No.

IN THE

Supreme Court of the United States

JESSICA LYNN TKACZ (ON BEHALF OF USCIS BENEFICIARY ALAYNE C. FERREIRA), PETITIONER

v.

DANIEL G. BOGDEN, U.S. ATTORNEY FOR NEVADA; JEH JOHNSON, SECRETARY OF DEPARTMENT OF HOMELAND SECURITY; AND JEANE KENT, FIELD DIRECTOR OF USCIS, LAS VEGAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Is the deferential "substantial evidence" standard employed by federal courts to review decisions of the Board of Immigration Appeals fundamentally incompatible with the USCIS Director's burden to prove marriage fraud by "substantial and probative evidence" when denying a visa petition because it prevents in federal court a more rigorous review of the agency's evidence which the "substantial and probative evidence" standard demands; it blocks federal courts from discovering administrative error; it ignores decisional and statutory that insist on this heightened evidentiary standard; and it denies petitioner due process by excusing the agency from adducing in federal court the same affirmative evidence of marriage fraud it was required to adduce in the administrative forum?

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

OPINIONS BELOW

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit in *Jessica Lynn Tkacz v. Daniel G. Bogden et al.*, C.A. No.18-15771, decided and filed December 19, 2019, and reported at 788 Fed. App'x 528 (9th Cir. 2019), affirming the district court's grant of summary judgment to respondents, is set forth in the Appendix hereto (App. 1-4).

The published Decision and Order of the United States District Court for the District of Nevada in *Jessica Lynn Tkacz v. Elaine C. Duke et al.*, Civil Action No. 2:14-cv-00092-RFB-CWH, decided and filed March 31, 2018, and reported at 303 F. Supp. 3d 1052 (D. Nev. 2018), granting respondents' motion for summary judgment and denying petitioner's motion for summary judgment, is set forth in the Appendix hereto (App. 5-25).

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *Jessica Lynn Tkacz v. Daniel G. Bogden et al.*, C.A. No.18-15771, decided and filed on January 31, 2020, denying petitioner's petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 26-27).

The unpublished Decision by the Field Office Director of the U.S. Citizenship and Immigration Services in *In re: Visa petition for Alien Relative by Jessica Lynn Tkacz's on behalf of Alayne Ferreira*, File Number A86 992 502, dated December 7, 2012, denying the visa petition, is set forth in the Appendix hereto (App. 28-41).

The unpublished Administrative Decision by the Board of Immigration Appeals (BIA) in *In re: Alayne Cristian Ferreira, Beneficiary of a visa petition filed by Jessica Lynn Tkacz*, File Number A86 992 502-Las Vegas, NV, dated December 20, 2013, dismissing petitioner Jessica Lynn Tkacz's appeal from the denial of her visa petition, is set forth in the Appendix hereto (App. 41-47).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court granting respondents' motion for summary judgment was entered on December 19, 2019; and its further order denying petitioner's timely filed petition for rehearing *en banc* was filed and decided on January 31, 2020 (App. 1-5;26-27).

In addition, on March 19, 2020, in light of the public health emergency associated with COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

No person shall...be deprived of life, liberty, or property, without due process of law....

5 U.S.C. § 706 [Administrative Procedure Act]:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations,

or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the

extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1154(c) [Section 204(c) of the Immigration and Nationality Act]:

(c) Limitation on orphan petitions approved for a single petitioner; prohibition against approval in cases of marriages entered into in order to evade immigration laws; restriction on future entry of aliens involved with marriage fraud

Notwithstanding the provisions of subsection (b) of this section 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 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.

8 CFR § 204.2(a)(1)(ii) & (iii)(B):

Petitions for relatives, widows and widowers, and abused spouses and children.

(a) Petition for a spouse -

(1) Eligibility. A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.

....

(ii) Fraudulent marriage prohibition. 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.

(iii)

....

(B) Evidence to establish eligibility for the bona fide marriage exemption. The petitioner should submit documents which

establish that the marriage was entered into in good faith and not entered into for the purpose of procuring the alien's entry as an immigrant. The types of documents the petitioner may submit include, but are not limited to:

(1) Documentation showing joint ownership of property;

(2) Lease showing joint tenancy of a common residence;

(3) Documentation showing commingling of financial resources;

(4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;

(5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit. Affidavits must be sworn to or affirmed by people who have personal knowledge of the marital relationship. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to the spouses, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph); or

(6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

STATEMENT

On June 8, 2007, Alayne C. Ferreira ("Ferreira"), a citizen of Brazil, married Irsa Pedrosa ("Pedrosa"), a United States citizen, in Orlando, Florida. On July 30, 2007, Pedrosa submitted a Form 1-130 petition with the United States Citizenship and Immigration Services ("USCIS") on Ferreira's behalf seeking to have her husband obtain a Permanent Resident Card as an eligible alien relative. In support of her petition, Pedrosa submitted their Certificate of Marriage issued by the State of Florida. At the same time, Ferreira submitted Form 1-485 to the USCIS, an application to register for lawful permanent resident status, a submission which relied on Pedrosa's Form 1-130 petition.

On June 9, 2008, both Ferreira and Pedrosa appeared for an interview before the USCIS in Las Vegas, Nevada, in furtherance of her petition and his application. Both swore that they were residing together in a bona fide marital relationship. Pursuant to 8 CFR § 204.2(a)(1)(iii)(B), they adduced proof of their marriage including their marriage certificate, communal consumer receipts, household utility bills, insurance policies, photographs, joint bank accounts and their driver's licenses reflecting the same address.

On September 27, 2008, two USCIS agents made an unannounced visit to the address on file for Ferreira

and Pedrosa. Petitioner Jessica Lynn Tkacz ("petitioner"or "Tkacz" or "petitioner Tkacz") answered the door and told the agents that both Ferreira and Pedrosa were at work and that she was their roommate. Shortly thereafter, Ferreira arrived home, admitted that Pedrosa was not living there and provided the agents with her current telephone number but not her current address, telling the agents that she might be living in either Florida or Puerto Rico.

According to the agents' written notes of their interview with Ferreira at his home that day, Ferreira told them that Pedrosa had come to Las Vegas for the interview of June 9, 2008, and then left; that "he just wanted to make a life in the United States and that [Pedrosa] had married him to help him;" and that he met his current girlfriend (petitioner Tkacz) about two months after filing his Form I-485 Application in late July of 2007, having been in a relationship with Tkacz ever since, a period of time which included the USCIS interview of Ferreira and Pedrosa in June of 2008 in Las Vegas when they both represented to the USCIS that they were residing together in a bona fide marital relationship (App. 34).

After this field interview of Ferreira by USCIC agents in September of 2008, Ferreira withdrew his Form 1-485 application to register for lawful permanent resident status based upon Pedrosa's Form 1-130 petition which she had filed on his behalf. On March 26, 2009, USCIS issued a notice of intent to deny ("NOID") Pedrosa's Form 1-130 petition. It mailed copies of the NOID to Pedrosa's last known address and also to her attorney of record. The copy mailed to Pedrosa was returned as "undeliverable." On May 26, 2009, USCIS

denied Pedrosa's Form 1-130 petition with a finding of fraud after not receiving any response to the NOID.

In the meantime, Ferreira divorced Pedrosa on March 24, 2009, and then married petitioner Tkacz on May 8, 2009. On July 23, 2010, petitioner Tkacz filed a Form 1-130 petition with the USCIS on Ferreira's behalf seeking to have him obtain a Permanent Resident Card as an eligible alien relative. Petitioner and Ferreira appeared for an interview on the petition at the USCIS Las Vegas Field Office on May 13, 2011. During the videotaped interview, petitioner and Ferreira submitted proof of a valid marriage, including the birth certificate of a common child, evidence which USCIS later determined was sufficient to establish their marriage as bona fide.

As to his prior marriage to Pedrosa, however, Ferreira admitted that he had withdrawn his earlier Form 1-485 application based on Pedrosa's Form 1-130 petition and he denied under oath that he had ever admitted to USCIS agents that he had married Pedrosa for the sole purpose of obtaining his green card. That is, he denied that he had ever told USCIS agents at their visit to his home on September 27, 2008, that his marriage to Pedrosa was "*only*...for the purpose of allowing him to make a life in the United States" (App. 35) (emphasis supplied). In fact, he asserted that following their marriage in June of 2007, he and Pedrosa lived together as husband and wife until October of 2007 (*Id.*).

The interviewing USCIS officer was skeptical of Ferreira's denial of his alleged admission to other USCIS agents at his home on September 27, 2008, and

threatened to confront the agent to whom he had made this admission (who was "right across the hall") with his denial (App. 10). After denying again making this alleged admission, Ferreira's counsel met with the subject agent outside of the room and the interview then ended (App. 10-11).

USCIS then issued a notice of intent to deny petitioner Tkacz's Form 1-130 petition based on Ferreira's prior alleged sham marriage with Pedrosa. Petitioner responded with documentation and on August 11, 2011, USCIS denied her petition based on its finding that Ferreira had entered into a sham marriage with Pedrosa in 2007 for the purpose of evading the immigration laws within the meaning of the fraudulent marriage bar of Section 204(c) of the Immigration and Nationality Act (8 U.S.C. § 1154(c)) ("the INA") (App. 11).

On September 8, 2011, petitioner appealed to the Board of Immigration Appeals ("BIA"). After the appeal was entered, USCIS requested a remand "back to the Director for issuance of a new Notice of Intent to Deny and to provide petitioner with an opportunity to review and respond to: (1) the beneficiary's [i.e., Ferreira's] statement; and (2) the site visit report prepared by USCIS officers, both relating to the prior marriage" (*Id.*).

Upon remand, USCIS conducted another videotaped interview of petitioner and Ferreira on August 30, 2012. Ferreira submitted a sworn affidavit and he denied remembering the statement attributed to him by the agents' memorandum of their interview of him on September 27, 2008, i.e., that he just wanted to

make a new life for himself in the U.S. and that Pedrosa had married him to help him (App. 12). It was unclear from the record whether petitioner Tkacz had requested that these USCIS agents to whom Ferreira had made this alleged statement on September 27, 2008, be made available for cross examination and neither Ferriera nor his counsel commented on their absence (*Id.*).

On October 2, 2012, USCIS issued another NOID regarding Tkacz's Form 1-130 petition and she together with Ferreira timely responded on November 1, 2012, with a brief and affidavits (App. 12-13). On December 7, 2012, the Field Office Director of USCIS issued a decision denying Tkacz's Form 1-130 petition (App. 28-41). As for Ferreira's claim that he actually resided with Pedrosa from their marriage in June of 2007 until October of 2007, the Director rejected Ferreira's proffered evidence of that cohabitation, i.e., an auto insurance policy showing coverage for just one automobile, since it was likely that this automobile was being used only by Ferreira who could have obtained the policy without Pedrosa's presence or knowledge (App. 35).

