U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 07375564

Date: MAY 16, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a physical therapy business, seeks to permanently employ the Beneficiary as a physical therapist. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent residence.

The Director of the Nebraska Service Center denied the petition on the ground 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 U.S. immigration laws.

On appeal, the Petitioner claims that the evidence of record did not warrant the application of the section 204(c) "marriage fraud" bar against the Beneficiary. Furthermore, the Petitioner claims that the Director should have delayed any decision on the instant petition until the Board of Immigration Appeals (BIA) decides the separate appeal by the Beneficiary's wife of the decision by U.S. Citizenship and Immigration Services (USCIS) denying her Form I-130, Petition for Alien Relative, which was filed on behalf of the Beneficiary.

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). It is the Beneficiary's burden in these proceedings to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Upon *de novo* review we will dismiss the appeal.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such

occupations. The current list of Schedule A occupations includes physical therapists. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), from the DOL prior to filing the petition with USCIS. Instead, the petition (Form I-140) is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the foreign national may 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)[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 Attorney General[2] 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 entered into a marriage, or attempted or conspired 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).

II. ANALYSIS

The record shows that the Beneficiary, an Egyptian national, first entered the United States on a B-2 (visitor) visa in June 2003. The Beneficiary states that he met his spouse, R.B., a naturalized U.S. citizen, in June 2006, and the record shows that they married on [redacted] 2007, when she was 59 and he was just short of 25. In November 2007 the Beneficiary's new wife filed a Form I-130, Petition for Alien Relative, the first step in seeking to obtain legal permanent resident status for her husband. This petition was denied in May 2009 by the District Director of the New York Field Office following two interviews at the field office and a site visit to the marital residence. The denial was based on section 204(c) of the Act and a finding that the evidence failed to establish that the marriage was not entered into for the purpose of evading U.S. immigration law. The Beneficiary states that the I-130 denial was appealed to the BIA, and the record includes a pink-sheet copy of a Form EOIR – 29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a USCIS Officer, which bears a stamp of the New York District Office dated June 4, 2009, along with the copy of a U.S.D.H.S.

---

[1] 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.

[2] 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.

(U.S. Department of Homeland Security) fee receipt of that same date. The record also includes a USCIS "Processing Sheet" dated June 6, 2009, confirming the receipt of the I-130 appeal and the requisite fee and stating that the record of proceeding must be transferred to the BIA within two years of the appeal date. There is no record of any decision rendered by the BIA.

The instant petition, Form I-140, Immigrant Petition for Alien Worker, was filed on April 11, 2017. After issuing a notice of intent to deny (NOID) and receiving the Petitioner's response thereto, the Director denied the I-140 petition on May 7, 2019. Once again, the decision rested on section 204(c) of the Act and a finding that the Beneficiary's marriage lacked *bona fides* because its purpose was to circumvent U.S. immigration law. The Director recounted the prior I-130 proceeding which led to the fraudulent marriage finding as follows:

> On November 25, 2007, an I-130 spousal petition [redacted]) was filed on behalf of the beneficiary. [The Beneficiary and his wife] appeared for the initial Section 245[3] interviewing officer on April 7, 2008. Based on the discrepancies that arose during the interview, the interviewing officer referred the matter for a STOKES interview.[4] The STOKES interview took place on November 4, 2008, a review of the evidence and subsequent investigation found fraud in that the marriage was not bona fide, i.e., the marriage was entered into solely to facilitate the beneficiary's receipt of an immigration benefit. On December 9, 2008, the ICE [Immigration and Customs Enforcement] agents discovered that [the Beneficiary] did not reside in the home as was claimed. Based on the official report provided by ICE, USCIS concluded that the marriage was solely to enable the beneficiary to obtain an immigration benefit with a fraudulent marriage. The report contained the following which was cited in the Notice of Intent to Deny:
>
> > An investigation conducted by Immigration and Customs Enforcement agents on December 9, 2008 indicates that your spouse [the Beneficiary] does not reside with you at your current residence. You were questioned by the ICE agents as to the whereabouts of your spouse. According to the official report, you replied that he had left for Egypt a week prior, however you did not know his exact date of departure. Your spouse actually departed the United States on December 3, 2008 on Egypt Air to Cairo. You stated that you did not take him to the airport, nor did you know how he got to the airport or which airport he departed from. You also stated that you would not be picking him up on his return. It is not plausible that someone in a bona fide marital relationship would not know the date that their spouse left the United States or the airport that he or she departed from. Furthermore, you were asked by the ICE agents whether your spouse [the Beneficiary] resided at your home, and your response was that he "lives in [redacted]' before you corrected yourself and stated that he stays in [redacted] with his friends and stays at your home 3-4 days each week. It was noted by the ICE agents that you stated that your spouse "lives in [redacted] on a couple of separate occasions during the investigation before correcting yourself. You also told

