

SEP 10 2004*Cahoon v. Ashcroft*, No. 02-72891

BERZON, J., concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in the majority's denial of Cahoon's claim to adjustment of status based on her current marriage.

I would grant the petition for review in part, however. The IJ did not inform Cahoon of her "apparent eligibility" for relief pursuant to the application she made for adjustment of status based on her marriage to Hammes. *See* 8 C.F.R.

§ 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing.").

We have held that the IJ's obligation to inform is "mandatory." *Bui v. INS*, 76 F.3d 268, 270 (9th Cir. 1996). "'Apparent eligibility' is a reasonable possibility that the alien may be eligible for relief." *Id.*

At the time of her removal hearing, there was a reasonable possibility that Cahoon was eligible for relief. Her application based on the Hammes marriage had been denied by the INS because of the Drury marriage, the validity of which was not determined by the IJ. If the Drury marriage was invalid, then the Hammes marriage may have been a valid basis for adjustment of status. The denial of Cahoon's application stated in part that: "You may renew your application for

status as a permanent resident during [removal] proceedings.” *See* 8 C.F.R. § 216.5(f) (“No appeal shall lie from the decision of the director; however, the alien may seek review of such decision in removal proceedings.”).

Had Cahoon’s application to the INS been successful, she would have become a conditional and then a permanent lawful resident within the required two years of her marriage to Hammes. Cahoon’s divorce from Hammes and Hammes’ failure to join her application were not a bar to complete relief because, pursuant to 8 U.S.C. § 1186a(c)(4), Cahoon could have obtained a hardship waiver of the ordinary requirement that a qualifying marriage be intact at the time of application.

In sum, the IJ’s failure to address the validity of Cahoon’s marriage to Drury leaves open the question whether a renewal of Cahoon’s adjustment of status application based on her marriage to Hammes could have been successful at her removal hearing. The IJ therefore erred by not informing Cahoon of her “apparent eligibility” for relief based on her marriage to Hammes. I would remand the proceedings for consideration of Cahoon’s eligibility for that relief. *See Moran-Enriquez v. INS*, 884 F.2d 420, 422 (9th Cir. 1989).