In addition, the Director discounted the various photographs of Ferreira and Pedrosa together because they were undated and appeared to have been taken at two unknown locations (*Id.*). As far as the Director was concerned, the evidence showed that Ferreira and Pedrosa were together at least twice: once at their marriage in Orlando, Florida on June 8, 2007, and then again at their USCIS interview in Las Vegas on June 9, 2008 (App. 35-36). Moreover, considering Ferreira's false statements in 2008 that he then had a bona fide

marital relationship with Pedrosa, the Director "suspected...[that these two incidences of their being together was] the extent of their 'marital' relationship" (App. 36).

He therefore rejected the affidavits of Ferreira and Tkacz to the contrary as "unconvincing and self-serving," concluding that "Ferreira failed to establish [the intent to establish a life together with Pedrosa] at the time of their marriage and his conduct after the marriage does not support a valid marriage for immigration purposes either"(App. 37;39). The Director thus "reasonably inferred that Alayne Ferreira entered into a sham marriage" justifying a denial of Tkacz's Form 1-130 petition (App. 40-41).

Petitioner appealed this denial to the BIA(App. 12-13). It denied relief on December 20, 2013 (App. 42-47). The BIA found "substantial and probative" evidence of a fraudulent marriage to Pedrosa by the fact that Ferreira became romantically involved with petitioner Tkacz shortly after he married Pedrosa in 2007 and then admitted that he falsely testified before the USCIS in June of 2008 to a bona fide marriage with Pedrosa (App. 13;46-47). Moreover, it noted that Pedrosa herself had not submitted a statement confirming that their 2007 marriage was valid; and there was "no persuasive evidence that Ms. Pedrosa and [Ferreira] had ever lived together" (App. 47).

Asserting federal jurisdiction on 28 U.S.C. § 1331, petitioner brought this civil action in the federal district court for the District of Nevada on January 1, 2014, against respondents Secretary of the Department of Homeland Security; Field Director of USCIS; and

the U.S. Attorney for the District of Nevada ("respondents")(App. 13). She claimed that USCIS's conclusion that Ferreira had previously committed marriage fraud was arbitrary and capricious, unsupported by any relevant statute or regulation, was accomplished without due process, and constitutes an unlawful failure or refusal by USCIS to exercise its discretion in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701 & 706 (*Id.*).

On March 31, 2018, the district court, Boulware, J., issued a memorandum and order granting respondents' motion for summary judgment and denying petitioner's motion for the same relief (App. 5-25). The district judge ruled that while the requirements of due process may not have been met in USCIS's first interview of Tkacz and Ferreira on May 13, 2011, when USCIS agents were not made available for cross-examination, due process was satisfied during its second interview on August 30, 2012, and during the course the subsequent appeal (App. 17-18). The record of this second interview did not reflect petitioner's request that USCIS agents be made available for cross-examination and even if this opportunity were denied, he did not find that cross-examination would significantly decrease the risk of an erroneous deprivation of rights (App. 18-19).

The motion judge also ruled the BIA's application of the fraudulent marriage bar of Section 204(c) of the INA, 8 U.S.C. § 1154(c)), to deny petitioner relief was not arbitrary, capricious, an abuse of discretion or otherwise contrary to law (App.20-25). As he saw it, USCIS provided substantial and probative evidence of a sham marriage to Pedrosa, i.e., Ferreira's

memorialized statement to its agents during their site visit on September 27, 2008, about Pedrosa helping him "to make a life in the United States," despite Ferreira's repeated denials that he made this statement; and his admission that he and Pedrosa had lied under oath about their bona fide marriage at his USCIS interview in June of 2008 (App. 23-24).

The district court further determined that this admission by Ferreira that he and Pedrosa were not living together as husband and wife less than a year after marrying "and that they were willing to lie about this fact under oath...was evidence that their marriage was potentially fraudulent from its inception" (*Id.*). Moreover, that Ferreira began a romantic relationship with petitioner Tkacz just a few months after marrying Pedrosa calls into question whether Ferreira and Pedrosa intended to establish a life together at the time they married" (App. 24).

As the district judge found, in meeting his burden to rebut this evidence of marriage fraud and to show that his marriage was bona fide, Ferreira "provided a plausible explanation for his relationship history, which the BIA did *not* engage with in its decision" (*Id.*)(emphasis supplied). As he explained to USCIS during his second interview, he dated Pedrosa for over a year before they married in 2007 and they lived together in Las Vegas for about four months thereafter (*Id.*). But Pedrosa then had to return to Florida to care for her ill mother with the distance between them putting a strain on their relationship (*Id.*). It was during this time that he met Tkacz and they soon became romantically involved (*Id.*). He admitted to then having made the "misguided decision"

to continue his immigration proceeding with Pedrosa even though they had already separated, a decision which led to the forced 2008 interview with USCIS in Las Vegas on June 9, 2008, and the ensuing events (*Id.*).

As the motion judge ruled, however, most of this plausible explanation by Ferreira rested on his own (and Tkacz's) testimony to which USCIS assigned little credibility (App. 24-25). In a case like this where the evidence supports multiple plausible interpretations, a reviewing court is not authorized to substitute its judgment for the agency's decision; and since there was significant circumstantial evidence that Ferreira's first marriage was fraudulent without countervailing objective evidence rebutting that conclusion, it could not find that the BIA's decision violated the APA (App. 25).

Petitioner appealed and on December 19, 2019, the court of appeals unanimously affirmed the district court's ruling in an unpublished Memorandum Order (App. 1-4). After agreeing with the district court that petitioner was not denied her due process rights in the proceedings before the USCIS, the Panel ruled that the BIA's finding of a fraudulent marriage between Ferreira and Pedrosa "is supported by substantial evidence in the record, even if the evidence may also lend support to Tkacz['s] and Ferreira's alternative interpretation" (App. 3). As it explained, petitioner's arguments "essentially ask us to reweigh the evidence and make our own credibility determinations, which we may not do in reviewing the agency's findings under the APA' (App. 4).

On January 31, 2020, the court of appeals denied petitioner's petition for rehearing *en banc* (App. 26-27).

REASONS FOR GRANTING THE PETITION.

The Deferential "Substantial Evidence" Standard Employed by Federal Courts to Review Decisions of the Board of Immigration Appeals Is Fundamentally Incompatible With the USCIS Director's Burden To Prove Marriage Fraud By "Substantial and Probative Evidence" When Denying a Visa Petition. This Incompatibility Prejudiced Petitioner by Preventing in Federal Court a More Rigorous Review of USCIS's Evidence Which the "Substantial and Probative Evidence" Standard Demands; It Blocks Federal Courts From Discovering Administrative Error; It Ignores the Decisions, Statute and Regulation Which Insist On This Heightened Evidentiary Standard; and It Denies Petitioner Due Process By Excusing The Agency From Adducing in Federal Court The Same Affirmative Evidence Of Marriage Fraud It Was Required to Adduce in the Administrative Forum.

USCIS's rationale for finding that Ferreira's prior marriage was a sham rests on inference, surmise, suspicion, assumptions and a disbelief of his plausible explanations. Its denial of petitioner's Form 1-130 petition did not depend on "substantial and probative evidence" because there is no affirmative, direct, competent evidence that Ferreira's marriage to Pedrosa in June of 2007 was more probably than not fraudulent at its inception, an evidentiary showing required by BIA decisional law, statute and regulation. USCIS's decision is therefore arbitrary and capricious

inasmuch as it departs from agency precedent without explanation, leaving the courts with no power to affirm its decisionmaking process. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

Despite this lack of substantial and probative evidence to support a finding of marriage fraud in the administrative setting, the federal courts reviewing this determination employ the deferential "substantial evidence" standard of review which asks only if the decision is supported by more than a scintilla but less than a preponderance of the evidence, a review which does *not* address USCIS's obligation to adduce affirmative, objective and probative evidence in the administrative forum that the marriage is more probably than not fraudulent at its inception and to avoid relying on mere inferences and assumptions, as it did here, to find a sham marriage. Because of the federal courts' deferential standard of review, USCIS's failure to hew to this higher evidentiary burden of proving marriage fraud by "substantial and probative evidence"in the administrative forum is protected from meaningful review by the courts.

This fundamental incompatibility between the heightened burden of proof imposed on the agency in the administrative setting when denying a visa petition on account of marriage fraud and the deferential standard of review employed by federal courts in assessing this decision to deny a visa petition—as yet unaddressed by any lower court or this Court----has important consequences to the detriment of litigants like petitioner and Ferreira. It unfairly prevents in federal court a more rigorous review of USCIS's evidence which the "substantial and probative

evidence" standard demands; it blocks the federal courts from discovering administrative error; it ignores the decisions, statute and regulation which insist on holding respondents' proof of marriage fraud to this higher evidentiary standard; and it denies litigants like petitioner and Ferreira due process by excusing USCIS in federal court from meeting its higher burden of proving marriage fraud by the same "substantial and probative evidence" that it supposedly did in the administrative setting.

This Court should accordingly grant the petition to resolve this important question of administrative law. It should take this opportunity to redefine the scope of review which federal courts may employ when reviewing decisions of the Board of Immigration Appeals so that it accommodates the heightened burden of proof resting on the USCIS in the administrative setting to prove marriage fraud not just by substantial evidence but rather by substantial *and probative* evidence, as required by BIA decisional law, statute and regulation.

A fraudulent marriage under the INA is one that despite its validity under civil law, is "entered into for the primary purpose of circumventing the immigration laws." *Matter of Singh*, 37 I&N Dec. 598, 601 (BIA 2019) quoting *Matter of Laureano*, 19 I&N Dec. 1, 2 (BIA 1983). The central question in determining whether a sham marriage exists is whether the parties "intended to establish a life together *at the time they were married*." *Id.* (emphasis supplied) citing *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975). This kind of determination requires an examination of the conduct of the parties both before and after the marriage in

order 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.* quoting *Matter of McKee*, 17 I&N Dec. 332, 334 (BIA 1980) and *Bark v. INS*, 511 F.2d at 1202 (emphasis supplied). See *Lutwak v. United States*, 344 U.S. 604, 617 (1953). If the marriage is valid at its inception, it will be valid for immigration purposes regardless of subsequent events. *Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980).

Under the fraudulent marital prohibition of Section 204(c) of the INA , the consequence for a non-citizen who engages in marriage fraud in order to achieve lawful permanent resident status in the United States is a non-waivable and permanent bar to the approval of any future visa petitions.

