alien's
8 conditional residence in the first place "was not a sham
9 marriage" and that the marriage "had terminated for other
10 reasons." Krazoun v. Ashcroft, 350 F.3d 208, 209 (1st Cir.
11 2003); accord Ibrahimi v. Holder, 566 F.3d 758, 760 (8th
12 Cir. 2009) (requiring alien to establish a qualifying
13 marriage entered in good faith). (Unpublished dispositions
14 in other circuit courts of appeals are also in accord.¹)

15 The BIA agrees in a published opinion. Where a citizen
16 spouse had withdrawn his support for a joint petition, the
17 BIA reasoned that placing the burden of proof on the alien
18 to demonstrate that the marriage was nonetheless entered
19 into in good faith "is consistent with the statutory
20 structure and intent." In re Mendes, 20 I. & N. Dec. at

¹ See, e.g., Roos v. U.S. Attorney Gen., 167 F. App'x 752, 755 (11th Cir. 2006) (unpublished disposition); Gaur v. Gonzalez, 124 F. App'x 738, 741-42 (3d Cir. 2005) (unpublished disposition).

1 838. We conclude that the same is true when no valid joint
2 petition is ever filed. Divorce and failure to file jointly
3 may "not necessarily demonstrate that the marriage was
4 entered into in bad faith, [but they are] bound to
5 raise the question as to whether that is the case." Id.
6 And as compared with the government, the alien is in the
7 better position to answer that question. Cf. Campbell v.
8 United States, 365 U.S. 85, 96 (1961) (stating "the ordinary
9 rule, based on considerations of fairness, does not place
10 the burden upon a litigant of establishing facts peculiarly
11 within the knowledge of his adversary"); United States v.
12 Cont'l Ins. Co., 776 F.2d 962, 964 (11th Cir. 1985)
13 (adhering "to the common law guide that the party in the
14 best position to present the requisite evidence should bear
15 the burden of proof"); Miles Metal Corp. v. M. S. Havjo, 494
16 F.2d 563, 565 (2d Cir. 1974) (allocating burden of proof to
17 party that, "in general is in a better position" to come
18 forward with evidence).

19 III

20 We have jurisdiction to review the legal question of
21 whether the immigration judge and the BIA "applied an
22 erroneous legal standard in making a discretionary

1 determination." Khan v. Gonzales, 495 F.3d 31, 35 (2d Cir.
2 2007). Accordingly, we have jurisdiction to review Boluk's
3 contention that the immigration judge and the BIA erred by
4 considering whether Boluk was a committed husband and by
5 relying upon the course of the marriage subsequent to the
6 wedding in ascertaining whether it was a good faith union at
7 the outset. See Ibrahimimi, 566 F.3d at 763.

8 As Boluk asserts, the "central issue is whether the
9 couple intended to establish a life together at the time
10 they were married." Yohannes v. Holder, 585 F.3d 402, 405
11 (8th Cir. 2009) (internal quotation marks omitted); see also
12 Damon v. Ashcroft, 360 F.3d 1084, 1088 (9th Cir. 2004).
13 However, the INA's implementing regulations specifically
14 provide that the immigration judge may "consider evidence
15 relating to the amount of commitment by both parties to the
16 marital relationship" in assessing good faith:

17 In considering whether an alien entered into a
18 qualifying marriage in good faith, the director
19 shall consider evidence relating to the amount of
20 commitment by both parties to the marital
21 relationship. Such evidence may include--

22
23 (i) Documentation relating to the degree to
24 which the financial assets and liabilities of
25 the parties were combined;

26
27 (ii) Documentation concerning the length of
28 time during which the parties cohabitated

1 after the marriage and after the alien
2 obtained permanent residence;

3
4 (iii) Birth certificates of children born to
5 the marriage; and

6
7 (iv) Other evidence deemed pertinent by the
8 director.

9
10 8 C.F.R. § 1216.5(e)(2); see also In re Laureano, 19 I. & N.
11 Dec. 1, 2-3 (BIA 1983) ("The central question is whether the
12 bride and groom intended to establish a life together at the
13 time they were married."). The BIA has held that "[t]he
14 conduct of the parties after marriage is relevant to their
15 intent at the time of marriage." In re Laureano, 19 I. & N.
16 Dec. at 3. The BIA's determination that the INA allows for
17 consideration of the course of a relationship after a
18 wedding in order to ascertain an alien's intent at the time
19 he entered his marriage is entitled to deference. Kuhali,
20 266 F.3d at 102.

21 It was therefore proper for the immigration judge to
22 attach significance to the course of the marriage post-
23 wedding: Boluk never supported Ms. Colangelo financially;
24 they had no joint bank account; they did not pay bills
25 together; they signed no joint lease; and they had no
26 children. J.A. at 95, 110. They separated soon after they
27 had the opportunity to live together, and were then

1 divorced. Cf. In re Velarde-Pacheco, 23 I. & N. Dec. 253,
2 256 (BIA 2002) (concluding alien "submitted clear and
3 convincing evidence that his marriage is bona fide" when
4 alien submitted, among other things, his marriage
5 certificate, his child's birth certificate, and
6 documentation demonstrating that he had known and lived with
7 his wife for years). If the immigration judge had failed to
8 consider the course of the marriage, the record would
9 consist of little more than the "bare fact of getting
10 married," which reveals nothing regarding the "motivation
11 for marriage." Sharma v. Holder, 633 F.3d 865, 873 (9th
12 Cir. 2011) (internal quotation marks and emphasis omitted).

13 The legal standard employed was thus proper and,
14 because our review "is limited to this legal determination
15 and does not extend to the underlying factual
16 determination," we do not "reevaluate the relative strength
17 of the evidence" presented to the immigration judge.
18 Yohannes, 585 F.3d at 405 (internal quotation marks
19 omitted); see also Ibrahim, 566 F.3d at 764 (determining
20 that jurisdiction exists only to evaluate a "predicate legal
21 question" in a challenge to an immigration judge's finding
22 that a marriage was not entered in good faith (internal

1 quotation marks omitted)).

2 **IV**

3 Finally, Boluk challenges the immigration judge's
4 failure to give "any weight" to the fact that Ms. Colangelo
5 traveled to Turkey to marry him. Pet'r Br. at 8. The
6 amount of weight to be accorded any particular fact raises
7 no question of law and is accordingly not within this
8 Court's jurisdiction to review the agency's determination.
9 8 U.S.C. § 1252(a)(2)(D); see Contreras-Salinas v. Holder,
10 585 F.3d 710, 713-15 (2d Cir. 2009).

11 **CONCLUSION**

12 For the foregoing reasons, we deny Boluk's petition for
13 review.