U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16608481

Date: JUN. 30, 2021

Appeal of Cleveland Field Office Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a business solutions provider. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

After the filing's initial grant, the Director of the Cleveland Field Office revoked the petition's approval. The Director found that the Beneficiary previously married to evade U.S. immigration laws, barring the petition's approval.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See 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. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in an NOIR. *Id.* at 452.

II. THE MARRIAGE FRAUD BAR

USCIS cannot approve an immigrant petition for a beneficiary who "attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Section 204(c) of the Act. The "central question" in determining whether a "fraudulent" or "sham" marriage occurred is whether the parties "intended to establish a life together at the time they were married." *Matter of P. Singh*, 27 I&N Dec. 598, 601 (BIA 2019) (citations omitted). USCIS must examine a record to determine if there is "substantial and probative evidence" of fraud warranting a petition's denial under section 204(c) of the Act. 8 C.F.R. § 204.2(a)(1)(ii); *Matter of P. Singh*, 27 I&N Dec. at 602.

A petitioner bears the initial burden of proving a beneficiary's eligibility for a requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361. If a record contains evidence of marriage fraud, a petitioner must generally rebut that derogatory information by the same preponderance-of-evidence standard. *Matter of P. Singh*, 27 I&N Dec. at 606. If, however, USCIS denies (or revokes) a petition under section 204(c) of the Act based on marriage fraud, a record must contain substantial and probative evidence of the fraud, meaning evidence that a marriage was more than probably a sham. *Id.* at 606-07.

Here, the Director issued a written notice of intent to revoke the instant petition's approval, informing the Petitioner of the Beneficiary's prior marriage to a U.S. citizen. As the NOIR notes, the Beneficiary's former spouse petitioned for him to obtain lawful permanent resident status as her "immediate relative" by filing Form I-130, Petition for Alien Relative, in 2014. *See* section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i) (exempting close relatives of U.S. citizens from numerical limitations on immigrant visas). During the couple's initial interview for the I-130 petition, they provided discrepant testimony regarding several aspects of their life together. Additionally, following multiple site visits to the couple's purported residences, USCIS officers concluded that the couple did not regularly reside together. USCIS ultimately denied the I-130 petition, finding that the Beneficiary's spouse had not demonstrated the *bona fide* nature of the marriage.[1] This decision was appealed to the Board of Immigration Appeals (BIA), which remanded the matter to allow both parties to further develop the record. After review of additional evidence on remand, USCIS again denied the I-130 petition, finding that the record did not demonstrate the *bona fides* of the marriage.[2]

[1] Following the denial, the Beneficiary's spouse filed a second I-130 petition in 2016, which USCIS also denied. We note that the written notice of denial of the second I-130 petition was not found in the record.

[2] This denial was also appealed to the BIA, however because the couple subsequently divorced, this second appeal to the BIA is moot. As of the date of this decision, no information on the status of the second appeal was available from the BIA.

After receiving the Petitioner's NOIR response, the Director reviewed the record and concluded that the Beneficiary's marriage was not *bona fide* at inception. The Director therefore concluded that section 204(c) of the Act barred the petition's approval.

The Petitioner notes on appeal that neither the initial denial of the first I-130 petition, nor the denial after the BIA remand, states that the record included substantial and probative evidence of marriage fraud. Rather, the Director states that the record did not establish that the Beneficiary and his spouse "resided together in a *bona fide* relationship as ... both have claimed." Although the denial of the I-130 petition did not include a finding of marriage fraud, we note that this does not preclude application of section 204(c) of the Act barring the instant petition's approval. In a recent decision, the BIA stated:

> The plain language of the statute and the regulation does not foreclose the application of the section 204(c) bar in cases where the prior visa petition filed on the beneficiary's behalf was denied based on failure to establish a *bona fide* marital relationship, but the marriage had not been determined to be fraudulent.

Matter of Jongbum Pak, 28 I&N Dec. 113 at 116-117 (BIA 2020).[3]

The BIA issued *Singh* prior to the Director's decision in October 2020. *Singh* clarifies that substantial and probative evidence of marriage fraud, which triggers the bar to a petition's approval under section 204(c) of the Act, means evidence establishing "that it is more than probably true that the marriage [was] fraudulent." *Matter of P. Singh*, 27 I&N Dec. at 607. The requisite degree of proof is lower than clear and convincing evidence, but higher than a preponderance of evidence, the normal standard of proof in petition proceedings. *Id.*

Because *Singh* is a precedent decision, all USCIS officers must follow it in proceedings involving the marriage fraud bar. *See* 8 C.F.R. § 103.10(b). However, the Director did not include a discussion of *Singh* or the substantial and probative nature of the evidence of marriage fraud. We will therefore withdraw the Director's decision and remand the matter.

On remand, the Director should review the record to conduct a proper independent analysis of the applicability of section 204(c) of the Act. This should include review of the notice of denial of the second I-130 petition not currently in the record. If, pursuant to *Singh*, the Director finds evidence establishing that the Beneficiary "more than probably" engaged in marriage fraud, she should notify the Petitioner and explain how the evidence meets the standard of proof.

III. ABILITY TO PAY

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $67,933 per year, from the priority date on November 27, 2017, and continuing until the beneficiary obtains lawful permanent residence.[4] The

[3] In that case, the BIA concluded that the Director independently analyzed the applicability of section 204(c) of the Act and did not "erroneously equate the beneficiary's first wife's failure to prove the *bona fides* of their marriage with the beneficiary's intent in entering into that marriage." *Id.* at 119.

[4] The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R.

regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record includes the Petitioner's annual report for 2016 but does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2017, the year of the priority date, onward. Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

Therefore, on remand the Director should analyze the record and determine whether the Petitioner has established its ability to pay the proffered wage. The Director should request such regulatory-required evidence and allow the Petitioner reasonable time to respond.

IV. CONCLUSION

The Director applied the marriage fraud bar without consideration of the BIA's most recent guidance on the subject. Also, the Petitioner has not demonstrated the Petitioner's continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

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

§ 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.