Given this dire result, the BIA had long ago determined that "the evidence of [marriage] fraud must be relatively high to trigger the bar." *Singh*, 37 I&N Dec. at 607.

In *Matter of Tawfik*, 20 I&N Dec. 166, 167-169 (BIA 1990), the BIA made clear that before the USCIS can deny a visa petition brought on behalf of an alien because he or she has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws, the evidence of such an attempt or conspiracy "must be documented in the alien's file and must be substantial and probative." *Id.* at 167 citing *Matter of Kahy*, 19 I&N Dec. 803, 806-807(BIA 1988); *Matter of Agdinaoay*, 16 I&N 545 (BIA 1978); *Matter of La Grotta*,, 14 I & N Dec.110 (BIA 1972).

In the wake of *Tawfik*, § 204(c) of the INA (8 U.S.C. § 1154(c)) now provides that the Director of USCIS is authorized to deny a visa petition brought on behalf of an alien only when there is "substantial and probative evidence" of marriage fraud. In addition, the regulations promulgated pursuant to § 204(c) of the INA were reorganized and amended to add the "substantial and probative" language so that 8 CFR § 204.2(a)(1)(ii) now requires the Director to deny any alien a visa petition "for whom there is substantial and probative evidence" of marriage fraud.

In *Singh*, the BIA panel identified how this heightened burden of proof in the administrative setting has been implemented in marriage fraud cases. As it explained, this requirement refers to the quality and quantity of competent, credible, and objective evidence. 37 I&N Dec. at 606-607. "Given that the 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, *the evidence of fraud must be relatively high to trigger the bar*." *Id.* at 607 (emphasis supplied). Specifically, the BIA in *Singh* concluded that after *Tawfik*,

> the degree of proof required for a finding of marriage fraud sufficient to support the denial of a visa petition under section 204(c) of the Act should be higher than a preponderance of the evidence and closer to clear and convincing evidence. Thus, we hold that to be "substantial and probative," the *evidence must establish that it is more than probably true that the marriage is fraudulent*....[W]e note that this is consistent with the standard we currently employ in

> adjudicating visa petitions involving marriage fraud.

Id. (emphasis supplied).

In a footnote, the BIA further explained that this standard is "higher than a preponderance of the evidence but less than clear and convincing evidence." *Id.* n.7. In *Tawfik*, the BIA made the point that merely reasonable inferences from the record that the beneficiary entered into a marriage for the purpose of obtaining immigration benefits is *not* enough to rise to the level of substantial and probative evidence required to justify the denial of a visa petition. *Tawfik*, 20 I&N Dec. at 168. *Singh*, 37 I&N Dec. at 602. Instead, the evidence of marriage fraud must be affirmative, direct, relevant, documented in the alien's file and, if inferential, create "such a *strong* inference of fraud that it rises to the level of fraud." *Singh*, 37 I&N Dec. at 608 (emphasis supplied). *Tawfik*, 20 I&N Dec. at 168-169.

The Director in *Tawfik* revoked the approval of a visa petition filed by the beneficiary's citizen spouse because the beneficiary and the petitioner were living in different cities and because the Director had determined that the beneficiary was living with his first wife. The panel held that while these factors may raise an inference of fraud, this inference was insufficient to constitute "substantial and probative evidence" that the couple intended to evade the immigration laws at the time of their marriage. 20 I&N Dec. at 169-170. Nor was it probative of the couple's intent *at the time they married*, which is the central issue in marriage fraud cases. *Id.* at 170.

In fact, that one of the spouses married the other so that he could obtain a green card does *not* make the marriage a sham, though it is evidence that might support an inference of a fraudulent marriage. In *U.S. v. Orellana-Bianco*, 294 F.3d 1143, 1151-1152 (9th Cir. 2002), the court of appeals wrote that

> "motivations are at most evidence of intent, and do not themselves make the marriages shams." Just as marriages for money, hardly a novelty, or marriages among princes and princesses for reasons of state may be genuine and not sham marriages, so may marriages for green cards be genuine.
>
> An intent to obtain something other than or in addition to love and companionship from that life do not make the marriage a sham. Rather, the sham arises from the intent not "to establish a life together."

Id. (footnotes omitted) quoting *United States v. Tagalicud*, 84 F. 3d 1180, 1185 (9th Cir. 1996) and *Bark v. INS*, 511 F.2d at 1201(evidence of physical separation cannot support a finding that a marriage was not bona fide when it was entered). Accord, *Simko v. Bd. of Immigration Appeals*, 156 F. Supp.3d 300, 312-313 (D. Conn. 2015) (suspicious circumstantial evidence "suggestive" of marriage fraud cannot overcome BIA's established policy that reasonable inferences do not rise to the level of substantial and probative evidence required to justify a visa denial).

The USCIS's burden of proof after *Tawfik* and continuing through *Singh* is that affirmative, direct, competent evidence is necessary to prove that the

marriage was more probably than not fraudulent at its inception; and that circumstantial evidence which could reasonably fuel only a suspicion or an inference of marriage fraud is not substantial and probative enough to prove that a marriage was more probably a sham when it took place. Thus in order to justify a visa denial, USCIS was and is bound to adduce evidence which is affirmative, direct, relevant, documented in the alien's file and, if inferential, creates such a *strong* inference of fraud that it rises to the level of fraud itself.

As a practical matter, this heightened burden of proof for USCIS means that where the administrative record is one where two equally plausible explanations----one of fraud and one of a legitimate marriage----are possible, the Director *must* adduce affirmative evidence to demonstrate that the marriage is more probably than not fraudulent when it took place and he/she cannot rely on mere inferences and assumptions to prove this alleged fact. See *Boansi v. Johnson*, 118 F. Supp.3d 875, 880 (E.D.N.C. 2015). In the absence of such substantial and probative evidence, the denial of a visa cannot stand.

But while the USCIS is required to adduce this kind of substantial and probative evidence of fraud in the administrative setting to justify a visa denial, it is under no such obligation to do so when the matter travels to federal court. There a federal court sitting in review of such decisions asks only whether the evidence of marriage fraud is substantial, i.e., "more than a scintilla, but... something less than a preponderance of the evidence" in order to affirm USCIS's denial of a visa petition. See, e.g., *Brown v. Napolitano*, 391 Fed. App'x 346, 349-350 (5th Cir. 2010);

Omokaro v. Hamilton, 2016 WL 4192058 (S.D. Tex. 2016). They fail to employ----or even advert to----the higher burden of proof which the USCIS carries in the administrative setting. See *Simko v. Bd. of Immigration Appeals*, 156 F. Supp.3d at 310; *Zemeka v. Holder*, 989 F. Supp.2d 122, 129-130 (D.D.C. 2013). See also *Alabed v. Crawford*, 691 Fed. Appx. 430, 431 (9th Cir. 2017); *Armah-El-Aziz v. Zanotti*, 2015 WL 4394576 at *6 (E.D. Va. 2015); *Rojas v. Johnson*, 2014 WL 12527213 at *4 (M.D. Fla. 2014) (mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings).

Under this deferential "substantial evidence" standard of review, as long as USCIS's finding that Ferreira and Pedrosa's marriage was fraudulent is supported by more than a scintilla but less than a preponderance of the evidence, that finding will stand even if the evidence may also lend support to the plausible explanation of Ferreira that his marriage to Pedrosa was bona fide at its inception. In fact, as the district court found here, in meeting his burden before the agency to rebut evidence of marriage fraud and to show that his marriage was bona fide at its inception, Ferreira "provided a plausible explanation for his relationship history, *which the BIA did not engage with in its decision*" (App. 24)(emphasis supplied).

Ferreira's explanation offered a coherent rationale for the events surrounding his marriage to Pedrosa on June 8, 2007. As he explained to USCIS during his second interview, he dated Pedrosa for over a year before they married in 2007 and they lived together in Las Vegas for about four months thereafter (App.24). But Pedrosa then had to return to Florida to

care for her ill mother with the distance between them putting a strain on their relationship (*Id.*). It was during this time that he met Tkacz and they soon became romantically involved (*Id.*). He admitted to then having made the "misguided decision" to continue his immigration proceeding with Pedrosa even though they had already separated, a decision which led to the forced interview with USCIS in Las Vegas on June 9, 2008, and the ensuing events (*Id.*).

Yet, as it did in *Boansi v. Johnson*, 118 F. Supp.3d at 881, USCIS "paid little attention to [Ferreira's] rationale for living apart or any other evidence submitted to support the couple's legitimate marriage." *Id.* Instead, based on *no* direct, affirmative evidence that either Ferreira or Pedrosa intended to evade the immigration laws at the time of their marriage in June of 2007, USCIS chose to disbelieve Ferreira's explanation entirely and to infer from this credibility judgment itself that he, Pedrosa, and even Tkacz were complicit in marriage fraud (App. 24-25). But as the district judge surmised, Ferreira's explanation "may very well be what happened in this case" (App. 24).

However, as it further observed, under the court's deferential standard of review, "[w]here the evidence in a case could support multiple plausible interpretations, the Court is not permitted to substitute its own judgment for that of the agency" (App. 25). The court of appeals likewise ruled that the agency's finding of a fraudulent marriage "is supported by substantial evidence in the record, even if the evidence may also lend support to Tkacz and Ferreira's alternative interpretation" (App. 3). Because

substantial evidence supports USCIS'd findings, its visa denial was not arbitrary and capricious (App. 4).

This different treatment of the evidence in each forum is stark. Where two equally plausible explanations----one of fraud and one of a legitimate marriage----are possible from the record, the Director in the administrative forum *must* adduce affirmative, objective and probative evidence that the marriage is more probably than not fraudulent and he/she cannot rely on mere inferences and assumptions, as it did here, to find a sham marriage. Yet in the federal forum, even where two equally plausible explanations are possible, the Director can still rely on something less than a preponderance of the evidence in asking the court to uphold its visa denial *regardless of whether or not it thinks that USCIS adduced in the administrative forum substantial and probative evidence of a fraudulent marriage*. In this way, USCIS's failure to hew to its higher evidentiary bar in the administrative forum is protected from meaningful review by the courts.

This fundamental incompatibility between the heightened burden of proof imposed on the agency in the administrative setting when denying a visa petition on account of marriage fraud and the deferential standard of review used by federal courts in assessing the agency's decision to deny a visa petition has important consequences to the detriment of litigants like petitioner and Ferreira. It unfairly prevents in federal court a more rigorous review of USCIS's evidence which the "substantial and probative evidence" standard demands; it blocks the federal courts from discovering administrative error; it ignores

the decisions, statute and regulation which insist on holding respondents' proof of marriage fraud to a higher evidentiary standard; and it denies litigants like petitioner and Ferreira due process by excusing USCIS in the judicial setting from meeting its higher burden of proving marriage fraud by the same affirmative evidence it was required to adduce in the administrative setting.

