U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30291268

Date: APR. 24, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, an agronomy researcher, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner qualified for EB-2 classification, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. In addition, the Director concluded the Petitioner's EB-2 petition is barred under section 204(c) of the Act. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree.[1] 8 C.F.R. § 204.5(k)(2). A U.S. bachelor's degree or a foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. *Id.*

Once a petitioner demonstrates eligibility for the underlying classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest."

[1] Profession shall include, but not be limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

Id. at 889.

II. ANALYSIS

The Petitioner entered the United States as a student on an F-1 visa and completed a master's degree in plant and soil science at [redacted] in December 2011, and a doctor of philosophy degree in agronomy at [redacted] in May 2018. Since May 2023, he has been a research specialist with the [redacted] a Texas state university.

On [redacted] 2010, the Petitioner married a U.S. citizen (former wife or former spouse) who filed a family-based Form I-130, Petition for Alien Relative, on his behalf on September 7, 2011. The couple attended an in-person interview at the Atlanta Field Office, and due to a lack of details in the former spouse's testimony, the case was referred to USCIS's fraud unit to investigate whether the marriage is bona fide. The investigation determined that the Petitioner had submitted a fraudulent residential lease agreement to prove he was living with his former spouse. The Director of the Atlanta Field Office denied the petition concluding the marriage was entered into for the sole purpose of obtaining an immigration benefit. In support of this conclusion, the Director noted: that the health insurance, joint bank account, and credit card evidence was obtained a year after the parties' married, and shortly before their interview; the Petitioner submitted a fraudulent residential lease to show he was living with his former spouse; and the parties' identification documents did not have the same addresses.

A. Section 204(c) of the Act

U.S. Citizenship and Immigration Services (USCIS) cannot approve a visa petition for a noncitizen who attempted or conspired to enter a marriage "for the purpose of evading the immigration laws." Section 204(c) of the Act. Even if legally valid where it occurred, a marriage "entered into for the primary purpose of circumventing the immigration laws" permanently bars approval of a visa petition. *Matter of P. Singh*, 27 I&N Dec. 598, 601 (BIA 2019) (citations omitted). To determine the existence of a fraudulent or sham marriage, adjudicators must consider whether the parties "intended to establish a life together at the time they were married." *Id.* Officers must examine the parties' conduct before

[2] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

and after the marriage to ascertain their intent, but "only to the extent that it bears upon their subjective state of mind at the time they were married." *Id.*

To sustain a marriage fraud determination, USCIS must conclude there is "substantial and probative evidence" of fraud. 8 C.F.R. § 204.2(a)(1)(ii). The Board of Immigration Appeals (Board) recently clarified this standard of proof as evidence that a marriage was "more than probably" fraudulent. *Matter of P. Singh*, 27 I&N Dec. at 607. This standard exceeds a preponderance of the evidence but does not rise to the level of clear and convincing evidence. *Id.* at 607 n.7.

Citing *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) and *Matter of P. Singh*, 27 I&N Dec. 598 (BIA 2019) the Director stated that "[their] independent review of the evidence in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the [Petitioner] attempted to enter into a prior marriage for the purpose of evading immigration laws." However, this is an incorrect standard.

In *P. Singh*, the Board stated "although "any relevant evidence" could be considered in assessing marriage fraud, "a reasonable inference" of fraud is not sufficient to meet the "substantial and probative evidence" standard."[3] *Id.* at 602. Instead, the Board held that "[i]n determining if the evidence of marriage fraud is substantial and probative, that is, whether it establishes that it is more than probably true that the marriage is fraudulent, the nature, quality, quantity, and credibility of the evidence in the record should be considered in its totality. This assessment may be based on either direct or circumstantial evidence." *Id.* at 610. On remand, this is the standard that must be applied to the facts of this case.[4]

Furthermore, the Director should consider the Petitioner's assertions that he submitted the lease in order to protect his wife from USCIS scrutiny, and also evaluate the countervailing evidence that their marriage was bona fide at the time of its inception, which includes: the parties attended their interview together; the parties obtained health insurance; and the Petitioner's former spouse wrote to him from jail numerous times.[5]

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[3] We note that the Petitioner's Form I-130 was denied in September 2011, approximately eight years before *Matter of P. Singh* was decided. As such, the Field Office Director's determination that the marriage was fraudulent was decided under a different legal standard, and thus should not be given deference. While the Director notes in their decision denying the Petitioner's Form I-140 that she conducted an "independent review" of the evidence, their conclusion relies on the same evidence cited by the Field Office Director. Furthermore, and as noted above, an incorrect "reasonable inference" standard was used instead of the correct "substantial and probative evidence" standard to find that it is more than probably true that the marriage is fraudulent based on the nature, quality, quantity, and credibility of the evidence as considered in its totality.

[4] In *P. Singh*, the Board found sufficient proof marriage fraud when: 1. there was a site visit by USCIS officers to determine the validity of the marriage; 2. during a site visit, the wife admitted her marriage was a sham; 3. during the site visit, the wife gave multiple inconsistent statements about who lived in the house; 4. during the site visit, USCIS officers observed a photograph of the beneficiary with another individual (his wife's daughter) in an intimate pose; 5. during the site visit, evidence was found that the wife's daughter was living with the beneficiary instead of her, and no explanation could be provided to explain; 6. the home where they lived was jointly owned by the beneficiary and his wife's daughter; and 7. the petitioner was the beneficiary's children's maternal grandmother. The Board found these factors were substantial and probative evidence that the parties had entered a marriage for the purpose of obtaining an immigration benefit.

