U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF Q-C-R- INC.

DATE: AUG. 25, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a restaurant, seeks to employ the Beneficiary as a cook. It requests classification of the Beneficiary as an "other worker" under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor for lawful permanent resident status a foreign national who is capable of performing unskilled labor that requires less than two years of training or experience and is not of a temporary or seasonal nature.

The Director of the Nebraska Service Center denied the petition. The Director found that the Beneficiary had entered into a marriage for the purpose of evading U.S. immigration laws and was therefore ineligible under section 204(c) of the Act for the benefit sought in this petition.

On appeal the Petitioner submits a brief and asserts that previously submitted documentation rebuts the Director's conclusion that marriage fraud was committed by the Beneficiary.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Section 204(c) of the Act provides that:

> Notwithstanding the provisions of subsection (b) [Allocation of Immigrant Visas] no petition shall be approved if (1) the alien has previously been accorded, or sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by [USCIS] to have been entered into for the purpose of evading the immigration laws or (2) [USCIS] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

To determine that a beneficiary is barred under section 204(c) of the Act, USCIS must find that there is substantial and probative evidence in the record that the beneficiary entered into a marriage for the purpose of evading the immigration laws. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).

II. ANALYSIS

For the reasons discussed below, we find that the current record does not support the Director's finding that the Beneficiary entered into marriage for the purpose of evading U.S. immigration laws. We find that further proceedings are needed to complete the record and enable a determination to be made, in accord with the requirements of *Tawfik*, as to whether there is "substantial and probative evidence" that the Beneficiary entered into a marriage for the purpose of evading U.S. immigration laws. We will remand the case to the Director for this purpose.

The Beneficiary indicates that he first entered the United States without inspection in November 1991 and started working in March 1992 as a cook at [redacted] in [redacted] In 1996 the Beneficiary married a U.S. citizen, [redacted] who then filed a Petition for Alien Relative, Form I-130, on behalf of the Beneficiary. The Form I-130 petition was approved by the Vermont Service Center on June 26, 1996. In 1997, the Beneficiary was interviewed three times at the U.S. Consulate in [redacted] Ecuador. After the final interview the consular officer concluded, based on a series of discrepancies in the information provided by the Beneficiary and his wife and the lack of convincing secondary evidence of a *bona fide* relationship, that the Beneficiary entered into the marriage for the sole purpose of obtaining an immigrant visa.

The Director of the Vermont Service Center subsequently sent a notice of intent to revoke (NOIR) the approval of the Form I-130 petition to the Beneficiary's wife by certified mail. The NOIR advised that additional evidence could be submitted in the next 60 days to overcome the grounds for revocation and that "[f]ailure to submit such evidence could result in the revocation of the approval previously granted." The NOIR was returned to the Vermont Service Center on February 10, 1998, with a stamp of "Unclaimed" on the envelope. There is no evidence in the file that the Vermont Service Center took any further action with respect to the Form I-130 petition, and USCIS records do not indicate that any further action was taken.

In succeeding years [redacted] filed two Form I-140 petitions on behalf of the Beneficiary (receipt numbers [redacted] and [redacted] requesting that he be granted employment-based classification as a skilled worker. Both petitions were denied on the ground that [redacted] could not establish its continuing ability to pay the proffered wage. The Beneficiary indicates that he ceased working for [redacted] in February 2014, and began working full-time for the Petitioner.

The Petitioner filed the current Form I-140, Immigrant Petitioner for Alien Worker, in January 2016, accompanied by a labor certification that was filed with DOL on September 30, 2014 (the priority date). The Director issued a notice of intent to deny (NOID) advising the Petitioner that the Beneficiary appeared to be ineligible for the benefit sought in this petition under section 204(c) of

the Act because of the consular interviews in Ecuador which, in the view of the consular officer, indicated that the Beneficiary had entered into his marriage with a U.S. citizen in 1996 for the purpose of evading U.S. immigration laws. The Director noted that the Petition for Alien Relative, Form I-130, filed on the Beneficiary's behalf by his U.S. wife was approved in 1996, but that after the consular interviews in 1997 a notice of intent to revoke the approval was issued in January 1998.

