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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35720
D.C. No. 3:18-cv-00522-AC

[Filed: October 13, 2021]

MICHELLE MANOR; OREN MANOR
Plaintiffs-Appellants,
v.

ALEJANDRO N. MAYORKAS, Secretary, Department of Homeland Security; MERRICK B. GARLAND, Attorney General; UR MENDOZA JADDOU, Director, U.S. Citizenship and Immigration Services; ANNE ARRIES CORSANA, District Director, U.S. Citizenship and Immigration Services; ANYA RONSHAUGEN, Portland Field Office Director, U.S. Citizenship and Immigration Services
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

MEMORANDUM[*]

Submitted October 8, 2021[**]

Before: W. FLETCHER, IKUTA, and BRESS, Circuit Judges

Plaintiffs Michelle and Oren Manor sue under the Administrative Procedure Act, challenging the Board of Immigration Appeals' ("BIA") determination that Oren was ineligible to be the beneficiary of a Form I-130 Petition for an Alien Relative, as a prelude to adjustment of status, on the ground that he had previously entered into a fraudulent marriage for the purpose of gaining immigration benefits. They appeal the district court's grant of summary judgment against Plaintiffs. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review *de novo* the district court's grant of summary judgment. *Wang v. Rodriguez*, 830 F.3d 958, 960 (9th Cir. 2016). "Our review of the BIA's decision to impose a marriage-fraud penalty is governed by the Administrative Procedure Act. We must set aside the BIA's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Zerezghi v. USCIS*, 955 F.3d 802, 807 (9th Cir. 2020) (quoting 5 U.S.C. § 706(2)(A)). "We review *de novo* whether the BIA violated procedural due process in adjudicating an I-130 petition[.]" *Id.* at 807

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

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 343(a)(2).

(citing *Ching v. Mayorkas*, 725 F.3d 1149, 1155–59 (9th Cir. 2013)).

First, the BIA's denial of the I-130 petition was not arbitrary and capricious. While the agency's finding of marriage fraud must be based on "'substantial and probative evidence' . . . , on review, [we] must examine whether there was 'substantial evidence' to support the finding." *Id.* at 814 n.6. "Under this standard, we must affirm unless the evidence is so compelling that no reasonable fact-finder could fail to find the facts were as [Plaintiffs] alleged." *Damon v. Ashcroft*, 360 F.3d 1084, 1088 (9th Cir. 2004).

The record does not compel the conclusion that Oren's previous marriage to Casey Brice was bona fide—that is, that they "intend[ed] to establish a life together at the time they were married." *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975). Oren, Brace, and Brace's daughter were the only people present at their wedding in October 2006. The record contains scant and conflicting evidence of Oren and Brace's courtship and conflicting evidence as to whether they ever cohabitated. *See Matter of Singh*, 27 I & N Dec. 598, 609 (BIA 2019) ("[E]vidence that the parties knowingly and deliberately attempted to mislead or deceive immigration officials regarding their cohabitation, joint finances, or other aspects of the marriage strongly indicate fraud."). When interviewed separately and asked questions about their relationship and daily lives as a married couple, Oren and Brace gave vague and sometimes conflicting

answers. Affidavits submitted in response to requests for additional evidence provide little support from friends or family that their marriage was bona fide. Manor submitted additional evidence including joint banking account statements and joint car insurance, but these were dated nearly two years after the marriage, following the requests for additional evidence. Accordingly, the Manors failed to rebut the substantial evidence showing Oren Manor's marriage to Brace was fraudulent.

Second, USCIS did not violate the Manors' due process rights by failing to provide an opportunity to cross-examine Brace after her 2010 interview. In *Ching*, 725 F.3d 1149, we applied the factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and found a due process violation in the agency's failure to allow a spouse to cross-examine her first husband during an I-130 interview. We concluded that "the extreme weight of the first two factors" in that case—Ching's interest and the risk of an erroneous deprivation—meant the process by which the petition was denied was inadequate. *Ching*, 725 F.3d at 1159. But the evidentiary record in Ching presented a "particularly high" risk of erroneous deprivation because the petitioner "ha[d] substantial evidence that the first marriage was bona fide." *Id.* at 1158. Here, unlike in *Ching*, the agency did not rely heavily on Brace's statements, and Manor did not provide compelling evidence to rebut any of her claims. *See id.* Accordingly, the risk of erroneous deprivation here is not high, and the opportunity to cross-examine Brace was not required under *Mathews*.

The Manors also contend that they should have been permitted to confront two individuals who called an immigration enforcement tip line. USCIS gave these statements no weight, however, and did not consider them in its analysis. As a result, the Manors' lack of opportunity to examine the individuals who called the tip line created no risk of erroneous deprivation under *Mathews*.

Finally, the Manors argue that the BIA erred in relying on Brace's statements because those statements were coerced. However, the Manors waived that argument by failing to raise it before the BIA. *See Reid v. Engen*, 765 F.2d 1457, 1460 (9th Cir. 1985) ("As a general rule, if a petitioner fails to raise an issue before an administrative tribunal, it cannot be raised on appeal from that tribunal.").

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:18-cv-00522-AC

[Filed: July 31, 2020]

MICHELLE MANOR, et al.,
Plaintiffs,

v.

JEFFERSON B. SESSIONS, III, U.S. Attorney General, U.S. Department of Justice, et al.,
Defendants.

OPINION AND ORDER

MOSMAN, J.

On July 6, 2020, Magistrate Judge John V. Acosta issued his Findings and Recommendation ("F&R") [ECF 44], recommending that I GRANT Defendants' Motion for Summary Judgment [ECF 37], and that I DENY Plaintiffs' Motion for Summary Judgment [ECF 34]. No objections were filed.

LEGAL STANDARD

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge but retains responsibility for making the final determination. The

court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

CONCLUSION

Upon review of the F&R, I agree with Judge Acosta's analysis and conclusions. Therefore, I ADOPT his F&R [44] in full. I GRANT Defendants' Motion for Summary Judgment [37] and I DENY Plaintiffs' Motion for Summary Judgment [34]. This case is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 31st day of ~~August,~~ [July] 2020.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:18-cv-00522-AC

[Filed: July 31, 2020]

MICHELLE MANOR, et al.,
Plaintiffs,

v.

JEFFERSON B. SESSIONS, III, U.S. Attorney General, U.S. Department of Justice, et al.,
Defendants.

JUDGMENT

MOSMAN, J.

Based upon my Opinion & Order [ECF 46] granting Defendants' Motion for Summary Judgment [ECF 37], it is ordered and adjudged that this case is DISMISSED with prejudice.

DATED this 31st day of ~~August,~~ [July] 2020.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Case No. 3:18-cv-00522-AC

[Filed: July 6, 2020]

MICHELLE MANOR and OREN MANOR
Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary, Department of Homeland Security; JEFFERSON B. SESSIONS, III, U.S. Attorney General, U.S. Department of Justice; L. FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services; ANNE ARRIES CORSANO, District Director, U.S. Citizenship and Immigration Services; AND ANYA RONSHAUGEN, Portland Field Office Director, U.S. Citizenship and Immigration Services,
Defendants.