These unfair results are conspicuous in this case where Ferreira's statements to USCIS agents at the initial field interview in September of 2008 were not relevant to the central question of whether he and Pedrosa intended to establish a life together *at the time they were married*, as required under BIA decisional law. Moreover, Pedrosa was never interviewed and her whereabouts were unknown at all the relevant times; the agents' field memorandum of its conversations were never produced in a timely or meaningful manner; there was no affirmative evidence showing that Ferreira and Pedrosa had not lived together as husband and wife for at least four months; and Ferreira's plausible explanation of events surrounding their marriage were completely ignored. There was no strong circumstantial evidence of marriage fraud at its inception in 2007, just the bare

For the reasons identified herein, a writ of certiorari should issue to the court of appeals for the Ninth Circuit to review its decision and, ultimately, to vacate and reverse that ruling and remand the matter to the USCIS with directions to reconsider its decision denying petitioner's Form 1-130 petition; or provide petitioner with such further relief as is fair and just in the circumstances of this case.

CONCLUSION

Respectfully submitted,

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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

Jessica Lynn TKACZ, aka Alayne C. Ferreira, Plaintiff-Appellant,

v.

Daniel G. BOGDEN, U.S. Attorney Nevada; Jeh Johnson, Secretary of Department of Homeland Security; Jeane Kent, Field Director USCIS, Las Vegas, Defendants-Appellees.

No. 18-15771

Submitted December 6, 2019* San Francisco, California

FILED December 19, 2019

Attorneys and Law Firms

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Appeal from the United States District Court for the District of Nevada, Richard F. Boulware II, District Judge, Presiding, D.C. No. 2:14-cv-00092-RFB-CWH

Before: GOULD and CALLAHAN, Circuit Judges, and BOUGH,** District Judge.

MEMORANDUM***

Plaintiff-Appellant, Jessica Tkacz, appeals the district court grant of summary judgment in favor of Defendants-Appellees (collectively, the "agency"). Tkacz, a United States citizen, filed a Form I-130 visa petition with the United States Citizenship and Immigration Services (USCIS) for immediate relative status on behalf of her alien husband, Alayne Ferreira, a native of Brazil. USCIS denied the petition on the basis that Ferreira had previously entered a fraudulent marriage with another United States citizen for the sole purpose of obtaining immigration benefits. See 8 U.S.C. § 1154(c) (stating, in part, that "no petition shall be approved" if the alien has previously sought immediate relative status as the spouse of a United States citizen "by reason of a marriage determined ... to have been entered into for the purpose of evading the immigration laws"). After a remand and a second hearing on the matter, USCIS again denied the application. The Board of Immigration Appeals (BIA) agreed with USCIS and dismissed Tkacz's second appeal. Tkacz filed this action in district court, alleging that the agency violated her due process rights and the Administrative Procedure Act (APA).1 We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's summary judgment order.

1. Tkacz first argues that her due process rights were violated because the agency failed to follow Ching v. Mayorkas, 725 F.3d 1149 (9th Cir. 2013). In Ching, we found a due process violation by the agency's denial of Ching's request for the opportunity to cross-examine her husband's *529 ex-spouse at her I-130 interview. Id. at 1159. Unlike Ching, however, Tkacz provides no evidence, nor makes any claim, that she asked the

agency to produce Ferreira's ex-spouse or the USCIS officers for cross-examination, or that the agency denied such a request. Even after the BIA remanded Tkacz's first appeal for a second hearing, there is no indication in the record that Tkacz demanded the opportunity to cross-examine these witnesses at the second hearing. Furthermore, Tkacz fails to demonstrate any prejudice as she does not show how an opportunity for cross-examination of either Ferreira's ex-spouse or the USCIS officers would have had any effect on the ultimate denial of her I-130 petition. Accordingly, we agree with the district court that Tkacz fails to present any genuine dispute of material fact as to the alleged violation of her due process rights.

2. We also agree with the district court that the agency, in denying Tkacz's I-130 petition, did not act arbitrarily or capriciously in violation of the APA. In reviewing a challenge to agency action at the summary judgment stage, the reviewing court's "function ... is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Occidental Engineering Co. v. Immigr. & Naturalization Serv., 753 F.2d 766, 769 (9th Cir. 1985). The agency's finding that Ferreira and his ex-spouse's marriage was fraudulent is supported by substantial evidence in the record, even if the evidence may also lend support to Tkacz and Ferreira's alternative interpretation. See Bear Lake Watch, Inc. v. FERC, 324 F.3d 1071, 1076 (9th Cir. 2003) ("Substantial evidence ... means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [the agency's] findings." (internal citations omitted)).

Tkacz's arguments essentially ask us to reweigh the evidence and make our own credibility determinations, which we may not do in reviewing the agency's findings under the APA. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ("[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."). Because substantial evidence supports the agency's findings, and Tkacz otherwise has not shown how its denial of the I-130 petition was arbitrary and capricious, we affirm the district court's grant of summary judgment.

3. Tkacz also filed two motions pending this appeal. We dismiss Tkacz's motion to stay removal [ECF Dkt. No. 39] as moot, given our resolution of this case. We deny Tkacz's motion for judicial notice [ECF Dkt. No. 43] of an affidavit that was not part of the administrative record before the agency.

AFFIRMED.

Footnotes

*The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

**The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

***This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1Because the parties are familiar with the facts of this case, we do not recount them in detail here.

303 F.Supp.3d 1052

United States District Court, D. Nevada.

Jessica Lynn TKACZ, Plaintiff,

v.

Elaine C. DUKE, et al., Defendants.

Case No. 2:14–cv–00092–RFB–CWH

Signed 03/31/2018

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ORDER

Motions for Summary Judgment (ECF Nos. 49 and 50)

RICHARD F. BOULWARE, II, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Before the Court is Plaintiff's Second Motion for Summary Judgment (ECF No. *1056 49) and Defendants' Second Motion for Summary Judgment (ECF No. 50). For the reasons discussed below, Defendants' motion is granted and Plaintiff's motion is denied.

II. PROCEDURAL BACKGROUND

Plaintiff filed a Complaint in this case on January 1, 2014. ECF No. 1. The case was initially assigned to Judge Robert C. Jones and Magistrate Judge Carl W. Hoffman. ECF No. 2. The case was reassigned to Judge Richard F. Boulware, II on August 12, 2014. ECF No. 13. Plaintiff filed a Motion for Summary Judgment on August 30, 2014. ECF No. 15. Defendants filed a Cross Motion for Summary Judgment on September 16, 2015. ECF No. 17. Plaintiff filed a Motion to Amend/Correct Complaint on October 6, 2014. ECF No. 21. At a hearing on September 23, 2015, the Court denied without prejudice the Motions for Summary Judgment (ECF Nos. 15 and 17) and ordered Plaintiff to file a Motion to Amend that complied with local rules by attaching the proposed Amended Complaint. Plaintiff filed the revised Motion to Amend on October 7, 2015, which was granted at a hearing on December 16, 2015. ECF Nos. 31, 36. The Amended Complaint was filed on December 21, 2015. ECF No. 37. Defendants filed an Answer to the Amended Complaint on February 16, 2016. ECF No. 40. Defendants filed a Motion to Dismiss for Lack of Prosecution on January 27, 2017. ECF No. 43. On June 23, 2017, the Court held a hearing in which it denied the Motion to Dismiss for Lack of Prosecution and ordered that dispositive motions were due by August 25, 2017. ECF No. 48. Plaintiff and Defendants filed the instant Second Motions for Summary Judgment on August 25, 2017. ECF Nos. 49, 50.

III. LEGAL STANDARD

In deciding a motion for summary judgment challenging a final agency action, the function of the reviewing court is to determine whether, as a matter of

law, the evidence in the administrative record permitted the agency to make the decision it did. Occidental Engineering Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985). The standard of review set forth in Fed. R. Civ. P. 56 is not applicable, but instead, the entire case on review under the Administrative Procedure Act (APA) is a question of law. Id. at 770. Summary judgment involving review of agency action does not require fact-finding by the district court. Rather, the court's review is limited to the administrative record. Northwest Motorcycle Ass'n. v. Dep't of Agriculture, 18 F.3d 1468, 1472 (9th Cir. 1994).

Under the APA, a Court may only hold unlawful and set aside an agency action that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). "Agency action should be overturned only when the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1150 (9th Cir. 2002) (internal citations and quotations omitted). Although a court's review under the APA should be "searching and careful," it is not de novo. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). A district court may not substitute its judgment for that of the agency. Id.

An agency's factual findings are reviewed under the substantial evidence *1057 standard. Ramos–Vasquez

v. INS, 57 F.3d 857, 861 (9th Cir. 1995). "Substantial evidence constitutes more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [the agency's] findings." Bear Lake Watch, Inc. v. FERC, 324 F.3d 1071, 1076 (9th Cir. 2003) (internal citations omitted).

IV. BACKGROUND

The following facts are taken from the administrative record in this case.

A. Ferreira–Pedrosa Marriage

Plaintiff's husband and the intended beneficiary of her I–130 petition, Alayne Ferreira, married his first wife, Irsa Pedrosa, on June 8, 2007 in Orlando, Florida. On June 25, 2007, Pedrosa signed an I–130 Petition on Ferreira's behalf, which was filed on July 30, 2007 along with Ferreira's I–485 Application. On June 9, 2008, Ferreira and Pedrosa appeared for a United States Citizenship and Immigration Services (USCIS) interview regarding their marriage, where they both claimed, under oath, that they were residing together in a bona fide marital relationship.

On September 27, 2008, two USCIS Officers, Carol Lazaro and Ilene Valenzuela, conducted an unannounced site visit at the address on file for Ferreira and Pedrosa. The fraud verification memorandum created by Officer Lazaro is the only record of this event and provides the following information: Plaintiff Tkacz answered the door and told the officers she was living there as a roommate, and that Pedrosa and Ferreira were at work. Officer Lazaro

then called Ferreira's cellular telephone number. Ferreira answered and told Officer Lazaro that he and his wife are the only residents at the address, and that his wife was at home that day. Officer Lazaro then explained to Ferreira that she knew Plaintiff was living at his home and that Pedrosa was not living in Las Vegas. Shortly after the phone call, Ferreira arrived at his house and spoke with the officers in person. The memorandum summarizes the interaction between Ferreira and the officers:

When Mr. FERREIRA arrived home, he invited myself and officer Valenzuela into his home. Jessica [Tkacz] did not seem pleased with our presence and went upstairs. Mr. FERREIRA, SIO Valenzuela and myself all sat down at the kitchen table to talk. Mr. FERREIRA was able to provide a current telephone number for Irsa PEDROSA, which was [ ], but was unaware of her current address, although he stated he believed she was either living in Florida or Puerto Rico. He stated Irsa PEDROSA had come to Las Vegas for the interview and then left town. He stated he just wanted to make a life in the United States and that Irsa had married him to help him. Mr. FERREIRA stated that about two months after filing the Form I–485, Application for Adjustment of Status, He met his current girlfriend Jessica TKACZ. They have been in a relationship ever since. At one point Jessica had become pregnant but had lost the baby.

