U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26244401

Date: SEP. 19, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Skilled Worker)

The Petitioner, a provider of nursing services, seeks to permanently employ the Beneficiary as a registered nurse. The company requests her classification under the employment-based, third-preference (EB-3) immigrant visa category as a "skilled worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least two years of training or experience. *Id.*

The Director of the Nebraska Service Center denied the petition. The Director concluded that - before the petition's filing - the Beneficiary engaged in a "fraudulent" marriage to circumvent U.S. immigration laws, barring the petition's approval. On appeal, the Petitioner contends that the Director misapplied law and misstated facts and evidence.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).[1] Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director's decision does not establish application of the correct standard of proof. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position with a foreign worker, a prospective U.S. employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Finally,

[1] On appeal, the Petitioner contends that U.S. Citizenship and Immigration Services (USCIS) bears the burden of demonstrating the Beneficiary's entry into a fraudulent marriage. We agree that USCIS must initially examine the record to determine if there is evidence of a sham marriage. *See Zerezghi v. USCIS*, 955 F.3d 802, 805 (9th Cir. 2020); *Matter of P. Singh*, 27 I&N Dec. 598, 605 (citing *Matter of Kahy*, 19 I&N Dec. 803, 806-07 (BIA 1988)). But a petitioner bears the ultimate burden of rebutting marriage fraud evidence. *Zerezghi*, 955 F.3d at 805; *Matter of P. Singh*, 27 I&N Dec. at 605.

if USCIS grants a petition, a noncitizen beneficiary may apply abroad for an immigrant visa or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient registered nurses and that noncitizens' employment in these "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar jobs. 20 C.F.R. § 656.5. Thus, DOL authorizes USCIS to adjudicate Schedule A labor certification applications in immigrant visa petition proceedings. 20 C.F.R. § 656.15(a). USCIS therefore rules not only on this petition, but also on its accompanying labor certification application. *See* 20 C.F.R. § 656.15(e) (describing USCIS's Schedule A labor certification determinations as "conclusive and final").

II. ANALYSIS

USCIS cannot approve a visa petition for a noncitizen who attempted or conspired to enter into a marriage "for the purpose of evading the immigration laws." Section 204(c) of the Act. Even if legally valid where it occurred, a marriage "entered into for the primary purpose of circumventing the immigration laws" permanently bars approval of a visa petition. *Matter of P. Singh*, 27 I&N Dec. at 601 (citations omitted). 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." *Id.* Officers must examine the parties' conduct before and after the marriage to ascertain their intent, but "only to the extent that it bears upon their subjective state of mind at the time they were married." *Id.*

"Substantial and probative evidence" must support a marriage-fraud finding. 8 C.F.R. § 204.2(a)(1)(ii). The Board of Immigration Appeals (BIA) recently clarified this standard of proof as meaning evidence that a marriage was "more than probably" fraudulent. *Matter of P. Singh*, 27 I&N Dec. at 607. This standard exceeds a preponderance of the evidence but does not rise to the level of clear and convincing evidence. *Id.* at 607 n.7.

Citing *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990), the Director stated that she found the Beneficiary's marriage to her former U.S. citizen spouse to be fraudulent based on "substantial and probative evidence." 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 *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 her decision and remand this matter. On remand, consistent with *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.