[3] Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence. 8 U.S.C. § 1255.

[4] *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.

the ICE agents that you did not know where your husband stayed in [redacted] each week nor did you have a phone number for him in [redacted] You told the ICE agents that you contacted your husband via his cell phone at [redacted] When asked why your spouse had a cell phone number with a [redacted] phone number, your response was that he has family in [redacted] In addition, when asked where your spouse's vehicles were, you responded that he kept them in [redacted] You also did not know for sure where your spouse worked for certain, but that he does freelance physical therapy in [redacted]

Furthermore, you were asked to show the ICE agents where your spouse kept his possessions in the home. You led the agents to a spare bedroom where you said your spouse keeps his clothes in a closet. You presented some dry cleaning from a [redacted] Laundromat which was still in the wrapper. You voluntarily gave the interviewing officers the receipt that was attached to the wrapper that had your spouse's name on it and was dated July 17, 2007. There was no other evidence of your spouse's possessions in the house except two suitcases of his in the garage.

Based upon the finding of the ICE report, which is in the beneficiary's file, USCIS is compelled to conclude that [the Beneficiary] entered into a marriage for the purpose of evading immigration laws, making Section 204(c) of the Immigration and Nationality Act applicable in this case.

The Director went on to discuss the Petitioner's response to the NOID in the instant I-140 proceeding, which included an affidavit from the Beneficiary and a letter from counsel. The thrust of the claims in both of these documents was that the ICE report of the house visit in December 2008, at which the Beneficiary's wife alone was present, was a one-sided analysis which downplayed substantial evidence that the Beneficiary and his wife had a *bona fide* marital relationship and were indeed sharing the household. Without substantive evidence to support these assertions, however, the Director made an independent determination and deemed the affidavit and the letter insufficient to establish the *bona fides* of the marital relationship. The Director "determined that under the provisions of section 204(c) the beneficiary appears to be prohibited from benefitting from" the instant petition. Accordingly, the Director denied the petition.

On appeal the Petitioner argues that the denial of the I-140 petition short shrifts the substantial evidence in the record of a *bona fide* marital relationship between the Beneficiary and his wife. Instead of accepting this evidence, the Petitioner argues that the Director relied on the ICE report of December 2008 which, the Petitioner charges, was not even-handed in its factual determinations and was given undue weight by the New York Field Office in denying the I-130 petition in 2009. The Petitioner asserts that the evidence submitted in support of the I-130 petition demonstrates that there was not "substantial and probative evidence that the Beneficiary previously engaged in marriage fraud," the standard set in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), to invoke the immigration benefit bar of section 204(c). The Petitioner claims that the Director's denial of the I-140 petition "relies on conclusions reached by other adjudicators without making an independent finding of fraud as required by the BIA in *Matter of Tawfik*."