On March 26, 2009, USCIS issued Ferreira and Pedrosa a Notice of Intent to Deny (NOID) their I–130 petition. A copy of the NOID was sent to Pedrosa's last known address, which was returned as "undeliverable," and to her attorney of record, John Doechung Lee. USCIS did

not receive a response to the NOID and denied the I–130 petition on May 26, 2009.

Ferreira divorced Pedrosa on March 24, 2009 and married Plaintiff on May 8, 2009.

B. Tkacz–Ferreira I–130 Proceedings

Plaintiff filed an I–130 petition for Ferreira on July 23, 2010 and they appeared *1058 for an interview with USCIS on May 13, 2011. The interview was video recorded. At that interview, the USCIS Officer asked Ferreira if he had previously had an I–130 petition filed on his behalf and if he withdrew that petition, to which Ferreira responded yes. The Officer continued, "And according to the investigators, you withdrew that after admitting that you entered into the marriage for the sole purpose of getting your green card." Ferreira denied making this admission. The Officer then stated, "Well the person you admitted it to is right across the hall, she's a supervisor. Let me go ask her." The Officer then reminded Ferreira that he was under oath and left the interview room for a few minutes, presumably to speak to the supervisor he had referred to. When he returned, the Officer stated that they were all done for the day and he would send Ferreira something in the mail regarding his case. Ferreira's counsel asked where the supervisor was and said that she had accused Ferreira of something he did not do. The Officer responded that he had just asked the supervisor if she remembered Ferreira's case, to which Ferreira's counsel responded "yeah, that doesn't mean she was right. It doesn't mean he admitted that." The Officer then stated, "I'm taking [the supervisor's] word over his word, how's that?" Ferreira's counsel then stated that he would like to see the supervisor, at which point

the Officer said in a raised voice, "so you're calling [the supervisor] a liar too?" Ferreira's counsel responded that he was not calling her a liar. Ferreira's counsel then stepped out of the interview room and had a conversation in private with the supervisor in question. While Ferreira's counsel was absent, the Officer told Ferreira that he had accused the supervisor of lying on a report, which was a very serious accusation and could send her to prison. He reiterated, "But I'm going to believe her—she's been here for 35 years." The Officer, Ferreira's counsel, and the supervisor then spoke in the hallway for a few minutes and the interview ended. The total interaction lasted less than 12 minutes.

After this interview, an NOID was issued based on an alleged sham marriage between Ferreira and his ex-wife, Pedrosa. A response was timely filed and USCIS denied the I–130 petition with a finding of INA § 204(c) marriage fraud on August 11, 2011.

A timely appeal was filed with the Board of Immigration Appeals (BIA) by Plaintiff on September 8, 2011. After Plaintiff filed the appeal, USCIS requested a remand "back to the Director for issuance of a new Notice of Intent to Deny and to provide the petitioner with an opportunity to review and respond to 1) the beneficiary's statement and 2) the site visit report prepared by USCIS officers, both relating to the prior marriage."

The BIA remanded the case on May 24, 2012 to allow Plaintiff to review and respond to Ferreira's statement and the site visit report prepared by USCIS officers related to the unannounced site visit on September 27, 2008. A subsequent USCIS interview was held on August 30, 2012. This interview was also video

recorded. A different USCIS Officer interviewed the couple on that occasion, speaking to them both together and separately. The Officer also took a sworn written statement from Ferreira, which was witnessed and which Ferreira signed. This interview was much more detailed than the first interview and lasted over an hour and a half. In this interview, Ferreira denied remembering ever making the statement recorded in the USCIS memorandum that he just wanted to make a new life for himself in the U.S. and that Pedrosa had married him to help him. Ferreira's counsel was also present at this interview and clarified that Ferreira understood the question, saying that the *1059 statement could be interpreted many ways and asking Ferreira if he said anything at all similar to what the USCIS Officer recorded in the memorandum. Ferreira reiterated that he did not recall saying anything of that kind. It is unclear from the record whether the petitioner ever requested that either of the USCIS Officers who conducted the unsupervised site visit on September 27, 2008 be made available for cross-examination during the second interview. Neither Ferreira nor his counsel commented on their absence during the video recording of the interview.

After this interview, USCIS issued another NOID dated October 2, 2012. A timely response was filed on November 1, 2012. A Denial Notice was issued again on December 7, 2012. A timely appeal was filed on January 4, 2013. Counsel for the Plaintiff submitted a brief within 30 days and the file was forwarded to the BIA. The BIA denied relief on December 20, 2013. This decision is the final agency action in this case. In it, the BIA explained its reasoning as follows:

Based on the fact that the beneficiary became romantically involved with the petitioner shortly after he married Ms. Pedrosa, and his admission that he falsely testified that he was in a valid and bona fide marriage with Ms. Pedrosa in June 2008, we find substantial and probative evidence supporting the application of the fraudulent marriage bar in section 204(c) of the Act...We note that Ms. Pedrosa, who also provided false testimony during their interview, has not submitted a statement confirming that their marriage was bona fide. Moreover, there is no persuasive evidence that Ms. Pedrosa and the beneficiary ever lived together. Because we agree that the beneficiary is precluded from obtaining an approved visa petition under the provisions of section 204(c) of the Act, we need not address the remaining arguments on appeal.

Plaintiff then filed the Complaint in this case on January 1, 2014. Plaintiff alleges that USCIS's conclusion that the beneficiary, Ferreira, previously committed marriage fraud is arbitrary and capricious, not supported by relevant statute or regulation, and constitutes unlawful failure or refusal to exercise discretion, in violation of § 701 and § 706 of the APA. The Amended Complaint adds a claim for violation of Plaintiff's Fifth Amendment Due Process rights.

V. DISCUSSION

A. Due Process

1. Legal Standard

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S.

Const. amend. V. "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994). The Ninth Circuit has held that petitions for immediate relative status are protected by due process because "grant of an I–130 petition for immediate relative status is a nondiscretionary decision. Immediate relative status for an alien spouse is a right to which citizen applicants are entitled as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility." Ching v. Mayorkas, 725 F.3d 1149, 1156 (9th Cir. 2013).

In analyzing due process claims in the immigration context, the question of how much process is due is case-specific. Courts apply the Mathews factors to the specific facts of the case at hand:

First, the private interest that will be affected by the official action; second, the *1060 risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In Ching, the Ninth Circuit reversed a grant of summary judgment where the plaintiffs argued that "the denial of [the alien spouse's] I–130 visa petition violated their Fifth Amendment Due Process rights because they were not afforded the opportunity to

cross examine [the alien spouse's] first husband, Elden Fong, or the USCIS officer who took Fong's statement." Ching, 725 F.3d at 1154–55. In that case, the BIA had relied primarily on a written statement made by the ex-husband of the alien spouse, stating that he had been paid to marry the alien spouse in a sham marriage. The BIA did not make the ex-husband or the agent who interviewed him available to the petitioner for cross-examination. Id. at 1153. The Ninth Circuit reversed and remanded with instructions to remand to the agency so that the agency could hold an evidentiary hearing. Id. at 1159.

In evaluating the Mathews factors, the Ching Court noted that the first factor favored the plaintiffs because "[t]he right to live with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual' and that cannot be taken away without procedural due process." Id. at 1157 (citing Landon v. Plasencia, 459 U.S. 21, 34–35, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982)). As to the second factor, the Court explained that the risk of erroneous deprivation was especially high where the witness (an ex-spouse) may have been motivated by malice and where the plaintiffs had presented substantial evidence that the marriage was not a fraud, including descriptive details of their life together and documentary evidence, including bills and a lease. Id. at 1158. The Ninth Circuit cited to the Supreme Court for the principle that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). As to the third factor, the Ching Court noted that, although the government

has a substantial interest in preventing those who commit marriage fraud from erroneously receiving benefits, "there is a significant public interest in allowing those who are legitimately married to receive the benefits intended for them." Ching, 725 F.3d at 1158–59. The Court found that "[t]he additional procedures would entail the minimal cost to the government of holding an additional hearing in this case" and "because the process sought by Plaintiffs is guaranteed to aliens in removal proceedings, there are no practical problems with such a requirement." Id. at 1159.

In a recent unpublished decision, the Ninth Circuit found that application of the marriage fraud prohibition was not arbitrary and capricious based on the following evidence:

Alabed and Murillo submitted very little documentation in support of their I–130 petition, and Alabed and Murillo gave inconsistent answers to certain questions during their interviews. When Murillo was confronted with these inconsistencies, she admitted the marriage was fraudulent and provided USCIS with a sworn statement attesting that Alabed had paid her to enter into the marriage. Moreover, USCIS obtained a police report in which Alabed mentioned his girlfriend, Gina Botello. Botello provided a *1061 sworn statement to USCIS indicating that she had been in a romantic relationship with Alabed since June 1998, prior to Alabed's marriage to Murillo. The romantic relationship between Alabed and Botello was confirmed by PG&E records showing that the two lived together from 1999 until 2000. This was substantial and probative evidence of marriage fraud. Alabed v. Crawford, 691 Fed. Appx. 430, 431 (9th Cir. 2017).

The Court also held that the plaintiffs "did not have a due process right to cross-examine Botello, Murillo, or the USCIS officers who interviewed Botello and Murillo." Id. at 432. The Court found that a case-specific analysis of the Mathews factors led to a different outcome than that in Ching because: (1) USCIS relied on objective evidence other than the witness statements in making its marriage fraud determination, (2) Plaintiffs' rebuttal evidence was less compelling, and (3) Plaintiffs "had access to and submitted declarations from the very witnesses they wish to cross-examine," making it unlikely that cross-examination would significantly reduce the risk of erroneous deprivation. Id. Although not binding on this Court, Alabed demonstrates that due process can be satisfied in the immigration context even where petitioners are not given the opportunity to cross-examine key witnesses.