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Plaintiffs appeal the denial by U.S. Citizenship and Immigration Services ("USCIS") of the Petition for Alien Relative ("Form I-130") filed by Plaintiff Michelle Manor ("Mrs. Manor"), a United States citizen, on behalf of Plaintiff Oren Manor ("Manor") (collectively "Plaintiffs"), an Israeli citizen. USCIS

denied the Form I-130 petition pursuant to Section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c), based on a finding that Manor's prior marriage was fraudulent. This court has jurisdiction pursuant to 5 U.S.C. §§ 701 et seq., and 28 U.S.C. §§ 1331, 2201. The parties have filed cross-motions for summary judgment (ECF Nos. 34, 37). For the following reasons, Defendants' motion should be granted and Plaintiffs' motion should be denied.

Factual Background

Mrs. Manor is a United States citizen. Admin. Record ("AR") 49, ECF No. 23-1. Manor is an Israeli citizen. AR 566. Mrs. Manor and Manor were married on December 2, 2010, and they have two children. AR 8. On January 9, 2011, Mrs. Manor filed a Form I-130 petition on behalf of Manor seeking to classify him as an "immediate relative" under section 201 of the INA. AR 74. On March 28, 2012, Mrs. Manor and Manor were interviewed by USCIS regarding their marriage. AR 75. On March 22, 2013, USCIS issued a Notice of Intent to Deny ("NOID") the I-130 petition based on prior marriage fraud. AR 3.

USCIS based its decision on Manor's first marriage to Casey Lee Brace ("Brace"), a U.S. citizen. AR 74, 80. Manor was first admitted to the United States on May 1, 2006, as a nonimmigrant visitor. AR 74. On October 11, 2006, Manor married Brace. *Id.* On May 25, 2007, Brace submitted a Form I-130 on Manor's behalf, which was approved on October 10, 2007, without an interview. *Id.* However, USCIS

sought additional information when Manor sought to adjust his status to that of legal permanent resident based on his marriage to Brace. AR 4, 555.

On September 15, 2008, USCIS interviewed Manor and Brace in Charleston, South Carolina. *Id.* During the interview, while under oath, Manor and Brace informed the USCIS officer that they did not live together for the first eight months of their marriage. AR 6, 82. Following the interview, USCIS requested additional information and issued a Form I-72, Request for Evidence ("RFE"). AR 6, 82. Manor and Brace responded to the request, but USCIS found the documents insufficient and issued another RFE, including complete banking records, copies of residential leases, phone statements, a medical examination for Manor, and pay stubs. AR 6. On December 4, 2008, Adam Pugh, an attorney representing Manor and Brace, sent a response, including checking account statements, and medical examination records for Manor. AR 6, 82.

To further investigate, USCIS scheduled another interview with Manor and Brace on July 15, 2009, in Charleston, South Carolina. AR 7. Neither Manor nor Brace appeared for the July 2009 interview. AR 7, 83. USCIS discovered that Manor requested that his address be changed to 3439 NE Sandy Blvd. #618, Portland, OR 97323 in May 2009. AR 7. The Sandy Boulevard address is a post office box. AR 7, 83. USCIS discovered that Manor's address was 6804 Lexington Road, Austin, Texas. AR 7. On July 29, 2009, USCIS received a request from Michael

Meltzer, Manor's attorney, to transfer the case to Portland, Oregon. AR 7. The case was transferred to Portland and an interview scheduled for November 5, 2009. *Id.*

Neither Manor nor Brace appeared for the November 2009 interview. AR 7, 83. On November 6, 2009, Manor sent a letter advising that he and his family had the flu and had been advised to avoid contact with others. AR 83, 354. The interview was rescheduled for January 28, 2010. AR 83, 352. On December 23, 2009, Manor included Brace as the sole beneficiary of his life insurance policy. AR 80, 243-44, 729-30.

Brace did not appear for the January 28, 2010 interview. AR 83. At the January 2010 interview, Manor appeared with counsel and claimed that Brace was caring for her grandmother in Missouri, was four months pregnant, and was unable to attend. AR 84, 347. USCIS scheduled another interview for March 4, 2010, so that Brace could appear. AR 84.

In late January or early February 2010, Brace's alleged then-boyfriend, Chris Paschall, called a USCIS tip hotline and claimed that Brace had been paid to marry Manor. AR 7, 302-09. Paschall also stated that Brace was offered additional money if she would appear at the interview and that Brace was then pregnant with his child. AR 8. Shortly thereafter, Jeff Klingensmith, Brace's ex-boyfriend, also called the tip line claiming that Brace's marriage was fraudulent. AR 7.

On March 4, 2010, Manor and Brace appeared for the interview without counsel and were interviewed separately. AR 7-8, 84. Brace stated that she had flown to Portland the previous day and was planning to fly to Charleston later that day. AR 84. At the end of the interview, Brace withdrew her Form I-130 petition on Manor's behalf and admitted that she married Manor solely to assist him in obtaining immigration benefits. AR 316-17. On June 23, 2010, Manor's adjustment of status application was denied and a Notice to Appear for Removal Proceedings was issued.[1] AR 75, 557; Compl. Ex. J, ECF No. 1-10. Manor and Brace separated shortly thereafter, and their divorce became final on October 4, 2010. AR 75, 788.

On September 6, 2016, USCIS denied Mrs. Manor's I-130 visa petition on Manor's behalf based on the fraudulent marriage bar, 8 U.S.C. § 1154(c). AR 73-88. Mrs. Manor appealed the decision to the Board of Immigration Appeals ("BIA"), which denied her appeal, finding that USCIS's decision was based on substantial and probative evidence. AR 12-15. Plaintiffs filed this action on March 27, 2018.

Legal Standard

The claims in this case involve the termination of an immigration petition, which is subject to judicial review under the APA. *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010) (citing 5 U.S.C. § 706).

[1] Beneficiary Plaintiff's removal proceedings have been stayed pending the outcome of the current I-130 petition.

When a party seeks review under the APA, the district court "sits as an appellate tribunal" and the "entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotations omitted); *Carlsson v. U.S. Citizenship and Immigration Servs.*, No. 2:12-cv-07893-CAS(AGRx), 2015 WL 1467174, at *4 (C.D. Cal. Mar. 23, 2015). "Where a court reviews the decision of an administrative agency, 'a motion for summary judgment stands in a somewhat unusual light, in that the administrative record provides the complete factual predicate for the court's review.' " *Achampoma v. Board of Immigration Appeals*, Case No. 1:16-cv-00668-GBL-MSN, 2016 WL 8732313, at *3 (E.D. Va. Dec. 2, 2016) (quoting *Chan v. U.S. Citizenship & Immigration Servs.*, 141 F. Supp. 3d 461, 464 (W.D.N.C. 2015)). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Gill v. Dep't of Justice*, 246 F. Supp. 3d 1264, 1268 (N.D. Cal. 2017 (quoting *Stuttering Found of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)); *Chan v. U.S. Citizenship and Immigration Servs.*, 141 F. Supp. 3d 461, 464 (W.D.N.C. 2015)).

