U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-A-T-S- INC.

DATE: MAY 25, 2017

APEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a trucking company, seeks to employ the Beneficiary as a carpenter. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Beneficiary had previously entered into a marriage for the purpose of evading immigration laws and, therefore, was subject to a bar under section 204(c) of the Act which prevented approval of the petition.

The matter is now before us on appeal. The Petitioner asserts that the Director ignored "a substantial amount of evidence . . . about the good faith of [the Beneficiary's] marriage." The Petitioner acknowledges the discrepancies in the interview testimony cited by the Director, but states that these were "inconsistencies, not misrepresentations." Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 204(c) of the Act provides for the following:

> Notwithstanding the provisions of subsection (b)[1] no 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 [director] to have been entered into for the purpose of evading the immigration laws; or

[1] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

> 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.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that section 204(c) may only be applied if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, in pertinent part:

> 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. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

Regarding the application of the bar to approval of a petition described in section 204(c), the court in *Mendoza v. Secretary, Department of Homeland Security*, 851 F.3d 1348 (11th Cir. 2017) stated:

> . . . the marriage-fraud bar applies where the attorney general 'determine[s],' based on 'substantial and probative evidence' that the beneficiary previously sought a visa based on a marriage entered into for the purpose of circumventing the immigration laws. 8 U.S.C. § 1154(c) (emphasis added); 8 C.F.R. § 204.2(a)(1)(ii). But this

> dictate must be read in conjunction with § 1361, which puts the onus on the petitioner to show that the beneficiary is 'eligible' for a visa. And it is reasonable to conclude that, where there is unrebutted evidence suggesting that the beneficiary previously sought a visa by operation of a fraudulent marriage, the petitioner failed to carry her burden of proving the beneficiary's ultimate eligibility.

Citing *Matter of Kahy*, 19 I&N Dec. at 80-07, the court in *Mendoza* continued, "the mere presence of evidence in the record suggesting that the marriage-fraud bar applies, rather than a definitive finding of previous marriage fraud, is sufficient to require the petitioner to prove that the marriage-fraud bar does not apply."

II. PROCEDURAL HISTORY

The Beneficiary's prior family-based immigrant visa petition, a Form I-130, Petition for Alien Relative (Form I-130), filed by (M.O.), the Beneficiary's then-wife,[2] was submitted on March 29, 1997. The Beneficiary stated that he met M.O. in August 1996 and the record contains a marriage certificate showing that the Beneficiary married M.O. on 1997, in New York. The Director of the Newark, New Jersey, District Office issued a denial decision on March 6, 2000, detailing 14 discrepancies between interview question responses by the Beneficiary and M.O. and concluding that the "marriage is strictly for [the Beneficiary] to procure permanent residence in the United States and for no other reason." The Petitioner filed the current employment-based Form I-140 immigrant petition on November 20, 2015. The Director denied the current petition because the evidence of record revealed that the Beneficiary had previously entered into a marriage for the purpose of evading immigration laws and was subject to a bar under section 204(c) of the Act.

Prior to the I-130 denial, the couple was interviewed by the Newark, New Jersey, District Office. *Stokes v. INS*, 393 F. Supp. 24 (S.D.N.Y. 1975), set forth procedures for governmental investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately. During their separate Stokes interviews on January 27, 1999, the Beneficiary and his then-spouse provided contradictory answers in response to questions (listed below in the order the questions were asked) about their home and daily routine.

In response to questions about their independent residences prior to marriage:

- The Beneficiary stated that he had been inside her previous residence one time; and,
- M.O. stated that she did not know if he had ever been inside her previous residence.

[2] The record contains a court decree showing the couple divorced on 2001.

In response to questions about details of basic household chores such as laundry:

- The Beneficiary stated that they had traveled three blocks to the laundromat 3 days before the date of the interview; and,
- M.O. stated that they had driven to the laundromat 3 or 4 days before the interview, but could not state how long it took to get there.