2. Discussion

Although the requirements of due process may not have been met in Tkacz and Ferreira's first USCIS interview, the Court finds that the requirements of due process were satisfied through the petitioner's second interview and subsequent appeal. The Court notes that the couple's first interview was very brief, they were not given the inculpatory USCIS memorandum in advance, they were not allowed to explain the context of the damaging statement, and the USCIS Officer appears to have based his determination upon a single witness statement without making the witness available for cross-examination. Had the BIA not remanded the case for a second interview, it would be more difficult to say that due process was satisfied here. USCIS requested a remand, however, specifically so that the couple could have the opportunity to review

and respond to the USCIS memorandum and Ferreira's prior statement regarding his marriage to Pedrosa. It is unclear from the record and from Plaintiffs' motions whether the couple requested that either of the USCIS Officers who conducted the September 27, 2008 site visit be made available for cross-examination at the second USCIS interview. In Plaintiff's Motion for Summary Judgment, she complains that "[t]he two alleged sworn officers who made reports did not present them at the May 13, 2011 hearing." ECF No. 49 at 15. The motion does not mention USCIS refusing to produce the officers for the second interview on August 30, 2012, however, and the record does not indicate that such a request was ever made. Plaintiff acknowledges that she was given a copy of the USCIS memorandum that formed the primary basis for the finding of marriage fraud on August 12, 2011, more than a year before the second interview. It is clear from the video recording of the first interview that Plaintiff was aware of the identity of at least one of the USCIS Officers and Plaintiff's counsel spoke to her in person. Plaintiff had sufficient time and notice to prepare for the second interview and request the presence of the USCIS Officers if she desired to do so.

Even if Plaintiff did request and was denied the opportunity to cross-examine the officers at the second USCIS interview, the Court finds that due process was still satisfied in this case. Applying the Mathews factors, the first factor weighs in Plaintiff's favor because the interest at *1062 stake here is highly significant. Landon, 459 U.S. at 34–35, 103 S.Ct. 321. The second factor is more equivocal, however. In determining marriage fraud, the Court must look to the parties' intent at the inception of the marriage. United

States v. Orellana–Blanco, 294 F.3d 1143, 1151 (9th Cir. 2002). Ferreira's statement to USCIS during the unannounced site visit is the only evidence in this case that is directly probative on that issue, making it highly significant. On the other hand, it is unclear what could be gained from cross-examination. Plaintiff argues that Ferreira's English skills are faulty at times and that his statement "does not mean he entered the marriage fraudulently and only for an immigration benefit. In fact, the statement means [Pedrosa] helped him after they had already broken up which is what happened." ECF No. 49 at 20. This is not what Ferreira testified to in the second USCIS interview though. When asked about this statement, Ferreira flatly denied ever saying anything of the kind to the USCIS Officers. If this was a more nuanced situation, for example if Ferreira testified that the Officers took his words out of context or that the language barrier caused them to misinterpret him, cross-examination might be helpful to get a fuller factual background. But this case involves a direct credibility determination regarding whether Ferreira made the statement or not, leaving less to gain from live testimony. Plaintiff has not alleged that either of the Officers had a personal bias against Ferreira or Tkacz or any motive to lie. The Court does not find that cross-examination would significantly decrease the risk of erroneous deprivation under these circumstances. As to the third factor, holding another evidentiary hearing in this case would not be unduly burdensome, but the Court notes that USCIS already held a second hearing in which the parties discussed the facts of this case in considerable detail and it is unclear what new information Plaintiff expects cross-examination of the USCIS Officers to reveal. The Court finds that Plaintiff is not entitled to cross-examination under the facts of

this case and that due process was satisfied through the second USCIS interview and subsequent appeal.

B. APA Review of the Finding of Marriage Fraud

Having determined that the administrative procedures followed in this case did not violate Plaintiff's due process rights, the Court turns to the question of whether the BIA's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, in violation of the APA.

1. Legal Standard

A petition for immediate relative status must be denied 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 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." 8 U.S.C. § 1154(c). Under INA regulations, the USCIS is to "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." 8 C.F.R. § 204.2(a)(1)(ii). Known as the "fraudulent marriage prohibition," this provision also states, "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 *1063 or

conspiracy must be contained in the alien's file." Id. In general, when a prior marriage fraud finding is used to deny a subsequent alien relative petition, the reviewing body cannot rely solely on the prior finding but must consider de novo the evidence in the record. Matter of Tawfik, 20 I. & N. Dec. 166, 168 (BIA 1990). In determining whether or not the beneficiary has previously engaged in marriage fraud, "the district director may rely on any relevant evidence, including evidence having its origin in prior Service proceedings involving the beneficiary, or in court proceedings involving the prior marriage." Id. If USCIS finds that a visa petition should be denied based on the marriage fraud prohibition and substantial and probative evidence supports that finding, the petitioner bears the burden of rebutting the finding and showing that the prior marriage was bona fide. See Matter of Tawfik, 20 I. & N. Dec. at 167; Matter of Kahy, 19 I. & N. Dec. 803, 806–07 (BIA 1988); 8 C.F.R. § 204.2(a)(1)(ii).

The relevant question in deciding whether the fraudulent marriage prohibition applies is whether "the bride and groom did not intend to establish a life together at the time they were married." Orellana–Blanco, 294 F.3d at 1151 (citing Bark v. Immigration & Naturalization Service, 511 F.2d 1200, 1201 (9th Cir. 1975)). "Conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married...Evidence that the parties separated after their wedding is relevant in ascertaining whether they intended to establish a life together when they exchanged marriage vows. But evidence of separation, standing alone, cannot support a finding that a marriage was not bona fide when it was entered." Bark,

511 F.2d at 1202. Evidence of intent may take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, cohabitation, and shared experiences. Matter of Laureano, 19 I & N Dec. 1, 3 (BIA 1983).

A marriage is not necessarily fraudulent simply because obtaining citizenship was one motive behind it. "Just as marriages for money, hardly a novelty, or marriages among princes and princesses for reasons of state may be genuine and not sham marriages, so may marriages for green cards be genuine. An intent to obtain something other than or in addition to love and companionship from that life does not make a marriage a sham. Rather, the sham arises from the intent not 'to establish a life together.' " Orellana–Blanco, 294 F.3d at 1151 (internal citations omitted). Courts also must be careful not to project preconceived notions of what a bona fide marriage looks like onto petitioners. "The concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of bona fide marriage would raise serious constitutional questions...Aliens cannot be required to have more conventional or more successful marriages than citizens." Bark, 511 F.2d at 1201–02.

2. Discussion

The Court does not find that the BIA's application of the marriage fraud prohibition in this case was arbitrary, capricious, an abuse of discretion or otherwise contrary to law. Upon reviewing the evidence in the administrative record, the Court does not find that USCIS "relied on *1064 factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Safari Aviation Inc., 300 F.3d at 1150 (internal citations and quotations omitted).

First, USCIS provided substantial and probative evidence of a fraudulent marriage in this case. Most importantly, it had the memorandum and statement from the September 27, 2008 site visit, which it had to weigh against Ferreira's testimony that he never said Pedrosa married him to help him start a new life in the United States. As Ferreira admitted that both he and Pedrosa lied under oath at his USCIS interview in June 2008, USCIS was not irrational in assigning very little weight to his testimony. That admission itself—that Ferreira and Pedrosa were not living together as husband and wife less than a year after marrying and that they were willing to lie about this fact under oath—was evidence that their marriage was potentially fraudulent from its inception. Finally, USCIS had the fact that Ferreira began a romantic relationship with Tkacz just a few months after he married Pedrosa. Although this fact alone is insufficient to establish marriage fraud, Bark, 511 F.2d at 1202, combined with the other circumstantial evidence in this case, it calls

into question whether Ferreira and Pedrosa intended to establish a life together at the time they married.

Second, having found that USCIS provided substantial and probative evidence that Ferreira engaged in marriage fraud, the burden shifted to Plaintiff to establish that the marriage was bona fide and rebut the evidence of fraud. Alabed, 691 Fed. Appx. 430 at 431 (citing In re Kahy, 19 I & N at 806–807). The Court notes that Ferreira provided a plausible explanation for his relationship history, which the BIA did not engage with in its decision. He testified in his second USCIS interview that he dated Pedrosa for over a year before they married and that the couple lived together in Las Vegas for approximately four months. At this point, he testified that Pedrosa had to return to Florida to care for her ill mother and the distance put a strain on their relationship. It was while Pedrosa was gone that Ferreira met Tkacz and the pair soon became romantically involved. Ferreira stated that he then made the misguided decision to continue in his immigration proceedings with Pedrosa, even though the couple was already separated at that point. This may very well be what happened in this case. The problem is that the only evidence Ferreira submitted to support this explanation was his own testimony and that of Tkacz, which USCIS understandably assigned very little credibility, given Ferreira's previous misrepresentations and the evidence that Tkacz was at least somewhat complicit in his marriage fraud.

Where the evidence in a case could support multiple plausible interpretations, the Court is not permitted to substitute its own judgment for that of the agency. Marsh, 490 U.S. at 378, 109 S.Ct. 1851. Based on the significant circumstantial evidence that Ferreira's first

marriage was fraudulent and Ferreira's failure to produce substantial objective evidence besides the testimony of himself and the Plaintiff in rebuttal, the Court does not find that the BIA's conclusion violated the APA.

VI. CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (ECF No. 50) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (ECF No. 49) is DENIED.

The Clerk of Court is instructed to close this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSICA LYNN TKACZ, AKA Alayne C. Ferreira,
Plaintiff-Appellant,

v.

DANIEL G. BOGDEN, U.S. Attorney Nevada; et al.,
Defendants-Appellees.

No. 18-15771

D.C. No. 2:14-cv-00092-RFB-CWH District of Nevada, Las Vegas

ORDER

Before: GOULD and CALLAHAN, Circuit Judges, and BOUGH,* District Judge.

The panel has voted to deny the petition for rehearing en banc, and Judge Bough has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

Footnotes

* The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

U.S. Citizenship
and Immigration
Services

Date: December 7, 2012

Jessica Lynn Tkaez File Number: A86 992 502

8263 Amphora St. Receipt Number: WAC1090188436
Las Vegas, NV 89139 Beneficiary: Alayne Ferreira

It is ordered that your Form I-130, Petition for Alien Relative be denied because:

(SEE ATTACHMENT)

You may, if your wish, appeal this decision. You must submit such an appeal to THIS OFFICE with a filing fee of $110.00, If you do not file an appeal within the time allowed, this decision is final. Appeal in your case may be made to:

This decision will become final unless you appeal it by filing a completed Form EOIR-29. Notice of Appeal to the Board of Immigration Appeals from a Decision of a USCIS Officer Although the appeal will be decided by the Board of Immigration Appeals (BIA), you must send the Form EOIR-29 and all required documents, including the appropriate filing fee, to the following address: 5650 W. Badura Ave, Las Vegas, NV 89118. The Form EOIR-29 must be received within 30 days from the date of this decision notice. The decision is final if your appeal is not received within the time allowed. If you, the petitioner, intend lo he represented on appeal, your attorney or accredited representative must submit Form EOIR-27 with Form EOIR-29.

