U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30728131

Date: MAY 17, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner 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 (NIW) 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 Nebraska Service Center Director issued a Notice of Intent to Deny (NOID) the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the marriage fraud prohibition applied to the Petitioner meaning no petitions may be approved on her behalf. Section 204(c) of the Act, 8 U.S.C. § 1154(c). After the Petitioner provided a response to the NOID, the Director decided the response was insufficient to overcome the indications of a previous fraudulent marriage and they denied the petition.

The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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. LEGAL FRAMEWORK

As the Petitioner's eligibility for the NIW petition on the merits is not an issue within the Director's decision, we will not address it here. Instead, we will evaluate the propriety of the Director's application of the marriage fraud prohibition under section 204(c).

Even if a marriage may be legally valid where it occurred, USCIS cannot approve a visa petition for a foreign national who attempted or conspired to enter a marriage "for the purpose of evading the immigration laws." Section 204(c); 8 C.F.R. § 204.2(a)(1)(ii). 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. *Matter of P. Singh*, 27 I&N Dec. 598, 601 (BIA 2019) (citing *Matter of Laureano*, 19 I&N Dec. 1, 2–3 (BIA 1983) *Matter of McKee*, 17 I&N Dec. 332, 334 (BIA 1980)).

To sustain a marriage fraud determination, USCIS must conclude there is "substantial and probative evidence" that the foreign national "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." 8 C.F.R. § 204.2(a)(1)(ii). The Board of Immigration Appeals (Board) has clarified that evidence is substantial and probative when it establishes "that it is more than probably true that the marriage is fraudulent." *P. Singh*, 27 I&N Dec. at 607; *see also Mestanek v. Jaddou*, 93 F.4th 164, 173 (4th Cir. 2024); *Iyawe v. Garland*, 28 F.4th 875, 879 (8th Cir. 2022); *Zerezghi v. USCIS*, 955 F.3d 802, 816 (9th Cir. 2020) (each citing *P. Singh*). As the Board's language reflects, this standard falls between the preponderance and clear and convincing evidence standards. *P. Singh*, 27 I&N Dec. at 607 n.7.

In *P. Singh*, the Board stated "any relevant evidence" could be considered in assessing marriage fraud and 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." *Id.* at 610. The Board noted this assessment may be based on either direct or circumstantial evidence. *Id.* In most circumstances, USCIS officers should not give conclusive effect to determinations made in a prior proceeding and instead should reach an independent conclusion based on the evidence before them. *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

The Director cited to *P. Singh* in the denial decision and stated, "there is substantial and probative evidence that the marriage was entered into for the purpose of evading the immigration laws." Once the Director determined that substantial and probative evidence of marriage fraud was in the record and they notified the Petitioner, the burden shifted to her to rebut the allegation. *Matter of Kahy*, 19 I&N Dec. 803, 806–07 (BIA 1988). But the Petitioner made no such effort to contest the Director's marriage fraud allegation.

II. PROCEDURAL HISTORY

The Petitioner entered the United States in [redacted] of 2018 as a visitor for pleasure, received a six-month extension of stay until [redacted] 9, 2019, and she did not depart the country on or before her new period of authorized stay. The Petitioner married her second spouse on [redacted] 11, 2019; two days after her extended period of authorized stay expired. When the Petitioner entered the United States, she was widowed. Although the Indianapolis Field Office Director initially found the evidence accompanying the Form I-130, Petition for Alien Relative, to be inadequate to demonstrate the death of the Petitioner's first spouse, subsequent evidence comported to the type of material from her home country to establish his passing.

After conducting a brief investigation and performing an in-depth marriage fraud interview, the Field Office Director issued a NOID on the Form I-130 with the primary focus being inconsistent and discrepant testimony about the Petitioner's and her second spouse's life together. The NOID response contained a different divorce document for the Petitioner's second spouse, a different death certificate for her first spouse, and two utility bills from October of 2020 listing both the Petitioner's and her second spouse's names with the same mailing address. Absent was any response addressing the inconsistent and discrepant testimony provided during the in-depth interview.

Regarding the Petitioner's second spouse—the U.S. citizen who filed the Form I-130 on her behalf—the Field Office Director concluded that the foreign divorce document he provided to establish he was free to marry the Petitioner was not valid. Because this divorce decree was not valid, the Field Office Director concluded that the Petitioner's second spouse could not properly file the Form I-130 on her behalf.

But that was only the beginning of the reasons the Field Office Director decided an approval of the Form I-130 was unacceptable. The Field Office Director reviewed the NOID response and issued a decision determining that the marriage between the Petitioner and her U.S. citizen spouse was not a bona fide one. The Field Office Director also concluded that the couple provided false information with the petition and to the interviewing officer.