Under the APA, an agency's decision must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Family Inc. v. USCIS*, 469 F.3d 1313, 1315 (9th Cir. 2006). The standard of review is narrow and assesses "whether the decision was based

on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). The court may not substitute its judgment for that of the agency. *Overton Park*, 401 U.S. at 416; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011). The court is not required to resolve any facts where relief is sought under the APA; rather, the court determines whether the evidence in the administrative record permitted the agency to make the decision it did. *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir. 1985). The court considers the administrative record in existence at the time of the decision. *Carlsson*, 2015 WL 1467174, at *4. The court must uphold an agency's decision even if it is of less than ideal clarity where the "the agency's path may reasonably be discerned." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1478 (9th Cir. 1994) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). An agency's decision will be upheld under the arbitrary and capricious standard if the "evidence before the agency provided a rational and ample basis for its decision." *Nw. Motorcycle*, 18 F.3d at 1471.

The agency's factual findings are reviewed for substantial evidence. *Family Inc.*, 469 F.3d at 1315. The court "will not disturb the agency's findings under this deferential standard 'unless the evidence presented would *compel* a reasonable finder of fact to reach a contrary result.'" *Id.* at 1316 (quoting *Monjaraz–*

Munoz v. INS, 327 F.3d 892, 895 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003) (emphasis in *Family Inc.*). "When the 'BIA conducts a de novo review of the IJ's [Immigration Judge] decision,' the district court reviews 'the BIA's decision rather than the IJ's, except to the extent that the BIA expressly adopts the IJ's ruling.'" *Patel v. Johnson*, No. SA CV 15-0032-DOC (JCGx), 2015 WL 12698427, at *6 (C.D. Cal. Oct. 7, 2015) (quoting *Salazar-Paucar v. INS*, 281 F.3d 1069, 1073 (9th Cir. 2002)); *see also Alaelua v. INS*, 45 F.3d 1379, 1382 (9th Cir. 1995) (reviewing both the BIA and Immigration Judge's decisions when it is clear that the BIA decision "clearly incorporates" the Immigration Judge's decision).

In this case, the BIA conducted *de novo* review of USCIS Field Office Director's September 9, 2016 decision, and explicitly adopted the Director's decision in several places. AR 12 ("We agree with the Director that the evidence of record, including statements from the beneficiary's former spouse, constitute substantial and probative evidence that this prior marriage was entered into for the purpose of evading the immigration laws."); AR 14-15 ("We find the Director independently reviewed the evidence an correctly concluded that the visa petition may not be approved because the record contains substantial and probative evidence of prior marriage fraud by the beneficiary.") Thus, this Court will review the BIA's decision and those portions of the USCIS's decision expressly adopted by the BIA's decision. *Patel*, 2015 WL 12698427, at *6.

Discussion

Plaintiffs move for summary judgment on two grounds: (1) USCIS's decision is arbitrary and capricious because it rests on impermissible evidence and inferences that are not substantial or probative; and (2) USCIS violated Plaintiffs' due process rights by denying them the opportunity to cross-examine Brace, Paschall, and Klingensmith, and erroneously relying on Brace's statements. Defendants move for summary judgment on two grounds: (1) USCIS did not err in denying the petition because it was based on substantial and probative evidence of marriage fraud between Manor and Brace, and that Plaintiffs' evidence did not overcome the substantial and probative evidence of marriage fraud; and (2) there was no due process violation because Plaintiffs received all the process to which they were entitled.

I. Application of Marriage Fraud Bar is Not Arbitrary or Capricious

A. Marriage Bar Legal Framework

United States citizens may file a Form I-130 visa petition on behalf of their immediate relatives, defined as "children, spouses, and parents." 8 U.S.C. § 1151(b)(2)(A)(i). Receiving immediate relative classification through a Form I-130 is advantageous because such visas are not subject to "worldwide levels or numerical limitations" on the number of visas approved. 8 U.S.C. § 1151(b). When a Form I-130 petition is filed with USCIS, the agency must conduct

an investigation, and "if the facts stated in the petition are true," and the alien is an immediate relative, the petition is approved. 8 U.S.C. § 1154(b). However, § 1154(c) prohibits approval of the petition 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).

This provision is commonly referred to as the "fraudulent marriage bar." *Id.* The fraudulent marriage bar "is a severe penalty in several ways." *Zerezghi v. USCIS*, 955 F.3d 802, 804-05 (9th Cir. 2020).

> First, it applies "[e]ven if [the] current marriage is unquestionably bona fide." *Matter of Kahy*, 19 I. & N. Dec. 803, 805 n.2 (BIA 1988). Second, it is mandatory, not discretionary: If the noncitizen committed marriage, fraud at any time in

> the past, "no petition shall be approved" at any time in the future. 8 U.S.C. § 1154(c). The penalty applies regardless of whether the past sham marriage resulted in a successful immigration petition. 8 C.F.R. § 204.2(a)(1)(ii).

Id.; *see also Simko v. BIA*, 156 F. Supp. 3d 300, 310 (D. Conn. 2015) (observing that the fraudulent marriage bar is "very serious" because it is "nonwaivable and perpetual in duration"). To find a prior marriage fraudulent, USCIS must find "substantial and probative evidence" of an attempt to conspiracy "to enter into a marriage for the purpose of evading the immigration laws." *Matter of Tawfik*, 20 I. & N. Dec. 166, 167 (BIA 1990); *Zerezghi*, 955 F.3d at 805. Substantial and probative evidence is a standard of proof that "'refers to the quality and quantity of competent, credible, and objective evidence," establishing that " 'it is more than probably true that the marriage is fraudulent.'" *Zerezghi*, 955 F.3d at 815 (quoting *Matter of Singh*, 27 I. & N. Dec. 598, 607 (BIA 2019)). Direct and circumstantial evidence may be considered in determining whether there is substantial and probative evidence of marriage fraud. *Matter of Singh*, 27 I. & N. Dec. 598, 608 (BIA 2019).

The initial burden of demonstrating marriage fraud is on the government, and it may meet that burden with "documents in its possession, interviews with the couple, and observations made during site visits to the couple's marital residence." *Zerezghi*, 955

F.3d at 805 (citing *Matter of Singh*, 27 I. & N. Dec. at 600-01). If the government finds substantial and probative evidence of marriage fraud, it issues a Notice of Intent to Deny ("NOID") the petition. *Id.*; 8 C.F.R. § 103.2(b)(8)(iv); *Matter of Phillis*, 15 I. & N. Dec. 385, 386 (BIA 1975). The burden then shifts to the petitioner to rebut that finding, and the petitioner may present information on his or her own behalf. *Zerezghi*, 955 F.3d at 805; 8 C.F.R. § 103.2(b)(16)(i); *Matter of Singh*, 27 I. & N. Dec. at 605-06. "Although the government bears the initial burden of producing evidence of marriage fraud, the burden then shifts back to the petitioner to establish that the marriage is bona fide and to rebut the evidence of fraud." *Alabed v. Crawford*, 691 F. App'x 430, 431 (9th Cir. 2017); *In re Kahy*, 19 I. & N. Dec. 803, 806-07 (BIA 1988). After receiving the evidence, USCIS decides whether to approve or deny the petition. 8 C.F.R. § 204.1(d), (e). If the petition is denied, the petitioner may appeal that decision to the BIA, and the BIA's decision constitutes the final agency action. 8 C.F.R. § 1003.1(d)(iii).

