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FILED

OCT 13 2021

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

No. 20-35720

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

MEMORANDUM*

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

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

Submitted October 8, 2021**
Portland, Oregon

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

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

petition[.]" *Id.* at 807 (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.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

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The Clerk is requested to award costs to (*party name(s)*):

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