In response to questions about household appliances:

- The Beneficiary stated that their hair dryer was white;
- M.O. stated that their hair dryer was black;
- The Beneficiary stated that they had four televisions;
- M.O. stated that they had two televisions;
- The Beneficiary stated that they used a standing fan in their bedroom during the summer, and that they had returned the fan to his sister-in-law; and,
- M.O. was unable to state if they used a standing fan or a table fan, and speculated that the fan was possibly stored in the closet of their bedroom.

In response to questions regarding each others' families:

- The Beneficiary stated that his then-wife had two brothers, and that she was the middle child;
- M.O. stated that she was the oldest of three siblings;
- The Beneficiary stated that all of his siblings lived in the United States except his youngest sister, who lived in Ecuador;
- M.O. stated that she did not know if the Beneficiary's sister in Ecuador was his oldest or youngest sibling;
- The Beneficiary stated that he was the fifth child in his family; and,
- M.O. stated that she did not know if the Beneficiary was oldest, youngest, or in the middle of his family.

In response to questions regarding their daily household routines:

- The Beneficiary stated that he works Monday through Friday;
- M.O. stated that she did not know if the Beneficiary went to work on the Saturday before their interview;
- The Beneficiary stated that he normally returns home from work at 7 p.m.;
- M.O. stated that the Beneficiary normally returns home from work at 4 or 5 p.m.;
- The Beneficiary stated that M.O. went to bed at 10:30 p.m. on the night before the interview;
- M.O. was unable to state what time she went to bed on the night before the interview;
- The Beneficiary stated that they did not set an alarm for the morning of the interview; and,
- M.O. stated that she set an alarm for 8 a.m. on the morning of the interview.

In response to questions regarding their academic backgrounds:

- The Beneficiary stated that M.O. stopped working 6 months after graduating high school; and,
- M.O. stated that she did not graduate high school and does not have a diploma.

In response to questions regarding their household celebrations:

- The Beneficiary stated that they celebrated the past year's Thanksgiving with his brother's family, and that his brother purchased the turkey;
- M.O. stated that she did not know who purchased the turkey, and that she did not remember whether they even had turkey;
- The Beneficiary stated that on M.O.'s last birthday he gave her a necklace in the living room;
- M.O. was unable to state where the Beneficiary gave her the necklace;
- The Beneficiary stated that his wife had a birthday cake for her last birthday; and,
- M.O. was unable to state whether she had a cake on her last birthday.

The United States Citizenship and Immigration Services District Director, Newark, New Jersey, denied the Form I-130 petition after reviewing the testimonies given by husband and wife. The District Director listed the discrepant answers to the interview questions regarding their residences prior to marriage, household chores and appliances, each others' families, their daily routines, their academic backgrounds, and their family celebrations. After describing in detail the discrepancies between the interview responses from the Beneficiary and M.O., the District Director concluded that the "numerous discrepancies . . . more than adequately establish that this marriage is strictly for [the Beneficiary] to procure permanent residence in the United States." The Beneficiary's then-wife appealed the District Director's decision to the Board of Immigration Appeals (the Board). The Board dismissed the appeal, finding that the appeal "fails to set forth valid arguments which would warrant a reversal of the district director's decision."

The Petitioner subsequently filed the current Form I-140 employment-based immigrant petition.[3] The Director issued a notice of intent to deny (NOID) based on the discrepancies between the testimonies of the Beneficiary and his then-wife during their marriage interviews, and noted that "the

[3] We note that the Petitioner previously filed two other Form I-140 petitions on behalf of the Beneficiary, one under receipt number [redacted] and another under receipt number [redacted] The Director approved the first petition, but subsequently revoked the approval when he determined that the Beneficiary was under a marriage-fraud bar pursuant to section 204(c) of the Act. *Tawfik* states that the marriage-fraud bar may be applied at any time. *Id.* at 168 (citing *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)). The Petitioner appealed the Director's decision, and we dismissed the appeal after we determined that there was sufficient evidence in the record of proceeding to support a reasonable inference that a fraudulent marriage existed and determined that the Beneficiary was under a marriage-fraud bar pursuant to section 204(c) of the Act. The Director denied the second petition after determining that there was sufficient evidence in the record of proceeding to support a reasonable inference that the Beneficiary had entered into a fraudulent marriage and that the Beneficiary was under a marriage-fraud bar pursuant to section 204(c) of the Act.