The central question in determining whether a marriage was entered fraudulently is whether the parties "intend[ed] to establish a life together at the time they were married." *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975); *U.S. v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002); *Matter of Singh*, 27 I.&N. Dec. at 601. "[T]he couple must have married out of a 'bona fide desire to establish a life together' and must not have entered the marriage to 'evade immigration laws.'" *Zerezghi*, 955 F.3d at 804

(quoting *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002)). The conduct of the parties after marriage is only relevant to the extent that it bears on their subjective intention at the time they entered the marriage. "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.3d at 1202. Evidence of the parties' intent may include property leases, bank accounts, income tax forms, identification as a beneficiary on insurance forms, testimony of others regarding courtship, the wedding ceremony, cohabitation, and shared experiences. *Tkacz v. Duke*, 303 F. Supp. 3d 1052 (D. Nev. 2018), *aff'd*, 788 F. App'x 528 (9th Cir. 2019).

B. USCIS Relied on Substantial and Probative Evidence

The court finds that USCIS identified substantial and probative evidence of an attempt to enter into marriage for the purpose of evading immigration laws. The agency identified specific record evidence to support its finding of marriage fraud.

First, as USCIS indicated, Manor and Brace provided little evidence of their courtship and wedding, and even that evidence conflicted. *See Singh v. Cissna*, Case No. 1:18-cv-00782-SKO, 2019 WL

3412324, at *7 (E.D. Cal. July 29, 2019) (finding that three wedding photographs and marriage certificate were little support of relationship and contributed to substantial and probative evidence of marriage fraud). Brace and Manor represented that they met at a shopping mall where Brace worked. Brace said she approached Manor at the food court; Manor told a psychologist that Brace asked his friends about him. Yet a third version came from Allan Marom, Manor's cousin, who stated that he helped to introduce Manor and Brace. R 81.

Additionally, USCIS found that Brace and Manor's wedding was not a "significant event," noting the absence of photographs and documentary evidence showing family and friends celebrating the event. AR 81. And, USCIS noted that during a September 2008 interview, Brace and Manor gave incompatible answers to questions about how they met and how they spent time together, including what they had done the previous New Year's Eve. AR 81. Based on the lack of evidence about the wedding between Manor and Brace, and the scant and conflicting evidence of Manor and Brace's courtship, USCSI could reasonably conclude that their marriage was not a significant event. Substantial evidence in the record supports these findings and inferences reasonably drawn therefrom, and should not be disturbed.

Second, USCIS determined that Manor and Brace provided false and misleading information about their living arrangements from the inception of their marriage. *See Omokoro v. Hamilton*, 688 F.

App'x 263, 264 (5th Cir. 2017) (per curiam) (finding ample evidence of fraudulent marriage included lack of "substantial evidence that the [couple] ever lived together"). As USCIS indicated, on the Form I-130 petition, Brace indicated that she and Plaintiff-Beneficiary were cohabitating in Loris, South Carolina, from June 2006 to June 2007. AR 82. However, documentary evidence submitted by the couple at a September 15, 2008 interview in Charleston, South Carolina, indicated that Brace was living in Loris and that Manor was living in Myrtle Beach, South Carolina. At the September 2008 interview, Brace also admitted under oath that she had been living in Loris with friends for at least the first eight months of her marriage to Manor, a period that began in October 2006 and continued to June 2007. AR 82. Manor stated under oath at the September 2008 interview that he was living with his cousin Marom in North Myrtle Beach, and that Marom would not let Brace and Brace's child live with them because Marom did not want a child to reside with them. AR 82. These accounts conflicted with Marom's account: in a September 22, 2008 statement he told USCIS that Brace and Brace's daughter were welcome guests and he made no mention of an objection to having Brace's daughter stay with him. AR 82. USCIS's identified discrepancies are supported by substantial evidence in the record.

USCIS detailed additional inconsistencies in the couple's residential history. In Marom's September 2008 statement, Marom indicated that Marom was living at 4300 Trevor Street in North

Charleston, and that Manor was living at Marom's North Myrtle Beach apartment. However, in a November 2008 response to a request for evidence ("RFE"), Manor's attorney, Adam Pugh, provided the inconsistent representation that Manor and Brace had "lived together continuously since October 2006," but that they simply did not have a written lease agreement. AR 83, 381. Pugh represented that the couple lived with Marom at 5751 Ridgewood in North Myrtle Beach from October 2006 through May 2007 (AR 381), a representation completely inconsistent with the information that Manor, Brace, and Marom gave to investigators. Pugh also stated that the couple then resided together with Heidi Ross, a family friend, from May 2007 to November 2008, in Longs, South Carolina (AR 82, 381), but other documents showed that in September 2007, Manor reported his address as 4300 Trevor Street in North Charleston.

In its September 9, 2016 denial, USCIS found that there is "no reliable objective evidence to confirm" the residences of Brace and Manor. AR 83. USCIS found it notable that there was no lease information or "confirmation of any joint residence immediately following the marriage" and that the record disclosed contrary evidence. AR 83. USCIS highlighted that contrary to Pugh's statement, information from Ms. Ross failed to confirm the living arrangement, and Ross indicated that she resided in Maine, not South Carolina.

USCIS also cited evidence from 2009, showing that Brace and Manor were not cohabitating. In May

2009, Manor changed his address to Sandy Boulevard, Portland, Oregon. AR 83. In July 2009, Manor indicated that he was living on Beaverton Hillsdale Highway in Portland, Oregon. AR 83. After Brace and Manor failed to appear for an interview on November 5, 2009, Manor sent a letter suggesting that a family illness prevented them from appearing. However, at that time, Brace was living in Missouri, contrary to Manor's explanation. The November 2009 interview was rescheduled to January 2010, in Portland, Oregon. Manor contended that Brace was then living in Missouri temporarily to care for her grandmother in Missouri. AR 83-84. Brace submitted a letter in which she stated she was pregnant, suggested the child was Manor's, and that it was unsafe for her to travel. AR 84. The interview was rescheduled for March 4, 2010.

At the March 2010 interview, Brace and Manor were interviewed separately. Brace said she had arrived the previous morning and was leaving that evening, and that Manor paid for her airplane ticket from Missouri to Portland. AR 84. Brace admitted that she and Manor had never cohabitated. Brace indicated that she thought the marriage might go somewhere but it never did. Brace stated that she thought it was odd that they never lived together. AR 84. Brace further provided that she had asked for a divorce, and that Manor agreed to a divorce if she agreed to appear for the March 2010 interview. Brace admitted the marriage was for immigration purposes, and at the end of the interview, withdrew her Form I-130 petition on Manor's behalf. AR 84, 316-17.