In response to the NOID the Petitioner submitted some documents in support of its claim that the Beneficiary's 1996 marriage to a U.S. citizen was *bona fide* and not intended to evade U.S. immigration laws. The documents included copies of the following:

- Forms W-2, Wage and Tax Statements, issued to the Beneficiary and his wife for 1995.
- New York State Resident Income Tax Return for 1995, signed (but not dated) by the Beneficiary and his wife.
- Federal income tax return for 1995 – Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents – signed (but not dated) by the Beneficiary and his wife.
- A letter to the Beneficiary and his wife from dated September 17, 1996, regarding its rewards program.
- A letter to the Beneficiary and his wife from dated September 20, 1996, regarding long distance telephone service.
- A notarized letter from dated November 4, 1996, certifying that the Beneficiary and his wife had a joint savings account.
- A notarized letter from in to the U.S. Consulate in Ecuador, dated November 8, 1996, certifying that the Beneficiary's wife was an employee (since August 1996) and confirming that she was married to the Beneficiary.
- An life insurance policy of the Beneficiary's wife, dated November 19, 1996, naming the Beneficiary as a policy beneficiary.

The Director denied the petition. After reiterating the substance of the three interviews at the U.S. Consulate in Ecuador, the Director listed the documents submitted in response to the NOID and stated that "this information was not supplied to the consular office when requested during the final interview that was held on August 13, 1997." The Director cited several discrepancies and omissions in the documents and elsewhere in the record, stated that the Form I-130 petition originally approved "was revoked by the service on January 5, 1998," and concluded that the Beneficiary entered into a marriage for the purpose of evading U.S. immigration laws.

On appeal, the Petitioner asserts that neither the Beneficiary nor his first wife received the NOIR from the Vermont Service Center in 1998, or any subsequent notice that the 1996 approval of the Form I-130 petition had been revoked. The Petitioner claims that the NOID issued by the Nebraska Service Center on the current Form I-140 petition in August 2016 was the first time the Beneficiary was presented with the fraudulent marriage issue of section 204(c), and that the documents submitted in response to the NOID established the *bona fides* of the marriage. The Petitioner contends that the Director did not give due weight to this documentary evidence, but instead relied too heavily on the conclusions of a consular officer who never viewed the submitted documents.

The Petitioner also asserts that the various discrepancies and omissions in the record were minor in nature, or explainable, and do not cast doubt on the fundamental *bona fides* of the Beneficiary's prior marriage.[1]

The Form I-130 marriage-based immigrant petition filed on behalf of the Beneficiary was approved in 1996 and, contrary to the Director's decision denying the current Form I-140 petition, there is no evidence in the record that the approval has been revoked. The Vermont Service Center did not complete the revocation of the Form I-130 approval in 1998 since it did not follow up after its certified mail delivery to the Beneficiary's wife was returned unclaimed. As far as the record shows, therefore, the Beneficiary and his wife did not have the opportunity to submit evidence in response to the NOIR.

The Director's decision also stated that the materials submitted in response to the NOID in this proceeding were not furnished to the consular officer in Ecuador for the Beneficiary's final immigrant visa interview. But the record of that interview is unclear as to what documents were requested and what documents were produced by the Beneficiary. The consular officer noted that there was a "lack of secondary evidence" without further elaboration.

The Director also notes certain inconsistencies between the documents submitted in response to the NOID in this proceeding and other evidence in the file. Without further analysis, however, we cannot affirm the Director's conclusion that these inconsistencies constitute "substantial and probative evidence" that the Beneficiary entered into marriage with his first wife for the purpose of evading U.S. immigration laws, within the meaning of *Tawfik*.

For the reasons discussed above, we find that further proceedings are needed to complete the record and enable a determination to be made in accord with the requirements of *Tawfik* as to whether the Beneficiary entered into a marriage for the purpose of evading U.S. immigration laws. An effort should be made to verify the authenticity of the materials submitted in response to the NOID, especially since many of the documents – including the tax returns, the Citibank letter, and the life insurance policy – are the types of documents that could be probative evidence of the *bona fides* of a marriage. *See Matter of Soriano,* 19 I&N Dec. 764, 766 (BIA 1988). The Director may also request, and the Beneficiary may submit, additional evidence relating to the *bona fides* of the marriage.

III. CONCLUSION

The Director's finding that the Beneficiary entered into his first marriage for the purpose of evading U.S. immigration laws will be withdrawn. The case will be remanded for additional proceedings, including further consideration of the documentation submitted in response to the NOID and any other documents or issues deemed relevant.

[1] The record shows that the Beneficiary and his first wife divorced on [redacted] 2001, and that the Beneficiary married his current wife on [redacted] 2004.

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

Cite as *Matter of Q-C-R- Inc.*, ID# 429331 (AAO Aug. 25, 2017)