evidence submitted by the petitioner, which included documentation showing commingling of financial resources and affidavits of third parties having knowledge of the bona fides of the marriage relationship, was insufficient to overcome evidence in the record of proceeding that supported a reasonable inference that the petitioner's prior marriage . . . was entered into for the purpose of evading immigration laws."

In response to the NOID, the Petitioner submitted copies of joint income tax returns from 1998 and 1999 and joint bank account statements from six months in 1999, as well as personal statements from the Beneficiary, his ex-wife, and from third parties. We note that the record contains no evidence of the Beneficiary and M.O. living together as husband and wife from 2000 until their divorce in 2001. We also note that the bank statements misspell M.O.'s name, and reflect just three to five transactions per month in February, March, April, June, September, and October 1999 and an average monthly closing balance of $64.29. The Director concluded that the joint tax returns and joint bank account statements were not sufficient evidence to overcome the "numerous discrepancies and inconsistencies" in their testimony. The Director denied the petition after concluding that the Beneficiary was under a marriage-fraud bar pursuant to section 204(c) of the Act.

III. ANALYSIS

On appeal, counsel asserts that the Director ignored "a substantial amount of evidence . . . about the good faith of [the Beneficiary's] marriage." Counsel points to previously submitted joint income tax returns and joint bank statements, and also refers to the previous statements from the Beneficiary and his ex-wife explaining their testimony during their interviews. However, the record reveals that this evidence was not ignored by the Director; rather, the Director addressed this evidence in both his NOID and in his denial, and found this evidence to be insufficient to overcome the inconsistencies in the testimony of the Beneficiary and his former wife.

Counsel states that the discrepancies cited by the Director were "inconsistencies, not misrepresentations" and characterizes the noted discrepancies as minor. Counsel concludes that the inconsistencies "do not necessarily establish a fraudulent marriage.

When the couple were each interviewed regarding numerous facets of their relationship, the Beneficiary and his wife repeatedly provided contradictory information.[4] While counsel now characterizes these discrepancies as minor, the answers were inconsistent on basic elements of their claimed daily life together including what time of day the Beneficiary returned home from work, whether he worked on Saturdays, her education level, the distance to the laundromat, the basic

[4] In their personal statements, which are undated, the Beneficiary and his ex-wife challenge some of the answers attributed to them in their interviews. However, we note that the USCIS Officer who conducted the Stokes interviews with the Beneficiary and his then-wife documented their testimonies in a contemporaneous record. We find a contemporaneous record of testimony to be more reliable than an amended testimony made sometime after the fact. USCIS may reject a fact stated if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

appliances present in their home, and they even differed on whether they had used an alarm clock on the very morning of their interview.

In both the NOID and the denial, the Director acknowledged the joint income tax returns and joint bank statements and stated that these documents were not sufficient to overcome the discrepancies noted in the file. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." On appeal, the Petitioner provides copies of documents that they had submitted previously, including personal statements from the Beneficiary and from his former wife seeking to explain the discrepancies and inconsistencies in their previous testimony. The Petitioner also submits copies of statements that they had submitted previously from the couple's friends, relatives, neighbors, and co-workers, who relate stories of the couple's marriage. However, we note that the record contains no photographs of the couple's wedding, or of their life together in a house they claim to have shared with the Beneficiary's brother, his wife, and their two children. The only contemporaneous evidence submitted by the Petitioner regarding M.O.'s residence with the Beneficiary consists of a copy of her identification card issued on January 25, 1999, by New Jersey Motor Vehicle Services, copies of two federal income tax returns, and copies of six monthly bank statements showing just three to five transactions per month. The Petitioner submits no other independent objective evidence to explain the previous inconsistencies or to overcome the finding of marriage fraud.