If you or your attorney wishes to file a brief in support of your appeal, the brief must be received by the USCIS office where you file your appeal either with your appeal or no later than 30 days from the date of filing your appeal. Your appeal will be sent for further processing 30 days after the date USCIS receives it:

after that time, no brief regarding your appeal can be accepted by the USCIS office. For more information about filing requirements for appeals to the BIA, please see 8 CFR 1003.3 and the Board of Immigration Appeals Practice Manual available at www.usdoj.gov/coir.

Do NOT send your appeal directly to the Board. Please direct any questions you may have to the US Citizenship and Immigration Services office nearest your residence.

Sincerely yours,

LEANDER B. HOLSTON

Cc: Field Director

Fountas and Associates

ATTACHMENT

Beneficiary: Alayne Ferreira

File Number: A 086 992 502

Receipt Number: WAC1090188436

PROCEDURAL HISTORY

Reference is made to the Petition for Alien Relative (Form I-130), that you filed on behalf of Alayne

Ferreira on July 23, 2010. The petition was filed pursuant to Section 201(b) of the Immigration and Nationality Act (the Act), as amended, to accord him immediate relative visa status as the spouse of a citizen of the United States.

This is the second From I-130 filed on behalf of Alayne Ferreira seeking to confer immediate relative status upon him as the spouse of a United States citizen. USCIS determined, however, that Alayne Ferreira entered into this marriage solely to evade immigration laws.

The instant Form I-130 must be denied if the beneficiary has previously sought to be accorded immediate relative status as a spouse of a United States citizen by reason of a marriage entered into for the purpose of evading the immigration laws.

APPLICABLE LAW AND DISCUSSION

Section 204(c) of the Immigration and Nationality Act (the Act) provides:

... 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 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.

Title 8, Code of Federal Regulations, Part 204.2(a)(1)(ii) states, in pertinent part:

...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.

In making a determination that the beneficiary's prior marriage comes within the purview of section 204(c) of the Act, the district director may rely upon any relevant evidence, including evidence having its origin in prior Service proceedings involving the beneficiary, or in court proceedings involving the prior marriage. Matter of Tawfik, 20 I&N Dec. 166 (BIA 1990).

Where evidence in record that beneficiary was active participant in fraudulent marriage, the burden shifts to second petitioner to establish that the beneficiary did not seek to obtain status based on prior fraudulent marriage. Matter of Kahy, 19 I&N Dec. 803 (BIA 1988): Ghaly v. INS. 58 F.3d 1425 (9th Cir 1995).

United Slates Citizenship and Immigration Services (USCIS) records reflect that you appeared at the USCIS Las Vegas Field Office on May 13, 2011, and again on August 30, 2012, for interviews on the instant petition. USCIS finds the evidence that you submitted as proof of a valid marriage, including the birth certificate of a common child, is sufficient to establish that your marriage is bona fide; however. Alayne

Ferreira's previous involvement in a fraudulent marriage prevents him from benefiting from your petition.

The previous involvement in a fraudulent marriage started on July 30, 2007, when Alayne Ferreira submitted Form I-485. Application to Register Permanent Residence based upon a Form I-130. Petition for Alien Relative, submitted on his behalf by his United States citizen spouse at that time, Irsa Pedrosa. As evidence to support the I-130 petition, they submitted a Certificate of Marriage from the State of Florida for Irsa Enid Pedrosa and Alayne Ferreira, dated June 8, 2007.

On June 9, 200S, Irsa Pedrosa and Alayne Ferreira were interviewed by an officer of the United States Citizenship and Immigration Services. At this time, they both maintained, under oath before a Federal officer, that they were residing together in a marital relationship. As evidence of a bona fide marriage the couple submitted the following:

1. A receipt from Whitehall Jewelers for a ring and jewelry service plan sold to Alayne Ferreira on June 7, 2007;

2. Nevada General Auto insurance policy statements for Alayne Ferreira and Irsa Pedrosa, indicating a policy period from June 21, 2007, to September 12, 2007;

3. Farmers Auto Insurance Policy for Alayne and Irsa Pedrosa, dated May 22, 2008;

4. Southwest Gas Corporation utility bill for Alayne Ferreira or Irsa Pedrosa, dated June 5, 2008;

5. A statement from Southwest Gas Corporation showing service to Ferreira/Pedrosa from March 21 to September 13, 2007;

6. Fifteen (15) copied photographs of Alayne Ferreira and Irsa Pedrosa, undated;

7. Nevada Power utility bill for Alayne Ferreira only, dated June 10. 2008;

8. Wells Fargo Joint Bank Account Statements For Alayne Ferreira and Irsa Pedrosa, dated March through May, 2008;

9. Copies of Nevada Drivers Licenses for Irsa Enid Pedrosa-Lopez (issued June 4, 2008) and Alayne C. Ferreira, both reflecting the same address of 7600 Jones Blvd., #2015 Las Vegas, NV 89139;

10. A Walker Furniture receipt to Alayne Ferreira only, dated May 23, 2008;

11. A Sprint phone bill address to Alayne Ferreira only, dated March 28, 2008;

12. A T-Mobile phone bill addressed to Irsa Pedrosa only, due July 6, 2008.

On or about September 27, 2008, an Officer the United States Department of Homeland Security's Fraud Detection and National Security (FDNS) Office accompanied by a Supervisory Immigration Officer of USCIS conducted an unannounced site visit at 8623 Amphora St. Las Vegas. NV 89139, which was the claimed address of Alayne Ferreira and Irsa Pedrosa. The Officers were met at the door by a woman, later determined to be you. You then staled that Irsa and Alayne were at work, that you were a roommate, and

that you did not want to get involved (see Interoffice Memo, page 1). After being turned away by you at the door the Officers contacted Alayne Ferreira by telephone and he agreed to meet them at the home. He further indicated that only he and his wife lived in his home and that he had no roommates. When Alayne Ferreira arrived home shortly thereafter, he invited the Officers into his home and they sat at his kitchen table to discuss his living arrangements. Alayne Ferreira told the Officers that he knew the phone number of Irsa Pedrosa, but was unaware her address. Mr. Ferreira also slated dial Irsa Pedrosa had only come to Las Vegas for the immigration interview and then left town. He thought the Irsa Pedrosa may be living in Florida or Puerto Rico. According to the USCIS Officers on the site visit, Mr. Ferreira stated that he only wanted to make a life in the United States and that Irsa Pedrosa had married him to help him. Mr. Ferreira Further indicated that about two months after filing the Form I-485. Application to Register Permanent Residence or Adjust Status, he met his current girlfriend, you, Jessica Tkaez, and that the two of you had been in a relationship ever since. This would include the period of the June 9, 2008 interview at the Las Vegas Field Office when Mr. Ferreira testified under oath that he was living in a bona fide marriage with Irsa Pedrosa. He also stated that at one point you had become pregnant and lost the baby. Alayne Ferreira then withdrew his Form I-485 based off of the first Form I-130.

On or about March 26, 2009, USCIS issued a notice of intent to the deny petition that Irsa Pedrosa had filed on behalf of Alayne Ferreira. The notice was sent to Irsa Pedrosa's last known address and was not

returned as undeliverable. A copy was also sent to John Doechung Lee, attorney of record. On May 26, 2009, the petition was denied with a finding of fraud after USCIS did not receive a response to the notice of intent to deny the petition.

For the instant petition, on May 13, 2011, and again on August 30, 2012, Alayne Ferreira appeared under oath at the USCIS Las Vegas Field Office, both times denying having ever made any statement to the Officers at the site visit about his marriage to Irsa Pedrosa only being for the purpose of allowing him to make a life in the United States. He also claimed that he actually resided with Irsa Pedrosa from approximately June to October of 2007. To support this claimed period of marital cohabitation, the only evidence is the above (item 1.) Nevada General Auto insurance policy evidencing coverage for a single automobile, likely only being used and operated by Alayne Ferreira; furthermore, this policy may have been obtained by Alayne Ferreira without Irsa Pedrosa's presence or knowledge.

Most of the additional evidence covers lime periods where Alayne Ferreira and Irsa Pedrosa were admittedly not living in the same stale and when he was residing with you in a romantic relationship. The various copied photographs of Alayne Ferreira and Irsa Pedrosa are undated and appear to have been taken only at two unknown locations. It is now known that they have been together at least twice: at their wedding in Orlando, FL on June 8, 2007, and at their interview in Las Vegas, NV on June 9, 2008. Alayne Ferreira admittedly paid to fly Irsa Pedrosa in only for her to appear at his interview and that she had no other purpose for visiting Las Vegas on that day. In

summation, all of the evidence fails to show much, if any, interaction between Alayne Ferreira and Irsa Pedrosa outside of these two known occasions and is the suspected extent of their "marital" relationship.

On June 9, 2011, you signed an affidavit before a Notary Public for the State of Nevada, addressing the above USCIS site visit to the purported home of Alayne Ferreira and Irsa Pedrosa on September 27, 2008. In your affidavit, in addition to denying that Alayne Ferreira admitted to any participation in marriage fraud, you claimed that the USCIS officers "tried to push their way into the house," before you closed the door on them. You also claimed that the officers made him sign a withdrawal of the application he had with Irsa Pedrosa.

On August 30, 2012, your allegations against the USCIS officers were addressed during the second interview of the instant petition because they were submitted to support your petition and deny that your husband committed marriage fraud. After it was explained to you that your account of the USCIS officers conduct during the referenced site visit was inconsistent with how USCIS officers conduct inquiries into claimed relationships, you admitted that officers did not physically attempt to "push" their way into your home or physically make Alayne Ferreira sign a withdrawal.

Furthermore, in reference to your testimony and affidavits, you do not demonstrate how you would have knowledge of the nature of Alayne Ferreira's previous marriage because you did not meet him until he claimed to have physically separated from Irsa Pedrosa and you admitted to only briefly seeing her when she flew to

Las Vegas solely for Alayne Ferreira's interview around June 9, 2008. Accordingly, your only basis for knowing whether or not his first marriage was valid is directly from him; as he has already misrepresented himself in front of a federal officer, under oath, regarding his relationship with his first spouse, anything that he has told you regarding his prior marriage is unconvincing and self-serving.