Based on the lack of cohabitation, USCIS reasonably could conclude that Brace and Manor did not intend to "establish a life together at the time they were married." *Matter of Laareano*, 19 I. & N. Dec. 1, 2 (BIA 1983); *Damon v. Ashcroft*, 360 F.3d 1084, 1088 (9th Cir. 2004) (noting that evidence relevant to intent to establish a life together includes whether they shared a residence). Plaintiffs contend that Brace and Manor's inability to live together was due to financial hardship. The record makes clear that the couple's financial hardship is not the only reasonable inference – or, for that matter, an inference at all – that could be drawn from the evidence. Based on the inconsistent and false record evidence, USCIS reasonably could infer that the Manor and Brace attempted to deceive the USCIS investigators about their living arrangements. Manor provided contradictory statements about their living arrangements under oath and Manor's statements about their living arrangements were not confirmed by others. *See Tkacz*, 303 F. Supp. 3d at 1064 (stating that false information about cohabitation is evidence upon which the government may rely to find marriage fraud). Based on these inconsistencies, USCIS reasonably could conclude that there "was no reliable documentary evidence to demonstrate" that Manor and Brace were cohabitating. AR 85. *See Matter of Singh*, 27 I. & N. Dec. at 609 (holding that "evidence that the parties knowingly and deliberately attempted to mislead or deceive immigration officials regarding their cohabitation, joint finances, or other aspects of the marriage strongly indicated fraud.")

Third, USCIS examined the financial records and co-mingling of assets to discern whether Brace and Manor were attempting to establish a life together at the time they married. *Matter of* Laureano, 19 I.&N. Dec. at 2 (providing that government properly may consider co-mingling of financial assets to determine if marriage fraudulent); *Matter of Phillis*, 17 I. & N. Dec. at 387 (noting government may examine bank accounts and financial records to assess intent of parties) Banking records revealed that Manor and Brace did not begin co-mingling any assets until two years after they were married. Tellingly, there is no evidence of a joint checking account or of any co-mingled assets until *after* USCIS begin investigating whether Brace and Manor's marriage was bona fide.

In response to an RFE in September 2008, Brace submitted copies of a checking account in her name dated October 2007, and a savings account dated December 2007. In response to an October 2008 RFE, Manor and Brace submitted copies of a joint account statement, but it did not appear that Manor and Brace were utilizing the account at the same time. USCIS found that Brace utilized her own account for expenses in October 2008, while Manor utilized the joint account for expenses incurred in Texas, where Manor was living without Brace. Based on this evidence, USCIS reasonably could find that the "evidence does not support that the couple was co-mingling their finances at the inception of the marriage nor two years after." AR 85. This evidence lends additional support to USCIS's conclusion that it

was more probably true that the marriage was fraudulent. *Matter of Phyllis*, 15 I.&N. Dec. at 387.

The court concludes that based on the record as a whole, USCIS has identified specific and probative evidence of marriage fraud. There is an absence of any evidence that the parties intended to create a life together at the time their marriage occurred. There is scant evidence of courtship and no evidence that their wedding was celebrated by relatives and friends. Further, there is evidence that Manor and Brace did not cohabitate and that they attempted to deceive USCIS about their living arrangements. Finally, there is minimal evidence that Manor and Brace co-mingled assets, and what little evidence exists arose *after* USCIS began investigating whether the marriage between Brace and Manor was bona fide. Based on this substantial and probative evidence, it calls into question whether Brace and Manor entered into the marriage intending to establish a life together. *See Ruhe v. Barr*, Case No. 2:18-cv-03734-AB (AGRx), 2019 WL 4492953, at *5 (finding that minimal documentation, inability to provide consistent answers to USCIS questions amounted to substantial and probative evidence of marriage fraud).[2]

[2] Even if the evidence could support the interpretation advanced by Plaintiffs, the Court may not substitute its own interpretation over that of the agency. *Overton Park*, 401 U.S. at 416.

C. Plaintiffs Did Not Rebut Finding of Marriage Fraud and Show Prior Marriage Was Bona Fide

After finding USCIS provided substantial and probative evidence of marriage fraud, the burden shifted to Plaintiffs to establish the marriage between Manor and Brace was bona fide. *Zerezghi*, 955 F.3d at 805. In conjunction with Mrs. Manor's Form I-130 petition on Manor's behalf, Plaintiffs provided evidence regarding Manor's marriage to Brace, including the Oregon divorce decree between Brace and Manor; a March 2012 affidavit from Manor's friend in Austin, Texas; affidavits from Brace's uncle and grandfather indicating that Manor had visited them in Missouri; a list of emails for Manor from December 2007 through October 2009 purportedly from Brace, without content; Manor's 2008 income tax statement indicating he was "married filing separately," with a Myrtle Beach address; copies of Wells Fargo check cards for Manor's business bearing Brace's name; auto insurance for Manor and Brace; a report of a psychological evaluation of Manor conducted on March 16 and 19, 2012; copies of twenty-seven photographs, with twelve showing Brace and Manor together on four separate occasions; and five undated greeting cards with one envelope bearing a date stamp from December 2006, and another envelope bearing a date stamp in July 2009.

Mrs. Manor also submitted a lengthy response from legal counsel dated April 22, 2013; an affidavit from Manor, a life insurance policy naming Brace as

beneficiary dated October 2009; affidavit from a private investigator, Peter DeMuniz; court documents related to Christopher Paschall. AR 79-80. On November 25, 2015, Mrs. Manor and Manor submitted additional evidence from new counsel to support Plaintiff's current marriage, and information concerning Brace's death.

In the decision denying Mrs. Manor's visa petition, USCIS analyzed the foregoing evidence and determined that Plaintiffs did not successfully rebut the substantial and probative evidence of marriage fraud or establish that Manor's marriage to Brace was bona fide. For example, the evidence submitted showed that Manor learned of Brace's death through Facebook, when Brace's aunt reached out to inquire whether Manor knew if Brace had life insurance. AR 86. USCIS noted that after four years of marriage, Brace and Manor had no overlapping friends, such that Facebook was the only way Brace's relative knew how to get in touch with him.

The evidence also showed that Brace's pregnancy in 2010 was the result of an affair. At the time of the March 4, 2010 interview, Brace indicated that she was unsure whether Manor was the father. USCIS concluded that there was no documentary evidence that Manor traveled to Missouri in October 2009, near the time of conception. And, there was no documentary evidence that Brace traveled to Portland in October 2009. AR 86.

USCIS considered Mrs. Manor's testimony of her courtship with Manor. During a March 28, 2012 interview, Mrs. Manor testified that she met Manor through a friend. USCIS noted that if Manor was presenting himself as bona fide married man, mutual friends would not have considered him eligible to date. AR86. And, USCIS cited Mrs. Manor's testimony that she and Manor went on a blind date on March 6, 2010, just two days after Brace and Manor were providing testimony to USCIS that their marriage was bona fide. AR 86. USCIS may consider evidence of a party's intent to deceive as an indication of fraud. *Matter of Singh*, 27 I. & N. Dec. at 609. USCIS reasonably could conclude that Manor's actions in holding himself "out to be single while representing to immigration officials that [he is] still married" as evidence of marriage fraud. *Id.*

USCIS discussed the affidavits presented by Brace's uncle and grandfather, Troy and Herbert Townsend. The affidavits provide information that the uncle and grandfather were aware of the marriage and that Manor traveled to Missouri one time, but neither affidavit includes information that Brace traveled to Portland to visit Manor. AR 86, 229-30. Plaintiffs argue that USCIS has misconstrued the information the affidavits from Brace's uncle and grandfather contain, contending that they show that Manor traveled to Missouri. (Pls. Consol. Reply at 8.) But Plaintiffs have not pointed to any statements in the affidavits of the uncle or grandfather, backed by other objective evidence, that Manor's marriage to Brace was bona fide. The affidavits fail to verify any

aspect of Brace's courtship with Manor or that their marriage was celebrated by family. The affidavits equally support USCIS's interpretation that Brace was living in Missouri, and that Manor visited her there one time. *Ruhe*, 2019 WL 4492953, at *6; *see also Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2003) ("[A]n applicant must offer evidence that is probative of the motivation for marriage, not just the bare fact of getting married."). As noted in *Matter of Singh*, without objective evidence to corroborate the assertions by the affiants, such affidavits are not generally enough to overcome evidence of marriage fraud. *Matter of Singh*, 27 I. & N. Dec. at 609. Even if Plaintiffs have presented a rational alternative interpretation of the affidavits from Brace's uncle and grandfather, USCIS's analysis is rational, and therefore, must be upheld. *Tkacz*, 788 F. App'x at 529; *see also Overton Park*, 401 U.S. at 416 (nothing that if the evidence is susceptible to more than on rational interpretation, court must uphold the agency's findings).

