U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33358923

Date: OCT. 31, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a financial services business, seeks to employ the Beneficiary as a model validator under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents.[1] Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition, concluding that the Beneficiary was barred from receiving the requested immigration benefit under section 204(c) of the Act because there was substantial and probative evidence that the Beneficiary's marriage to a U.S. citizen was entered into for the purpose of evading immigration laws. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the foregoing analysis.

I. LAW

Immigration as an advanced degree professional 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

[1] The Petitioner seeks an amendment to a previously approved Form I-140, Immigrant Petition for Alien Work, because of a change in job title.

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.

Section 204(c) of the Act, 8 U.S.C. § 1154, provides that:

> Notwithstanding the provisions of subsection (b)[2] 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 Attorney General[3] 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.

Thus, section 204(c) of the Act provides that no family-based or employment-based immigrant petition shall be approved if the alien has been accorded, or has sought to be accorded, an immediate relative or preference status based on entering into a marriage, or attempting or conspiring to do so, for the purpose of evading U.S. immigration laws. Furthermore, if substantive and probative evidence indicates that a beneficiary entered into a prior marriage to evade immigration laws, section 204(c) of the Act bars a petition's approval even if there was no finding of a fraudulent marriage in prior petition proceedings. *Matter of Pak*, 28 I&N Dec. 113, 116-118 (BIA 2020), ("The plain language of the statute and the regulation does not foreclose the application of the section 204(c) bar in cases . . . based on failure to establish a bona fide marital relationship, but the marriage had not been determined to be fraudulent.")

II. ANALYSIS

The Beneficiary entered the United States in March 2002 as a J-1 exchange visitor. She later changed her status to F-1 student and has not departed the United States.[4] While in the United States the Beneficiary married twice. She married her first spouse, a foreign national, in [redacted] 2009 and divorced in [redacted] 2012.[5] She married her second spouse, a naturalized U.S. citizen, in [redacted] 2013.

In January 2014, the Beneficiary's second spouse filed Form I-130, Immigrant Petition for Alien Relative, on her behalf. USCIS interviewed the Beneficiary and her second spouse in connection with the Form I-130 in November 2014. The interviewing officer identified several discrepancies during

[2] Subsection (b) of section 204 of the Act refers to preference visa petitions, both family-based and employment-based, that are verified as true and forwarded to the Department of State for issuance of a visa.

[3] In *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974), the Board of Immigration Appeals (BIA) held that a determination of whether a marriage was entered into for the purpose of evading the immigration laws is to be made on behalf of the Attorney General by the district director in the course of adjudicating the subsequent visa petition.

[4] In April 2008, the Beneficiary was served with a Form I-862, Notice to Appear, and placed in removal proceedings. She was ordered removed by the Immigration Judge in [redacted] 2011 but granted withholding of her removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A), the same day.

[5] USCIS records show that the Beneficiary's mother, a naturalized U.S. citizen, filed Form I-130, Immigrant Petition for Alien Relative, on her behalf in June 2012. On the form, the Beneficiary did not list her current or any previous marriage. The Form I-130 petition was denied due to abandonment.

the interview. USCIS conducted site visits to the Beneficiary's second spouse's claimed addresses and interviewed him in March 2015. After being confronted with the discrepancies concerning his marriage to the Beneficiary, he requested to withdraw the Form I-130 petition. On April 17, 2015, USCIS acknowledged the withdrawal of Form I-130 petition.

In reviewing the amended Form I-140 petition, the Director found that "an independent review of the evidence in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the Beneficiary attempted to enter into a prior marriage for the purpose of evading immigration laws." The Director issued a notice of intent to deny (NOID) the petition stating the following:

> Address searches contained in the record indicate that the Beneficiary and [her second spouse] never shared a common address, but she shared multiple common addresses with [her first spouse] including during the time she was married to [her second spouse]. Based on the results of the site visit and documents obtain [sic], it appears that the Beneficiary's and [her second spouse's] marriage was for the purpose of the Beneficiary obtaining an immigrant benefit.

In response to the NOID the Petitioner submitted additional evidence. The Petitioner asserted that, because the Form I-130 petition was withdrawn, "USCIS has never made a prior finding of marriage fraud or attempted marriage fraud against the Beneficiary." However, section 204(c) bars a petition's approval even where no immigration benefit was sought. *Matter of Isber,* 20 I&N Dec. 676, 678 (BIA 1993) (finding that Congress extended the application of section 204(c) to marriages where no immigration benefits were sought, such as where "the petitioner withdrew the visa petition on being confronted with evidence that the marriage was a sham.").

The Director denied the petition, stating, "Based on the evidence in the record and on the decision by the AAO ... USCIS concludes that the Beneficiary attempted or conspired to enter into a marriage for the purpose of evading the immigration laws."

On appeal, the Petitioner asserts that USCIS does not have "substantial and probative evidence that [the Beneficiary's marriage to her second spouse] was a sham." The Petitioner reiterates the claims in the NOID response, again asserting that the lack of evidence of the bona fides of the marriage does not infer marriage fraud. The Petitioner further asserts that the Director failed to consider evidence submitted in response to the NOID related to the bona fides of the Beneficiary's marriage.

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 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).

Citing *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990), the Director stated that the record "presents substantial and probative evidence to support a reasonable inference that the Beneficiary attempted to enter into a prior marriage for the purpose of evading immigration laws." But the decision does not demonstrate that the Director found proof that the marriage was "more than probably" fraudulent. *See Matter of P. Singh*, 27 I&N Dec. at 607. The Director did not cite *Matter of Singh* or cases that follow it. *See, e.g., Matter of Pak*, 28 I&N Dec. 113, 118 (BIA 2020). The decision also does not state that the Beneficiary "more than probably" engaged in a sham marriage. The decision therefore does not establish application of the correct standard of proof.

Because the Director might have required less proof of marriage fraud than needed to bar the petition's approval, we will withdraw the decision and remand this matter. On remand, consistent with *Matter of Singh*, the Director should determine whether the record contains evidence that the Beneficiary's marriage was "more than probably" fraudulent. If so, the Director should then determine whether the Petitioner rebutted the derogatory information. Finally, the Director should enter a new decision.

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