

Interim Decision #2781

MATTER OF KONDO

In Rescission Proceedings

A-19855118

Decided by Board February 20, 1980

(1) A marriage legally valid but "factually dead" (nonviable) at the time of the adjustment of status cannot be the basis for rescission for cases arising in the Ninth Circuit. *Dabaghian v. INS*, 607 F.2d 868 (9 Cir. 1979) followed. *Matter of Sosa*, 15 I&N Dec. 572 (BIA 1976) no longer applied in that circuit.

ON BEHALF OF RESPONDENT:
William F. Thompson, III, Esquire
925 Bethel Street
Suite 205
Honolulu, Hawaii 96813

ON BEHALF OF SERVICE:
Gary Y. Fujiwara, Esquire
Trial Attorney

By: Milhollan, Chairman; Maniatis, Appleman, Maguire, and Farb, Board Members

The respondent through his counsel moves the Board to reconsider our decision of August 1, 1978, where we dismissed his appeal ruling that respondent's adjustment of status to that of a lawful permanent resident must be rescinded pursuant to section 246 of the Immigration and Nationality Act, 8 U.S.C. 1256, since it was based upon a marriage that was nonviable at the time of his adjustment. In reaching that result, we relied upon our precedent decision of *Matter of Sosa*, 15 I&N Dec. 572 (BIA 1976). The pertinent facts in the instant matter we fully stated in our previous opinion and need not be repeated here. For the reasons stated below, the motion will be granted and rescission proceedings terminated.

Recently, the United States Court of Appeals for the Ninth Circuit, the circuit in which the instant case arose, has held that a marriage legally valid but "factually dead" (nonviable) at the time of the adjustment of status cannot be the basis for rescission. *Dabaghian v. INS*, 607 F.2d 868 (9 Cir. 1979). We find that case controlling here and must follow its holding in the Ninth Circuit. In that respect, *Sosa*, is no longer applicable law in the Ninth Circuit on this issue. Furthermore, there is nothing in the record to support a finding that respondent's

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marriage was a sham or fraudulent from its inception.

ORDER: The motion is granted and the rescission proceedings are terminated.