[5] We acknowledge the seriousness of the Petitioner's use of a fraudulent residential lease agreement in his attempt to prove he was living with his wife. On appeal, the Petitioner states he submitted the lease in order "to not disclose her criminal case to protect her from [USCIS] examination. It unfortunately is impossible for [ex-wife] and I to live in the same place

On remand, consistent with *P. Singh*, the Director should determine whether the record contains evidence that the Beneficiary's marriage was "more than probably" fraudulent. If so, the Director should then determine whether the Petitioner rebutted the derogatory information. Finally, the Director should enter a new decision.

B. EB-2 Classification

The record supports the Director's conclusion that the Petitioner established his eligibility for EB-2 classification as an advanced degree professional under 8 C.F.R. § 204.5(k)(2). As such, we will determine whether the Petitioner's endeavor meets the *Dhanasar* framework for a discretionary national interest waiver.

C. National Interest Waiver – *Dhanasar's* Three Prongs

The Director determined that the Petitioner's evidence did not establish any of the three *Dhanasar* prongs. We disagree. The Director's decision did not engage with the Petitioner's assertions or evidence, and instead determined in a conclusory manner that while the Petitioner's endeavor had substantial merit, it was not of national importance. Furthermore, the Director determined that the "internet printouts do not demonstrate how the [P]etitioner's research has national or global implications in the field of agriculture . . . ." However, no further analysis was provided to support the Director's prong one conclusions.

On remand, the Director should consider, in addition to the recommendation letters provided, the Petitioner's evidence of how his research could impact global food scarcity, crop growth amid climate change, and how his research might be of commercial interest to U.S. growers. To support his assertions, he highlights his research into how fabric covering affects the emergence and yield of container-grown Egyptian spinach. He asserts his research has the potential prospective impact on "sustainable agriculture, economic growth, and food security in the USA." He also asserts his research into indoor vegetable production could potentially lead to innovative approaches for increasing crop cultivation through techniques like hydroponics or vertical farming. He maintains that this research is of substantial merit and national importance because it might enable year-long supply, reduce transportation emissions, conserve resources, minimize chemical use, and enhance climate resilience in the face of a growing human population and food scarcity issues.

As to *Dhanasar*'s second prong, the Director determined that the Petitioner was not well positioned to advance his endeavor. However, the Director's decision does not reflect that they considered current USCIS policy concerning individuals who hold an advanced degree in the fields of science, technology, engineering, and mathematics (STEM) tied to the proposed endeavor and related to work furthering a STEM area important to U.S. competitiveness or national security, which is an especially

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because of her pending criminal charges and we have to live in two states." He further explains that he created a lease with their names on it, because his studies prevented him from leaving Alabama and that due to her criminal problems, the marriage ended in divorce, on [redacted] 2015. We note that the Petitioner's admission to providing false documentation likely triggers his inadmissibility under section 212(a)(6)(c)(i) of the Act. This section makes any noncitizen who "by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission to the United States or other benefit," inadmissible.

positive factor to be considered along with other evidence. *See generally* 6 *USCIS Policy Manual* F.5(D)(2), https:///www.uscis.gov/policy-manual. Here, the Petitioner's degree in the field of agronomy and his research into food scarcity and climate change in the field of agriculture, would be a positive factor that the Director should consider. Furthermore, the Director's decision does not reflect that they considered the Petitioner's affiliation with [redacted] as well as the grant [redacted] received from the U.S. Department of Agriculture, with the goal of researching and enhancing the nutritional value in edible leafy green vegetables by using metallic-based nanoparticles. Finally, on remand, the Director should consider if the Petitioner's research citation history, his affiliation with [redacted] his prior research and publications, as well as his ongoing research and participation in a U.S. government funded research program, is sufficient to meet prong two.

As to the last prong of the *Dhanasar* analysis, whether on balance it would be beneficial to the United States to waive the requirement for a job offer and thus a labor certification, on remand, if the Director first determines that the Petitioner meets the first two prongs of the *Dhanasar* framework, then they should consider if he meets the third prong. However, once again, we highlight that because the Petitioner holds a doctorate degree in a STEM field, and his endeavor is to continue his research in the field of agronomy, the Director should analyze the evidence considering our STEM policy. *Id.* Current USCIS policy states that in evaluating the third prong we should consider the following combination of facts to be a strong positive factor in favor of granting the third prong: the person possesses an advanced STEM degree, particularly a Ph.D.; the person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and the person is well positioned to advance the proposed STEM endeavor of national importance. *Id.*

III. CONCLUSION

On remand, consistent with *Matter of P. Singh*, the Director should determine whether the record contains substantial and probative evidence that the Petitioner's marriage was "more than probably" fraudulent. If so, the Director should then determine whether the Petitioner rebutted the derogatory information and enter a new decision.

Furthermore, because the Director appears not to have considered the Petitioner's eligibility in light of USCIS's policy as it relates to professionals with advanced degree in a STEM field, we will remand for the Director to consider the evidence anew and enter a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.