Plaintiffs presented no evidence that Brace traveled to Texas when he moved there for six months in 2008 to 2009 to train as a locksmith. And, as USCIS correctly observed, Manor presented no evidence that he traveled to South Carolina or Missouri to live with Brace after completing the training; instead, Manor moved to Portland, Oregon. "[A]ffidavits alone will generally not be sufficient to overcome evidence of marriage fraud in the record without documentary evidence to corroborate the assertions made by affiants." *Matter of Singh*, 27 I. & N. Dec. at 609.

Plaintiffs contend that USCIS inappropriately relied on inconsistencies in the living arrangements with Manor and Brace, and that those circumstances resulted from their struggling financially. According to Plaintiffs, Manor and Brace's separation is understandable due to their financial situation and Brace's obligation to aid her grandparents. Plaintiffs argue that USCIS is imposing an outdated vision of marriage, and inappropriately focuses on evidence at the end of their marriage. *See Bark*, 511 F.2d at 1201-02 ("Aliens cannot be required to have more conventional or more successful marriages than citizens."). The court disagrees that USCIS relied on inappropriate factors or drew unreasonable inferences drawn from the record.

The facts in the divorce decree provided additional discrepancies about Brace and Manor's cohabitation from which USCIS could conclude that the marriage was fraudulent. In the divorce decree, Brace and Manor indicated that they lived in Conway, South Carolina from October 2006 through November 2008, and that the couple moved to Austin, Texas for training in November 2008 until May 2009, after which they both moved to Portland, Oregon. AR 84. Manor later contradicted the divorce decree when he stated under oath during interview that he had moved to Austin, Texas, by himself after three years of marriage. AR 84, 854. As detailed above, numerous other documents and the couple's sworn testimony contradicts the version of cohabitation and living arrangements presented in the divorce decree. The court rejects Manor's contention that information in

the divorce decree is not relevant because it was entered after Brace withdrew her I-130 petition. Manor signed the divorce decree under penalty of perjury and attested that the statements it contained were true. AR 795. *See Matter of Singh*, 27 I. & N. Dec. at 609 (noting that official government documents indicating fraud "carry more evidentiary weight" than informal evidence of a bona fide marriage). Thus, USCIS reasonably relied on the false sworn testimony in the divorce decree to conclude it was more than probably true that the marriage was fraudulent.

The court is not persuaded by Plaintiffs' argument that USCIS and the BIA unfairly focused on Brace's infidelity, the couple's poverty, and an outdated view of marriage. (Pls.' Consol. Reply at 6-10.) USCIS's finding of marriage fraud is amply supported by the record and the logical inferences that flow from it. Plaintiffs' arguments about the discrepancies in the evidence, and whether USCIS could reasonably make other interpretations is nothing more than a request that the court make a different interpretation of the evidence. Contrary to Plaintiffs' contention, USCIS and the BIA did not unduly focus on the evidence at the end of the relationship between Brace and Manor. As detailed above, USCIS and the BIA examined the entire record of the relationship between Manor and Brace and found that the evidence submitted in response failed to overcome the significant and probative evidence of marriage fraud. AR 14-15. At bottom, Plaintiffs simply are asking the court to reweigh the evidence presented and make its own independent

determination, which the court may not do. The court's task is to examine the record as a whole and "assess whether the evidence permitted the agency to reach the conclusion it did." *Occidental Eng'g*, 753 F.2d at 769. USCIS and the BIA thoroughly examined the record, including the rebuttal evidence offered by Plaintiffs and offered a well-reasoned and detailed explanation of the government's findings. AR 12-15, 73-88. Viewing USCIS's reasons in totality provides ample support for USCIS's conclusion that "it is more probably true that the marriage is fraudulent." *Matter of Singh*, 27 I. & N. Dec. at 610; *Singh v. Cessna*, 2019 WL 3412324, at *7.

Finally, the court rejects Plaintiffs' argument that Brace was coerced into withdrawing her I-130 and that her statements are unreliable and should be excluded. (Pls.' Mot. Summ. J. at 13-16.) Plaintiffs contend that the March 4, 2010 interview with Brace was highly coercive, that Brace was threatened with prosecution, and demonstrates that USCIS's decision is arbitrary and capricious. The court has reviewed the administrative record relied upon by USCIS and the BIA, including the video recording of Brace's March 4, 2010 interview, and finds that the evidence in the record sufficiently supports the government's decision.

Over the course of about an hour, Brace was questioned repeatedly about whether she had been paid to marry Manor, a fact that Brace denied. Brace indicated that Manor helped her with some bills and car insurance on occasion. Brace stated that she and

Manor married for love and admitted it was odd that she and Manor never lived together, and that she hoped the marriage would go somewhere, but it did not. Brace eventually admitted that she had asked for a divorce previously, stated that she did not have the money for a divorce, and that Manor agreed to file for divorce if she agreed to be interviewed. Brace was advised that she could be prosecuted, that the case of marriage fraud was strong, and the she should have plans for her daughter. The USCIS officer observed that if Brace was not being paid and Manor was receiving all the benefits of their relationship, she was receiving very little despite the risk she was taking. Eventually, Brace admitted that they married for immigration purposes, and she withdrew her Form I-130 visa petition on Manor's behalf. AR 316-17.

Even assuming *arguendo* that Brace's admission of marriage fraud was coerced, there is ample evidence in the record absent her admission and withdrawal of the petition that the marriage between she and Manor was fraudulent. *See Avitan v. Holder*, No. C-10-03288 JCS, 2011 WL 499956, at * 12 (N.D. Cal. Feb. 8, 2011) ("[P]laintiff has not cited any authority that suggests that where there is ample evidence in the record—apart from any admission made in connection with an earlier withdrawal, coerced or not—that a marriage was fraudulent, a court may not affirm a denial of an I-130 petition by the USCIS on the basis of that evidence only.") Thus, even if the court were to conclude that Brace was coerced and that exclusion of her statements during the interview, admission of fraud, and withdrawal of

the I-130 is required, substantial and probative evidence remains in the record to support USCIS's finding of marriage fraud. *Singh v. Cissna*, 2019 WL 3412324, at *8 (holding that even if confession of fraud was excluded because it was "coerced," significant and probative evidence supported government's finding of marriage fraud). As detailed above, there was scant and contradictory information about their courtship and wedding, false evidence of their cohabitation, and little evidence of co-mingling of assets. Further, as noted above, the evidence submitted by Plaintiffs was either not credible or was not inconsistent with a sham marriage.