In addition to the discrepancies detailed by the director and repeated above, we also note additional discrepancies contained in the record of proceedings. The Beneficiary's statement submitted on appeal indicates that M.O. moved in with him on the floor at New Jersey, after their 1997, wedding; however, on February 26, 1997, M.O. signed her Form G-325A, Biographic Information, indicating that she had lived at New Jersey, since June 1995. Furthermore, we again note that the Beneficiary's most recent statement indicates that M.O. moved in with him on the floor at New Jersey, after their 1997, wedding; however, on February 26, 1997, M.O. indicated on the Form I-130 family-based petition that she and the Beneficiary lived on the floor at that address. These discrepancies further discredit the legitimacy of the evidence submitted to resolve inconsistencies.

When interviewed, the Beneficiary and his then-spouse provided contradictory responses regarding basic elements of their claimed daily life together including what time of day the Beneficiary returned home from work, whether he worked on Saturdays, the distance to the laundromat, the basic appliances present in their home, and they even differed on whether they had used an alarm clock on the very morning of their interview. 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 primary purpose of evading the immigration laws. *Matter of Phillis*, 15 I&N Dec. 385, 386-387 (1975 BIA). The evidence submitted by the Petitioner, principally in the form of personal testimony, is insufficient to overcome the finding of fraud.

Therefore, we conclude that there is substantial and probative evidence in the record of proceeding to support a reasonable inference that a sham or fraudulent marriage existed. We agree with the Director's determination, and find that the Beneficiary and his ex-wife entered into a marriage in violation of the regulation 8 C.F.R. § 204.2(a)(1) for the purpose of evading the immigration laws. Thus, the petition on the Beneficiary's behalf cannot be approved based on the marriage-fraud bar described in Section 204(c) of the Act and we affirm the Director's denial of the petition.

IV. THE I-140 PETITION

A. The Beneficiary's Experience

We note the following previously unidentified defects in the Form I-140 petition that would prevent approval even if approval was not barred by Section 204(c) of the Act. The Petitioner has not established that the Beneficiary possesses the minimum experience requirements required for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position requires two years of experience in the offered job of carpenter. On the labor certification, the Beneficiary claims to qualify for the offered position based on experience working as a carpenter for [redacted] in [redacted] New Jersey, from December 1995 through December 1997. The claim is supported by an employment letter from the warehouse manager for [redacted] who stated that the beneficiary worked there from December 1995 through December 1997. However, on the Form G-325A, Biographic Information, signed by the Beneficiary on February 26, 1997, and submitted with the family-based petition previously filed on his behalf, the Beneficiary testified that he had worked for the Petitioner since November 1995. In addition, the Beneficiary submitted a 1997 IRS Form W-2, Wage and Tax Statement, issued to him by the Petitioner, and not by [redacted]

The Beneficiary's own testimony on Form G-325A contradicts his claim of work experience that satisfies the requirements of the labor certification. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. The evidence in the record does not establish that the Beneficiary possessed the required experience set forth on the labor certification by the priority date. This deficiency must be addressed in any further proceedings.

B. Ability to Pay the Proffered Wage

Also as an additional ground that would prevent approval of the petition, the Petitioner has not established its ability to pay the proffered wage as of the priority date and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, while the record contains copies of IRS Form W-2, Wage and Tax Statements, showing that the Petitioner paid the Beneficiary in each year from the priority date in 2001 through 2014, the Petitioner did not submit copies of its annual reports, federal tax returns, or audited financial statements for any of the years in question. These documents are expressly required by 8 C.F.R. § 204.5(g)(2). Accordingly, we find that the Petitioner has not established its continuing ability to pay the proffered wage to the Beneficiary since the priority date. This deficiency must be resolved in any further proceedings.

V. CONCLUSION

The petition on the Beneficiary's behalf cannot be approved based on the marriage-fraud bar described in Section 204(c) of the Act. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of T-A-T-S- Inc.*, ID# 00293552 (AAO May 25, 2017)