In reviewing the denial of the I-130 decision by the District Director of the New York Field Office, we note that in addition to relying on the ICE report of its house visit in December 2008 the District Director's decision listed most, though not all, of the documentation submitted in March 2009 in response to a NOID issued by the field office, and evaluated each piece of evidence in turn. This evidence included some family photographs, a series of affidavits from friends and relatives attesting to the marital relationship; [redacted] account records including a list of phone calls between Egypt and the United States; auto insurance documentation; the certificate of incorporation for the Beneficiary's physical therapy business; and bank statements. With regard to the photographs, the District Director stated that they appeared to be staged, taken on the same day, and failed to establish any history between the Beneficiary and his wife. As for the affidavits, the District Director found that they "fail to meet standards of credibility" for various reasons, such as the familial relationship of some of the affiants to the Beneficiary, the similarity of the language, or the lack of contact information for the affiants. Turning to the [redacted] documentation, the District Director noted that the phone calls between Egypt and the United States were generally short in duration and there was no confirmation that they were between the Beneficiary and his wife. The auto insurance policy, the District Director pointed out, had an effective date in March 2009 and was therefore not good evidence of a *bona fide* marriage between the Beneficiary and his wife as of their marital date in [redacted] 2007. Finally, with respect to the Beneficiary's certificate of incorporation[5] and bank statements, the District Director stated that the fact that these documents identify the Beneficiary's address as the residence he allegedly shared with his wife did not validate that they were actually in a *bona fide* marital relationship.

In essence, the District Director was not persuaded that the documentation submitted in the I-130 proceeding, even if some of it identified the Beneficiary and his wife as joint account holders or joint tax filers with the same residential address, demonstrated that the two were in a *bona fide* marital relationship. The District Director concluded that the additional evidence submitted in response to the NOID did not overcome the grounds for denial under section 204(c) of the Act. The petition was denied on the ground that the Petitioner failed establish that the Beneficiary's marriage on [redacted] 2007, was not entered into for the purpose of evading U.S. immigration law.

In the instant I-140 proceeding the Petitioner broadly complains that the evidence submitted in support of the prior I-130 petition was not properly considered in the current I-140 proceeding, but has not addressed any of the District Director's specific findings regarding the evidentiary weight of the documentation submitted in that earlier proceeding. Nor has the Petitioner submitted any new evidence in the current I-140 proceeding aside from two affidavits by the Beneficiary. The Beneficiary has not adequately explained why so few possessions of his were present in the house he allegedly shared with his wife at the time of the ICE visit in December 2008. Nor has he adequately explained why he spent so many nights away from the residence he allegedly shared with his wife. We also note that the Beneficiary's wife more than once during the house visit referred to her husband as living in [redacted] before "correcting" those statements. As previously indicated, the Petitioner bears the burden of proof in these proceedings, and must establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*. Based on the foregoing

[5] Like the auto insurance policy, the Beneficiary's certificate of incorporation for his physical therapy business, dated December 29, 2008, post-dated the two USCIS interviews of the Beneficiary and his wife and the house visit by ICE earlier in 2008, and was nearly a year and a half after the marital date of [redacted] 2007.

analysis, we independently conclude that the Petitioner has failed to establish that the Beneficiary's marriage was not entered into for the purpose of evading U.S. immigration laws.

With regard to the Petitioner's contention that the Director should have delayed issuing any decision on the I-140 petition based on section 204(c) of the Act until the BIA issues a decision on the appeal of the I-130 petition, no case law or other legal basis for this position has been offered. Even if the I-130 appeal is still before the BIA, the AAO is not constrained from deciding the appeal of the I-140 petition currently before us.[6]

III. CONCLUSION

Based on the evidence of record we agree that there is substantial and probative evidence that the Beneficiary entered into his marriage with a U.S. citizen in [redacted] 2007 in an attempt to evade U.S. immigration laws. Therefore, section 204(c) of the Act bars the approval of this petition, and the instant appeal will be dismissed.

ORDER: The appeal is dismissed.

[6] Moreover, the Petitioner has not provided any information about the fate of the I-130 appeal since its filing with the New York field office in June 2009. There is no confirmation in the record that the appeal was actually transferred to the BIA or that it is still pending before the BIA nearly 13 years after the appeal was filed.