In summary, USCIS reasonably found that the new information submitted by Plaintiffs did not overcome the substantial and probative evidence of marriage fraud. Because the agency's findings are supported by substantial evidence in the record as a whole, and Plaintiffs have not demonstrated that the decisions of USCIS and the BIA are arbitrary and capricious, Plaintiffs' motion for summary judgment on this ground should be denied, and Defendants' motion for summary judgment should be granted.

II. Due Process Did Not Require Plaintiffs Be Afforded the Opportunity to Cross-Examine Brace, Klengensmith, and Paschall

In their motion for summary judgment, Plaintiffs argue that their due process rights were violated when their requests to confront adverse witnesses were denied. Plaintiffs argue they should

have been allowed to cross-examine Brace, and her two former boyfriends, Jeff Klingensmith and Christopher Paschall. Additionally, Plaintiffs contend that Brace's interview on March 4, 2010, was a coercive interrogation and the information USCIS received was unreliable. Plaintiffs insist that because Brace is now unavailable,[3] any evidence USCIS received by Brace in the March 4, 2010 interview should be stricken and not considered.

Defendants contend that Plaintiffs' due process rights were not violated because there is no absolute right to cross-examination in the I-130 visa application process and that Plaintiffs received all the process they were due under the circumstances. Defendants argue that Brace's admission was not coerced, and that even if her statements and admission are excluded, substantial and probative evidence of marriage fraud remains in the record supporting USCIS's denial of the visa petition.

A. Due Process Summary Judgment Standards

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party demonstrates no issue of material fact

[3] Brace and her grandfather, Herbert Townsend, were killed by Paschall in 2015. AR 201-4.

exists, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A party cannot defeat a summary judgment motion by relying on the allegations set forth in the complaint, unsupported conjecture, or conclusory statements. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Summary judgment thus should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In determining whether to grant summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014); *Hernandez*, 343 F.3d at 1112. All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). However, deference to the nonmoving party has limits. The nonmoving party must set forth "specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e) (emphasis added). The "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

The court reviews "whether the BIA violated procedural due process in adjudicating an I-130 petition (thereby acting 'not in accordance with law')" de novo. *Zerzghi*, 955 F.3d at 807; *see Ching v. Mayorkas*, 725 F.3d 1149, 1155-59 (9th Cir. 2013) (establishing that petitioners have a due process right in I-130 petition for spouses, then question is what process is due).

The Due Process Clause of the Fifth Amendment requires that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. The threshold requirement in assessing a due process claim is to determine whether "there exists a liberty or property interest of which a person has been deprived, and if so, we ask whether the procedures followed by the [government] were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

The Ninth Circuit has held that a U.S. citizen seeking approval of a Form I-130 petition for an immediate relative has a constitutionally protected interest. *Zerezghi*, 955 F.3d at 808 (citing *Ching*, 725 F.3d at 1156.) The Ninth Circuit determined that "'as long as the petitioner and spouse beneficiary meet the statutory and regulatory requirements for eligibility" an "[i]mmediate relative status for an alien spouse is a *right* to which citizen applicants are entitled[.]'" *Zerezghi*, 955 F.3d at 808 (quoting *Ching*, 725 F.3d at 1156 (emphasis added)). In short, because Plaintiffs have a constitutionally protected interest in the approval of the Form I-130 visa petition, the court

must determine if the procedures utilized by the government in denying the petition were constitutionally sufficient. *Id.* at 809.

"'[N]ot every case requires a formal hearing or an opportunity to cross-examine witnesses to satisfy due process.'" *Ruhe*, 2019 WL 4492953, at *7 (C.D. Cal. June 26, 2019) (quoting *Singh v. Cissna*, 2018 WL 4770737, at *12; *Tkacz*, 303 F. Supp. 3d at 1059 (holding that in I-130 visa petition cases, determining "how much process id due is case-specific"). The court considers three factors to assess what process is due: "(1) the private interest at stake; (2) the risk of erroneously depriving the petitioner of that interest under the procedures currently in use, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the burdens of adding or substituting the procedures used." *Ruhe*, 2019 WL 4492953 at *7 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Contrary to Plaintiffs' suggestion, "there is no statutory right of cross-examination in I-130 visa adjudications." *Ching*, 725 F.3d at 1154 (highlighting that removal petitions are distinct from visa petition proceedings); *Zerezghi*, 995 F.3d at 810 (holding that in I-130 visa petition setting, court applies *Mathews* factors to determine what process is due); *see also Alabed*, 691 F. App'x at 432 (discussing that due process protections for I-130 petitioners under *Mathews* are case-specific). Thus, the court must determine whether due process requires that Plaintiffs be permitted to cross-examine Klingensmith and Paschall, and whether they should have been

permitted to cross-examine Brace. After careful consideration, the court concludes that due process does not require more process than that received by Plaintiffs.

C. Plaintiffs Received All Process They Were Due

1. private interest

Assessment of the first *Mathews* factor, consideration of the private interests affected by government action, weighs in favor of Plaintiffs. The right to marry and right not to be separated from one's family is a significant interest. *Ching*, 725 F.3d at 1157 ("The 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.") (internal quotation and citation omitted).

2. erroneous deprivation

The second *Mathews* factor considers the risk of an erroneous deprivation of such interest through the procedures used and the probative value of additional procedural protections. *Ching*, 725 F.3d at 1157-58. Plaintiffs rely on *Ching*, a case in which the Ninth Circuit determined that an I-130 visa petitioner and her beneficiary-spouse had a right to cross-examine the beneficiary spouse's ex-husband. *Ching*, 725 at 1159. In *Ching*, the USCIS applied the marriage fraud bar exclusively on the signed statement from the ex-husband, despite the compelling evidence submitted

in response from the petitioner that the beneficiary's previous marriage was bona fide. *Id.* at 1158. Plaintiffs insist that as in *Ching*, their due process rights were violated because they were denied the opportunity to cross-examine Brace, Klingensmith, and Paschall. Additionally, Plaintiffs contend that because Brace no longer is available, her statements should be not be considered. The court disagrees.

Unlike *Ching*, USCIS did not rely solely on Brace's withdrawal of her I-130 and her statements during the March 4, 2010 interview. As detailed above, USCIS and the BIA relied on other evidence in the file, including bank account statements, the inconsistent statements provided by Brace and Manor in interviews in 2008, the inconsistencies regarding their cohabitation, and lack of evidence about their courtship and wedding demonstrating that they intended to begin a life together at its inception. And, unlike *Ching*, Plaintiffs' rebuttal evidence including affidavits from friends and Brace's relatives was not compelling. *Ching*, 725 F.3d at 1158 (detailing that beneficiary presented "extensive details of her marriage" to ex-husband, including descriptions of intimate conversations, bills and a lease). As noted above, the BIA and USCIS found the rebuttal evidence submitted in response to the NOID was of limited probative value and showed that after Manor received training as a locksmith, Brace and Manor saw each other only one time, and Manor provided false testimony in the divorce decree about his cohabitation with Brace. Therefore, unlike the plaintiffs in *Ching*, Plaintiffs have failed to

demonstrate a high risk of an erroneous deprivation because they have failed to present substantial and compelling evidence that Manor's marriage to Brace was bona fide. *Alabed*, 691 F. App'x at 432 (finding no due process violation where cross-examination of former spouse was denied where USCIS relied on inconsistent statements, lack of supporting documentary evidence in addition to sworn confession that marriage was fraudulent).