Other adverse elements the Field Office Director noted in the denial included the U.S. citizen spouse's failure to address the anomalous deficiencies within his divorce decree, while also indicating that documentation was counterfeit and not issued by the proper authorities in his home country. And finally, the address he confirmed during his March 19, 2021 interview was the same address his alleged former spouse used when she completed the naturalization process less than a month earlier. But he offered no explanation why they would use the same address within one month of each other when he allegedly petitioned for a divorce from her in [redacted] of 2018. Again, the end result was the decision that the Petitioner's marriage was not bona fide.

After the Petitioner filed the NIW petition, the Director issued a NOID informing her that the record contained substantial and probative evidence that the marriage to her second spouse was entered into for the purpose of evading the immigration laws of the United States. The Director gave the Petitioner the required period to respond to the NOID with evidence that might demonstrate the marriage in question was bona fide. In response to this NOID, the Petitioner failed to provide evidence or arguments that addressed the bona fides of her marriage to the U.S. citizen. She instead argued that admissibility issues were not properly considered within the adjudication of a Form I-140. The Director found the Petitioner's NOID response to be lacking and determined it did not overcome the identified substantial and probative evidence of marriage fraud.[1]

III. ANALYSIS

The authorities who adjudicated the Form I-130 and the Form I-140 each discussed the evidence in the record relating to their individual determinations that the Petitioner here engaged in marriage fraud. We incorporate the discussions of that evidence here by reference as it is unnecessary that we rehash what each piece of evidence does or does not demonstrate. That said, although we may not discuss every document within the record, we have reviewed and considered each one.

[1] We acknowledge one error in the Director's denial, specifically concerning the Petitioner's submission of evidence regarding her first spouse's death, that the Nebraska Service Center Director stated was either fraudulent or was not acceptable material from her home country to establish her first spouse's passing. We withdraw the portion of the Director's denial solely related to the Petitioner's documentation to establish her eligibility to marry in the United States, as it was only her second spouse's—the U.S. citizen's—divorce decree that was deemed invalid. Considering the volume of the remaining evidence in the record that led the Director to conclude the Petitioner had entered into a fraudulent marriage to evade U.S. immigration laws, this error does not appear to have significantly influenced the Director's determination that there was substantial and probative evidence of marriage fraud.

Within the appeal, the Petitioner focuses on whether the Form I-140's adjudication was a discretionary determination and—as she argued in the Form I-140 NOID response—whether admissibility issues are properly considered when adjudicating this petition. But those topics are not relevant to this appeal. The Director's sole basis for denying the petition was that the Petitioner's previous efforts to circumvent U.S. immigration law by entering a fraudulent marriage precluded the petition's approval. What the law requires, and what the Director performed, is an evaluation of all the evidence in the record to make an independent determination of whether the record contains substantial and probative evidence that the Petitioner has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Therefore, the Petitioner's appellate arguments relating to a discretionary determination and admissibility issues are misplaced and inapposite.

The Petitioner concludes the appeal brief by asserting that section 204(c) does not negate the need to assess the merits of her Form I-140 eligibility claims. However, it is evident that she misinterprets the statute's provisions, which explicitly state that no petition may receive approval after USCIS determines section 204(c) is applicable to her case. Therefore, conducting an evaluation of her NIW petition's merits would be imprudent in terms of agency resource allocation, as approval of the petition would be precluded upon the determination of section 204(c) applicability. "[T]he consequence of engaging in marriage fraud under section 204(c) of the Act is a permanent bar to the approval of any future visa petition . . . ." *P. Singh*, 27 I&N Dec. at 607.

The Petitioner has chosen not to contest the basis of the Director's denial but instead has opted to challenge the adverse decision on procedural grounds. In doing so, she has foreclosed any future attempts at a positive outcome for this petition.

Even setting aside our above analysis regarding the Petitioner's procedural shortcomings on appeal, our independent review of the entire record of proceeding leads us to conclude that substantial and probative evidence exists to demonstrate that it is more than probably true that Petitioner's marriage to her second spouse—the U.S. citizen who filed the Form I-130—was fraudulent and that she attempted or conspired to enter a marriage "for the purpose of evading the immigration laws" in violation of law. Section 204(c); 8 C.F.R. § 204.2(a)(1)(ii); *Matter of Pak*, 28 I&N Dec. 113,118 (BIA 2020) (citing *P. Singh*, 27 I&N Dec. at 607).

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.