U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 17773528

Date: MAY 2, 2024

Appeal of Immigrant Investor Program Office Decision

Form I-526, Immigrant Petition by Alien Entrepreneur

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference (EB-5) classification makes immigrant visas available to noncitizens who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees. Noncitizens may invest in a project associated with a U.S. Citizenship and Immigration Services (USCIS) designated regional center. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992), section 610, as amended.

The Chief of the Immigrant Investor Program Office denied the petition, concluding that the record did not demonstrate by a preponderance of the evidence that the funds invested by the Petitioner into the new commercial enterprise were obtained through lawful means. The Chief also determined that the approval of the petition is prohibited under section 204(c) of the Act, 8 U.S.C. § 1154(c), because there is substantial and probative evidence that the Petitioner's prior marriage to his former spouse was entered into for the purpose of obtaining immigration benefits. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner maintains that his petition is approvable because it meets the statutory and regulatory requirements.

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 dismiss the appeal.

## I. LAW

Section 204(c) of the Act states in pertinent part:

> [N]o petition shall be approved if (1) the alien has previously been accorded, or has 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 the Attorney General to have been

> entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation at 8 C.F.R. § 204.2(a)(1) states:

> *(ii) Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A petitioner must show by a preponderance of the evidence that the marriage was legally valid and bona fide at its inception and not entered into for the purpose of evading the immigration laws. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983). Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading immigration law. *Matter of Phillis*, 15 I&N Dec. 385, 386 (BIA 1975). Evidence to establish intent could take many forms, including proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. *Matter of Laureano*, 19 I&N Dec. at 3.

A marriage that is entered into for the primary purpose of circumventing the immigration laws, referred to as a fraudulent or sham marriage, has not been recognized as enabling a noncitizen spouse to obtain immigration benefits. *Id.* at 2. The central question in determining whether a sham marriage exists is whether the bride and groom intended to establish a life together at the time they were married. *Id.* at 2-3.

In deciding if a marriage is a sham, USCIS must examine the record to determine if there is substantial and probative evidence of fraud to warrant the denial of a visa petition under section 204(c) of the Act. 8 C.F.R. § 204.2(a)(1)(ii); *Matter of P. Singh*, 27 I&N Dec. 598, 602 (BIA 2019). To be "substantial and probative," the evidence must establish that it is more than probably true that the marriage is fraudulent. *Matter of P. Singh*, 27 I&N Dec. at 607. The requisite degree of proof is higher than a preponderance of evidence but less than clear and convincing evidence, which the Board of Immigration Appeals refers to as "more than probably true." *Id.* The application of the substantial and probative evidence standard requires the examination of all of the relevant evidence and a determination as to whether such evidence, when viewed in its totality, establishes with sufficient probability that the marriage is fraudulent. *Id.*

In making the section 204(c) adjudication, USCIS may rely on any relevant evidence, including evidence having its origin in prior USCIS proceedings involving the beneficiary or in court proceedings involving in the prior marriages. *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

Ordinarily, USCIS should not give conclusive effect to determinations made in a prior proceeding but, rather, should reach its own independent conclusion based on the evidence before it. *Id.*

## II. ANALYSIS

The Chief found that there is substantial and probative evidence that the Petitioner's prior marriage to his first spouse, J-B-, was entered into for the purpose of obtaining immigration benefits and determined that the approval of the Form I-526 is prohibited under section 204(c) of the Act. The Chief noted that a field investigation revealed that the Petitioner's prior marriage to Ms. B- was not bona fide and that he engaged in a fictitious marriage with Ms. B- for the purpose of obtaining immigration status. The Chief provided detailed results of the field investigation, which need not be repeated here.

On appeal, the Petitioner offers no evidence showing a joint life with Ms. B- or any evidence to show that their marriage was not entered into for the purpose of evading the immigration laws. *See Matter of Phillis*, 15 I&N Dec. at 386 (holding that where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading immigration law). The Petitioner does not provide any evidence to address the derogatory information noted in the Chief's decision to support that the section 204(c) bar is inapplicable in his case. The Petitioner does not even argue that the marriage was entered into in good faith. There was no substantive effort to negate the Chief's finding that the prior marriage was a sham.

The Petitioner contends that the record does not contain independent determination by an immigration court, that no actual finding of fraud exists in his record, and that he was not subject to removal proceedings. The Petitioner claims that the record contains investigative narratives and inferences to fraud but no actual finding of fraud and that the fact that a notice to appear was not issued to the Petitioner verifies absence of a finding of fraud. The Petitioner further claims that the prohibition against the approval of any visa petition is not applicable in his case because of the lack of a finding of fraud based on substantive and probative evidence.

While the Petitioner claims that there is no actual finding of fraud, the record of U.S. government reflects that there was a marriage fraud investigation into the marriage between the Petitioner and Ms. B-, as noted in the Chief's decision. Based on the results of the investigation with a finding of fraud and the evidence in the record, including the documents contained in the record, the discrepancies noted in the Petitioner's and Ms. B-'s individual testimony during the interview before an immigration services officer, the fraudulent or altered lease agreement submitted to USCIS in support of the marriage between the Petitioner and Ms. B-, Ms. B-'s withdrawal request and admission regarding her and the Petitioner's separate living arrangements and the Petitioner's relationship with another woman during their marriage, and various public records, which show separate residences maintained by the parties involved, we agree with the Chief that that the marriage between the Petitioner and Ms. B- was not bona fide and they entered into a marriage for the sole purpose of obtaining immigration benefits. As a result of the investigation, there was a finding of fraud in this case, and the results of investigations were provided in detail in the Chief's decision.