Moreover, unlike in *Ching*, the additional process requested by Plaintiffs offers little probative value. Plaintiffs contend that they should have been able to cross-examine Paschall because Paschall's contention that Brace was paid to marry Manor heavily influenced the USCIS officer that interviewed Brace. Plaintiffs argue that Paschall and Klingensmith's statements influenced the USCIS decision because USCIS referenced their information the decision. AR 87. Plaintiffs' arguments are not persuasive.

Plaintiffs had access to the substance of the derogatory statements made by Paschall and Klingensmith in the NOID. AR 7-8. As indicated in the USCIS denial, Plaintiffs submitted rebuttal evidence in 2013 concerning Paschall's criminal history which undermined his credibility. AR 80. Significantly, USCIS's denial of the petition indicated that Paschall murdered Brace and Brace's grandfather, noted Paschall's potential for bias, and gave his information little to no weight in its decision. AR 86-87. And, USCIS noted that Klingensmith was the father of

Brace's daughter and may have been motivated to interfere, and therefore gave his statement "minimal weight." AR 86-87. Plaintiffs fail to demonstrate how their position now could be improved if they had been permitted to cross-examine either Paschall or Klingensmith. Therefore, the court finds that the risk of an erroneous deprivation would not be significantly reduced if the additional process Plaintiffs now seek from Paschall and Klingensmith was provided. *Ruhe*, 2019 WL 4492953, at * 8.

Plaintiffs' arguments concerning Brace merit more detailed discussion. Plaintiffs requested a hearing and an opportunity to cross-examine Brace on August 20, 2013, after receiving the NOID, but their request was denied. AR 49, 159-60. Plaintiffs also requested all derogatory information, including a copy of all recordings of any nature of Brace, but it appears they did not receive the video recording of Brace's March 4, 2010 interview until November 2015, after Brace's death. AR 31, 160. Plaintiffs argue that Brace was interrogated and subjected to undue coercion and threat of prosecution until she admitted her marriage to Manor was fraudulent. Plaintiffs contend that because Brace's admission was involuntary and Brace is not available for cross-examination, USCIS should not be permitted to rely on her statements.

USCIS's delay may have prevented a hearing with the opportunity to cross-examine Brace. *See* AR 57. Plaintiffs suggest that if they had been provided the opportunity to cross-examine Brace, they could

have uncovered Brace's motives for and influences on her testimony. AR 56.

Nevertheless, the court observes that by at least March 22, 2013, Plaintiffs were aware of the content of Brace's statements as they are detailed in the NOID. *Cf. Zerezghi*, 955 F.3d at 813 (holding that due process required remand for hearing because government failed to disclose information upon which it relied to determine marriage fraud, denying petitioner opportunity to rebut that evidence). Yet, Plaintiffs offer no information or theory about what substantive information Brace could have provided about the bona fides of her marriage to Manor. Despite being aware of Brace's statements in 2013, and having the opportunity to respond to them prior to Brace's death, Manor did not submit any probative, compelling evidence as to the legitimacy of his relationship with Brace. *See Singh v. Cissna*, 2019 WL 3412324, at *11 (finding petitioner had not demonstrated how the cross-examination sought would have enhanced or altered the adjudication). Plaintiffs fail to offer a persuasive theory about what information they were prevented from obtaining by being denied the opportunity to cross-examine Brace. Thus, the court finds that the risk of erroneous deprivation is very low and is heavily outweighed by the other factors.

3. administrative burden

The third *Mathews* factor requires the court to consider the public interest in providing benefits for

those who are legitimately entitled to receive them against the government's interest in preventing marriage fraud. *Ching*, 725 F.3d at 1158-59. Plaintiffs suggest as that the court must exclude Brace's statements and her admission that her marriage to Manor was fraudulent because using the evidence is fundamentally unfair, especially in light of her coerced confession.

The court concludes that this factor does not weigh in Plaintiffs' favor in this instance. Here, Plaintiffs submitted very little evidence before or after Brace's death to demonstrate that Manor's marriage to her was bona fide. There is little evidence that, at the marriage's inception, they intended to form a life together. When provided the opportunity to submit rebuttal evidence and respond to Brace's statements, Plaintiffs provided only an affidavit from Manor, a copy of a life insurance policy for Manor identifying Brace as the beneficiary, and documents concerning Paschall. AR 79-80. Moreover, when Manor was asked under oath in March 2012 why he believed that Brace withdrew the application, he responded that she was believed it was due to her infidelity. AR 853. Thus, unlike in *Ching*, Plaintiffs' rebuttal evidence here was weak, circumstantial, and failed to corroborate the bona fides of their marriage. Despite having the opportunity to respond directly to Brace's statements about the legitimacy of the marriage between Manor and Brace, Plaintiffs failed to provide documentary support that they intended to begin a life together at the time they wed. AR 14; *see Singh v. Cissna*, 2019 WL 3412324, at *11-12 (holding no due process

violation where opportunity to cross-examine former spouse denied); *Ruhe*, 2019 WL 4492953, at * 8 (same).

Finally, as discussed above, even without the admission of fraud from Brace, there remains substantial and probative evidence in the record supporting USCIS's conclusion that PB's marriage to Brace was fraudulently entered with the purpose of evading the immigration laws. Thus, Plaintiffs have failed to demonstrate the requisite prejudice because they cannot show how an opportunity to cross-examine Brace, Klingensmith, or Paschall would have affected the ultimate denial of the Form I-130 visa petition. *See Singh v. Cissna*, 2019 WL 3412324, at *11 (finding no due process violation where petitioner could not show process requested would have made determinative difference in denial of the petition).

In summary, the court concludes that on balance, the *Mathews* factors weigh in favor of Defendants. Plaintiffs have not demonstrated that they were deprived of adequate due process procedural protections. Therefore, Plaintiffs fail to present any genuine issue of material fact as to the alleged violation of their due process rights. *Tkacz*, 788 F. App'x at 529 (rejecting due process claim where cross-examination would not have impacted denial of I-130 petition); *Alabed*, 691 F. App'x at 432 (rejecting due process claim where it was unlikely cross-examination would significantly reduce the risk erroneous deprivation). Accordingly, Defendants' motion for summary judgment should be granted, and

Plaintiffs' motion for summary judgment should denied.

Conclusion

Based on the foregoing, the court recommends that Defendants' Motion for Summary Judgment (ECF No. 37) be granted and Plaintiffs' Motion for Summary Judgment (ECF No. 34) be denied.

Scheduling Order

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due within fourteen (14) days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 6th day of July, 2020.

/s/ John V. Acosta
JOHN V. ACOSTA
United States Magistrate Judge