In re Rowan

NCBE DRAFTERS’ POINT SHEET

This performance test requires examinees to write a persuasive argument. Specifically, it asks examinees to write a legal argument to an Immigration Judge in support of an application by a noncitizen spouse, William Rowan, to remove the conditions on his permanent residency in the United States. Because he and his wife are now divorced, he must seek a waiver of the requirement that both spouses request the removal of these conditions. Rowan’s ex-wife, Sarah Cole, actively opposes Rowan’s continued residency in the United States. Examinees must make the case that Rowan entered into his marriage with Cole in “good faith.”

The File contains a task memorandum from the supervising attorney, a “format memo,” a memo containing notes of the client interview, an affidavit by Cole, and a memorandum to file describing evidence to be submitted at the immigration hearing.

The Library contains selected federal statutes and regulations on the requirements for conditional residency for spouses; *Hua v. Napolitano*, a federal Court of Appeals case addressing the basic process and standards for seeking a waiver of the joint filing requirement; and *Connor v. Chertoff*, a federal Court of Appeals case addressing the substantial evidence standard of review and including dicta on the weight to be given to an affidavit provided by a spouse who opposes waiver of the joint filing requirement.

The following discussion covers all the points the drafters intended to raise in the problem.

1. FORMAT AND OVERVIEW

   The supervising attorney requests that the examinee draft a portion of a persuasive brief to an Immigration Judge. The File includes a separate “format memo” that describes the proper form for a persuasive brief.

   The format memo offers several pieces of advice to examinees:

   - Write briefly and to the point, citing relevant legal authority when offering legal propositions.
   - Do not write a separate statement of facts, but integrate the facts into the argument.
   - Do not make conclusory statements as arguments, but instead frame persuasive legal arguments in terms of the facts of the case.
   - Use headings to divide logically separate portions of the argument. Do not make
conclusory statements in headings, but frame the headings in terms of the facts of the case.

- Anticipate and accommodate any weaknesses, either by structuring the argument to stress strengths and minimize weaknesses, or by making concessions on minor points.

II. FACTS

The task memorandum instructs examinees not to draft a separate statement of facts. At the same time, they must integrate the facts thoroughly into their arguments. This section presents the basic facts of the problem. Other facts will appear below in the discussion of the legal argument.

- Cole was and is a U.S. citizen, present in England for graduate study. Rowan was and is a British citizen.
- Rowan and Cole began a relationship and moved in together within a few weeks.
- Rowan proposed marriage shortly afterward. Cole agreed and suggested that they move to the United States.
- Even before meeting Cole, Rowan had begun looking for work as a librarian and had decided that he had better job opportunities in the United States, where two of his siblings lived. Without telling Cole, he contacted the university library in Franklin City about a job, but no offer materialized.
- Rowan and Cole then moved to Franklin City. Rowan obtained a job as a librarian at Franklin State University, while Cole returned to her graduate studies at the university.
- Rowan and Cole lived together throughout the next two years. Cole traveled extensively for her work; she was absent from Franklin City for a total of seven months during this period. Rowan rarely contacted her during these absences.
- Rowan and Cole socialized primarily with friends that Rowan made at his library job. Two of these friends will testify that they observed the couple holding themselves out as husband and wife. One of these two will testify to Cole’s gratitude to Rowan for moving to the United States without a job, and Cole’s belief at that time that he “did it for love.”
- Rowan and Cole engaged in the following transactions together:
  - They leased a residence for two years in both of their names.
They opened a joint bank account.

They filed joint income tax returns for 2011 and 2012.

Cole purchased a car, and Rowan co-signed the promissory note for the related loan.

Eleven months ago, Cole faced a choice whether to take an assistant professorship at Franklin State University or a more prestigious position at Olympia State University in the State of Olympia. Rowan argued that she should stay in Franklin, presumably because he thought it would be difficult for him to find a comparable library job in Olympia.

Eventually, Cole decided to accept the Olympia State University position and moved to Olympia in April 2013 without getting Rowan’s agreement.

Rowan decided that he would not move to Olympia and told Cole this in a phone call.

Cole responded angrily and told him that she would file for a divorce and that she would oppose his continued residency in the United States.

Cole and Rowan were divorced about three months ago, on November 15, 2013.

Acting pro se, Rowan timely filed a Petition to Remove Conditions on Residence (Form I-751) and a request to waive the usual requirement of a joint petition by both spouses.

Rowan’s request was denied by the immigration officer, in part based on an affidavit filed by Cole.

Rowan then hired attorney Jamie Quarles for help with the immigration issues.

Quarles requested a hearing on the denial before the Immigration Court.

III. ARGUMENT

In the call memo, examinees are instructed to make two arguments: first, that Rowan has met his burden of proving that he married Cole in good faith; and second, that the decision denying Rowan’s petition lacks substantial evidence in the record. The major points that examinees should cover in making these two arguments are discussed below.

A. “Good Faith”

Under the Immigration and Nationality Act, an alien who marries a United States citizen may petition for permanent residency on a conditional basis. See 8 U.S.C. § 1186a(a)(1). Generally, the couple must jointly petition for the removal of the conditional status. See 8 U.S.C. § 1186a(c)(1)(A). If the couple does not file a joint petition, the alien is subject to having his or
her conditional residency revoked, and to being deported. This might occur, for example, if the
couple has divorced within two years of the conditional admission, or if they have separated and
the citizen spouse refuses to file jointly with the noncitizen spouse. See Hua v. Napolitano.