The Petitioner acknowledges the Chief's finding that the investigation yielded no direct evidence of marriage fraud but overwhelming circumstantial evidence of marriage fraud by the Petitioner. A

sworn statement by the parties admitting that the marriage is fraudulent, that money changed hands, and that the couple did not intend to live together or consummate the marriage is direct evidence of fraud that is substantial and probative. *Matter of P. Singh*, 27 I&N Dec. at 607. However, an admission or other such direct evidence is not necessary to establish marriage fraud. *Id.* at 608. Courts have found that circumstantial evidence alone is sufficient to establish fraud under section 204(c). *See., e.g., Omokoro* v. *Hamilton*, 688 F. App'x 263, 264 (5th Cir. 2017) (holding that a beneficiary's marriage to a U.S. citizen was fraudulent based on the facts that her husband married two other women during their first year of their marriage, that she filed her taxes as a single person while she was married to her husband, that the couple failed to provide evidence that they ever lived at the same address or combined their finances, that there were inconsistencies in the record regarding their wedding date, and that there was no substantive effort to negate USCIS' finding that the prior marriage was a sham, just the bald assertion that the marriage was entered into in good faith).

The Petitioner contends that he was not subject to removal proceedings and that the fact that a notice to appear was not issued to the Petitioner verifies absence of a finding of fraud. To support this claim, the Petitioner cites *Matter of Agdinaoay*, 16 I&N Dec. 545, 547 (BIA 1978). The Petitioner appears to argue that the Chief could not rely on the investigative report about marriage fraud because, according to his reading of *Matter of Agdinaoya*, the only previous finding of fraud that can be relied on is where a fraud charge has been sustained in an immigration court. However, *Matter of Agdinaoya* does not support the Petitioner's claim.

In *Matter of Agdinaoya*, the Board of Immigration Appeals stated that a finding that section 204(c) applies to a noncitizen must be based on evidence that is substantial and probative. *Matter of Agdinaoay*, 16 I&N Dec. at 546. The Board further stated that the district director should reach his conclusion based on evidence actually before him and should not give conclusive effect to determination made in prior collateral proceedings. *Id.* But the Board held that a district director can base his determination that the section 204(c) bar applies to a beneficiary on the fact that the beneficiary has previously been found deportable under sections 241(a)(2) and 212(a)(19) by virtue of applicability of section 241(c)(2) of the Act because a finding of deportability under these circumstances inherently involves a factual determination based on clear, convincing, and unequivocal evidence that the respondent engaged in fraudulent conduct by entering a marriage for the purpose of procuring his entry as an immigrant. *Id.* at 547. The Board did not hold that removal proceedings or an immigration judge's finding of marriage fraud is necessary for the section 204(c) bar to apply to a beneficiary. Furthermore, it is not necessary that the noncitizen has been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a fraudulent marriage. 8 C.F.R. § 204.2(a)(1)(ii).

The Petitioner also asserts that the Board had made it very clear that an actual finding of fraud based on substantial and probative evidence is required given the gravity of the punishment imposed on the noncitizen. To support this claim, the Petitioner cites *Matter of Tawfik*, 20 I&N Dec. at 168. The Petitioner appears to misinterpret *Matter of Tawfik* to hold that only a formal finding of fraud could suffice to meet the substantial and probative threshold. In *Matter of Tawfik*, the Board held that the district director may rely on any relevant evidence, including evidence having its origin in prior USCIS proceedings involving the beneficiary or in court proceedings involving the prior marriage. *Id.* The Board further stated that the district director should not give conclusive effect to determination made in a prior proceeding but, rather, should reach his own independent conclusion based on the evidence before him. *Id. Matter of Tawfik* does not support the Petitioner's claim because the Board did not

determine that only a former finding of fraud is sufficient to meet the substantial and probative threshold. The record reflects that the Chief has reviewed the entire record, including the Form I-526 and supporting documents, Forms I-130 and Forms I-485 and supporting documents, and investigators' finding statements and supporting documents, and reached her own independent decision concerning the instant visa petition.

Contrary to the attorney's claim that there is no actual finding of fraud in the Petitioner's record, we have shown that there is a finding of fraud in the Petitioner's record. Moreover, the record does not contain objective documentary evidence to overcome the derogatory information found during the marriage fraud investigations and noted in the record of proceedings.

The record contains substantial and probative evidence establishing that the Petitioner's marriage to his first spouse was a sham. From at least 2010 to the present, the Petitioner has maintained his relationship with his current spouse, R-S-, residing together at the same address, raising their two children together, and working together at the same business, during his first marriage to Ms. B- and also during his second marriage to C-W-. Ms. B- maintained a separate residence and admitted that she did not live with the Petitioner and the Petitioner had a child with another woman during their marriage. The Petitioner does not offer any evidence to establish that he and Ms. B- intended to establish a life together at the time they were married.[1] Upon de novo review, we determine the totality of the record demonstrates with sufficient probability that the Petitioner's marriage to his first spouse was fraudulent. Therefore, we agree with the Chief that the approval of the instant visa petition is barred by section 204(c) of the Act.

In light of our discussion on the applicability of section 204(c) of the Act in this case, we need not consider whether the Petitioner has established eligibility for the immigrant investor visa classification, including the requirement to demonstrate the lawful source of his investment funds. We will reserve EB-5 eligibility issues for future consideration should the need arise.[2]

## III. CONCLUSION

Having reviewed all of the relevant evidence in its totality, we conclude there is substantial and probative evidence in the record to establish with sufficient probability that the Petitioner's prior marriage was fraudulent and entered into for the purpose of evading the immigration laws. Therefore, the Chief properly denied the Petitioner's Form I-526 pursuant to section 204(c) of the Act.

**ORDER:** The appeal is dismissed.

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[1] *See generally 6 USCIS Policy Manual* E(10)(D, https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-10.

[2] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).