Because USCIS found that Alayne Ferreira previously entered into a sham marriage for the sole purpose of evading the immigration laws, USCIS notified you of the intent to deny your petition pursuant to section 204(c) of the Act. In compliance with Title 8, Code of Federal Regulations, Part 103.2(b)(8), you were then informed of this intent and that you were being afforded an opportunity to respond within the thirty (30) days. On November 1, 2012, you responded to the Notice of Intent to Deny. With your response, you included the following:

1. A brief from your attorney, Constantines Gus Fountas;

2. Your affidavit, dated October 30, 2012;

3. The affidavit of Alayne Ferreira, dated October 30, 2012.

The brief from Mr. Fountas argues that you perceived the behavior of the USCIS officers that visited your home as "pushy", that they made Alayne Ferreira sign a withdrawal, and that you have not changed your story from your original affidavit, dated June 9, 2011, to the present. He continues by providing the dictionary definition of "push" to include both physical force and non-physical conduct. He then provided the definition

of "making" to include conduct that is a means for advancement or success. Finally he questions why your statements should have any bearing on whether your husband's prior marriage was fraudulent. As your affidavit was initially submitted to defend your husband's prior marriage and his conduct during the USCIS site visit at your home, your statements must then be addressed. Accordingly, they have been given very little weight in opposition to USCIS finding that Alayne Ferreira and Irsa Pedrosa entered into a sham marriage for the sole purpose of obtaining an immigration benefit.

Mr. Fountas continues by claiming that Alayne Ferreira did not contradict himself when he claimed that Irsa Pedrosa lived with him from approximately June of 2007 to October of 2010, then when he said that she came to Las Vegas in 2008 for his interview before USCIS. As the Notice of Intent discussed, it is disputed that Irsa Pedrosa ever lived in Las Vegas with him, including the claimed several month period in 2007, based on the documentary evidence to support his claim of ever residing with her. While it is noted that Alayne Ferreira gave a somewhat vague statement during this site visit regarding Irsa Pedrosa coming to Las Vegas for the interview and then leaving town, and that this should not alone be inferred as him admitting that she only came to Las Vegas for the interview, the brief from your attorney failed to rebut the minimal weight accorded to the documentary evidence submitted as to be contemporaneous with his claimed cohabitation with Irsa Pedrosa; it is therefore acknowledged that Alayne Ferreira may not have directly contradicted his story about Irsa Pedrosa living with him and then returning solely to attend his interview around June 9, 2008, but

that it has only been established, based on the evidence, that she only came to Las Vegas for his interview around June of 2008.

Finally, counsel concedes that Alayne Ferreira misrepresented himself in front of USCIS regarding living with Irsa Pedrosa at the lime of his first interview, but denies that he committed marriage fraud and sites various case law regarding Alayne Ferreira and Irsa Pedrosa only being required to establish that they intended to establish a life together at the time of their marriage. As alleged in the Notice of Intent to Deny and left unanswered, Alayne Ferreira failed to establish this intent at the time of his marriage and his conduct after the marriage does not support a valid marriage for immigration purposes either. Conduct of parties after marriage is relevant to their intent at the time of marriage. Matter of Phillis. 15 I. & N. Dec. at 387 (citing Lutwak v. United States, 344 U.S. 604 (1953).

Your second affidavit, dated October 30, 2012, has been considered and was found to be similar to your first affidavit from June 9, 2011, in that you describe the events that occurred at the USCIS site visit of your home on September 27, 2008. You also discussed how your credibility should not be questioned because of your choice of words and that you perceived the USCIS officers' conduct to be in the manner as described. You also felt that Alayne Ferreira did not admit to these officers that his prior marriage was fraudulent. As your attorney addressed in his brief, your credibility should truly have no bearing on a finding of marriage fraud on your husband's prior relationship. Accordingly, your affidavits denying fraud on behalf of your husband have been given little weight in overcoming the inference

that he entered into a sham marriage for the sole purpose of obtaining an immigration benefit.

The affidavit of Alayne Ferreira also denies that he ever entered into a fraudulent marriage. Due to Alayne Ferreira already misrepresenting himself to USCIS regarding his prior marriage and that such affidavits, by their very nature, are largely self-serving, his affidavit is given no weight to support his prior marriage.

The evidence submitted by you and Alayne Ferreira, principally in the form of testimony denying marriage fraud, has been carefully considered, but the mere denial of fraud does not overcome the inference and is insufficient to sustain the petitioner's burden of proof. Matter of Phillis, 15 I&N Dec. 385 (BIA 1975). Further, it is incumbent upon 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. 582 (BIA 1988).

The record in the present case contains evidence from which it may reasonably be inferred that Alayne Ferreira entered into a marriage for the sole purpose of obtaining an immigration benefit. The following evidence was deemed particularly significant; the contradictions in the statements regarding the living arrangements of the parties- Alayne Ferreira maintained at his interview on June 9, 2008, and again over the phone immediately preceding the site visit on September 27, 2008 (see Interoffice Memorandum, page 1. provided with Notice of Intent to Deny), that he was then living with Irsa Pedrosa; the statements made to

USCIS officers during the site visit (provided with Notice of Intent to Deny): and the lack of compelling documentary evidence of any marital cohabitation or intent to start a life with Irsa Pedrosa.

CONCLUSION

A sham marriage has been defined by the BIA as a marriage which may comply with all the formal requirements of the law but which the parties entered into with no intent, or "good faith", to live together and which is designed solely to circumvent the immigrations laws. Sham marriages are not recognized for immigration purposes. See Matter of Patel, 19 I&N Dec. 774 (BIA 1988).

Based on totality of the circumstances, it is reasonably inferred that Alayne Ferreira entered into a sham marriage; therefore, your form I-130. Petition for Alien Relative, may not be approved and hereby is denied pursuant to Section 204(c) of the Immigration and Nationality Act.

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Constantinos Gus Fountas DHS/CIS - Phoenix, AZ

3340 Pepper LN., STE. 103 1330 South 16th St

Las Vegas, NV 89120 Phoenix, AZ 85034

Name: FERREIRA, ALAYNE CRISTIAN

A 086-992-502

Date of this notice: 12/20/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Chief Clerk

Enclosure

Panel Members:

Donovan, Teresa L.

Mann, Ana

Hoffman, Sharon

williame

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A086 992 502 - Las Vegas, NV Date:

In re: ALAYNE CRISTIAN FERREIRA, Beneficiary of a visa petition filed by JESSICA LYNN TKACZ, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Constantinos Gus Fountas, Esquire

ON BEHALF OF DHS: Virginia A. Vasquez

Office of the Chief Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

The United States citizen petitioner appeals a December 7, 2012, decision denying a visa petition (Form I-130) filed on behalf of the beneficiary, her husband. The petitioner has submitted a brief in support of her appeal, and the Department of Homeland Security ("DHS") has opposed the appeal. The appeal will be dismissed.

The beneficiary was previously the subject of a visa petition filed on his behalf by his first United States citizen wife, Irsa Pedrosa, whom he married on June 8, 2007. During an interview on June 9, 2008, Ms. Pedrosa and the beneficiary maintained that they were residing together in a marital relationship, and submitted evidence regarding the bona fides of the marriage. The beneficiary withdrew his Form I-485 following a site visit on September 27, 2008, and has acknowledged that he provided false testimony during his June 2008

interview. In particular, the beneficiary explained that he was not living with Ms. Pedrosa at the time of their interview, but was already involved in a relationship with the current petitioner.

The Field Office Director issue a Notice of Intent to Deny ("NOID") on March 26, 2009, identifying factors indicating that the beneficiary's marriage to Ms. Pedrosa was fraudulent. The Director provided Ms. Pedrosa 30 days to respond to the NOID, but she failed to respond by the deadline. Consequently, on May 26, 2009, the Field Office Director denied the Form I-130 under the provisions of section 204(c) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1154(c). Ms. Pedrosa did not appeal from this decision, and it became final.

The parties in this case married on May 8, 2009, and the petitioner filed a Form I-130 on the beneficiary's behalf on July 23, 2010. On August 11, 2011, the Field Office Director found that the beneficiary had previously married for the purpose of evading the immigration laws, and thus was disqualified from obtaining an approved visa petition under the provisions of section 204(c) of the Act. The petitioner subsequently appealed from this decision. On May 24, 2012, the Board granted the DHS's motion to remand the record to provide the petitioner an opportunity to submit additional evidence. The Field Office Director again identified factors indicating that the beneficiary's prior marriage was fraudulent in a NOID issued on October 2, 2012, and denied the visa petition based on the section 204(c) bar on December 7, 2012. The petitioner appealed from this decision.

In visa petition proceedings, the petitioner has the burden of establishing eligibility for the benefits sought. See Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove the required elements by a preponderance of the evidence. See Matter of Pazandeh, 19 I&N Dec. 884, 887 (BIA 1989). Where the bona fides of a marriage are challenged, the petitioner must present documentary or testimonial evidence to show that it was not entered into for the primary purpose of evading the immigration laws. 8 C.F.R. § 204.2(a)(1)(iii)(B) (evidence to establish the bona fides of a marriage includes proof of joint ownership of property, proof of joint tenancy of a common residence, proof of commingling of financial resources, birth certificates of children born of the petitioner and the beneficiary, and affidavits of others having knowledge of the bona fides of the marital relationship).

Evidence of a fraudulent marriage "must be documented in the alien's file and must be substantial and probative." Matter of Tawfik, 20 I&N Dec. 166, 167 (BIA 1990). A "reasonable inference" that a beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits does not rise to the level of substantial and probative evidence. Id. at 168. We review the Field Office Director's decision de novo. See 8 C.F.R. § 1003.1(d)(3)(iii).

In this case, the beneficiary's conduct during his marriage to Ms. Pedrosa reflects adversely on his intention at the time of marriage. See Matter of Phillis, 15 I&N Dec. 385, 387 (BIA 1975) (noting that the conduct of the parties after the marriage is relevant to their intent at the time of marriage). Based on the fact that the beneficiary became romantically involved with the petitioner shortly after he married Ms. Pedrosa,

and his admission that he falsely testified that he was in a valid and bona fide marriage with Ms. Pedrosa in June 2008, we find substantial and probative evidence supporting the application of the fraudulent marriage bar in section 204(c) of the Act. Matter of Tawfik, supra. We note that Ms. Pedrosa, who also provided false testimony during their interview, has not submitted a statement confirming that their marriage was bona fide. Moreover, there is no persuasive evidence that Ms. Pedrosa and the beneficiary ever lived together. Because we agree that the beneficiary is precluded from obtaining an approved visa petition under the provisions of section 204(c) of the Act, we need not address the remaining arguments on appeal.

The petitioner has submitted additional evidence on appeal, including several internet news articles. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, this Board will not accept evidence offered for the first time on appeal. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); see also Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

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FOR THE BOARD