If the alien spouse cannot get the citizen spouse to join in a joint petition, the alien spouse
may still apply to the Secretary of Homeland Security to remove the conditional nature of his
residency by granting a “hardship waiver.” 8 U.S.C. § 1186a(c)(4). This statute permits the
Secretary to remove the conditional status upon a finding, inter alia, that the marriage was entered

To establish “good faith,” the alien spouse must prove that he or she intended to establish
a life with the other spouse at the time of the marriage. The burden of proof rests on the alien
spouse to present evidence relating to the amount of commitment by both parties to the marital
relationship. Id. Such evidence may include (1) documentation concerning their combined
financial assets and liabilities, (2) documentation concerning the amount of time the parties
cohabited after the marriage and after the alien obtained permanent residence, (3) birth certificates
of children born to the marriage, and (4) any other relevant evidence. 8 C.F.R. § 216.5(e)(2).

Here, examinees can integrate several different items of evidence into the argument that
Rowan entered into a marriage with Cole in “good faith,” that is, with the intention to establish a
life with Cole at the time of the marriage. This evidence includes

- the couple’s cohabitation from before the marriage through the time of separation;
- the couple’s socializing as husband and wife;
- the extent of the couple’s financial interdependency, including a joint lease, a joint bank
  account, co-signing on a loan, and two joint income tax returns; and
- Rowan’s own conduct before the marriage, and after the marriage up until the time that
  Cole requested a divorce.

At the same time, examinees should also find ways to integrate and cope with less favorable
factual information. This constitutes the primary focus of the second argument.

B. “Substantial Evidence”

In addition to making an affirmative argument that Rowan meets his burden of proof on
“good faith,” examinees must make an argument that the decision to deny Rowan’s petition lacks
“substantial evidence” in the record. In Connor v. Chertoff, the court defined “substantial
“evidence” as “such relevant evidence as reasonable minds might accept as adequate to support [the determination], even if it is possible to reach a contrary result on the basis of the evidence.”

The factual discussion in *Connor* provides examinees with further grounds for argument. Specifically, examinees can distinguish *Connor* by arguing that here

- Rowan has not omitted any important information from his application;
- no internal inconsistencies exist in Rowan’s version of events;
- the documentary evidence includes records of completed financial transactions, including a lease, a car loan, and two joint income tax returns;
- cohabitation ended at the citizen spouse’s instigation, not the alien spouse’s;
- Rowan has provided corroborating evidence from friends in the relevant community; and
- all the foregoing facts tend to corroborate Rowan’s version of events, unlike the facts in *Connor*, where few if any of the supplemental facts provided persuasive corroboration.

The most significant evidence tending to support a denial of Rowan’s petition for waiver is Cole’s affidavit and in the statements it contains concerning Rowan’s intentions before and during the marriage. The *Connor* decision addresses the issue of spousal opposition. Based on *Connor*, an examinee might argue either that the affidavit should not be admitted into evidence, or that if admitted, it should not constitute substantial evidence in opposition to Rowan’s request.

In *Connor*, the court stated that the Federal Rules of Evidence do not apply in immigration hearings and thus admission of hearsay is permissible if the evidence is “probative” and admission is “fundamentally fair.” The case gives examinees relatively little ground to support an argument for exclusion.

However, *Connor* provides an alternate ground for argument. In dicta, it distinguishes between “opinion testimony on Connor’s intentions” and “relevant factual information drawn from firsthand observation.” This provides examinees with an argument that Cole’s statements also constitute an expression of opinion about Rowan’s intentions and should not be considered.

Cole’s affidavit expresses her belief that Rowan intended to use the marriage as a means of gaining permanent residency. She roots this argument in several assertions of fact, including that

- Rowan looked for work in Franklin City before proposing marriage;
Rowan made friends only with people at his job, and not with her colleagues; Rowan resisted her career plans; and Rowan resisted commitment, including children and property ownership.

The File contains means for examinees to rebut some, but not all, of these assertions. It is true that Rowan had decided before he met Cole that his best options for a position in his field were in the United States, where two of his siblings already lived. Also, Rowan’s decision to make friends with his coworkers and not with hers appears consistent with Cole’s statement that Rowan showed little interest in her work. However, Rowan’s resistance to her career plans is contradicted by his willingness to move to the United States without a job. Finally, Cole’s allegation of Rowan’s resistance to commitment is undercut by his willingness to enter into a long-term lease, to co-sign a car loan with her, and his efforts to persuade Cole to stay in Franklin City.

Finally, examinees might also take advantage of language that appears in Hua v. Napolitano: if an applicant meets her burden on good faith, her “marriage is legitimate, even if securing an immigration benefit was one of the factors that led her to marry.” In this case, Cole acknowledges that Rowan’s “affection for me was real.” Examinees can successfully argue that Cole’s opinion that Rowan was solely motivated by a desire to obtain U.S. residency matches neither her own experience of him nor the objective corroboration discussed earlier.

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