No._____

In the

Supreme Court of the United States

MARIA ELVIA SMITH,

PETITIONER,

v.

MERRICK B. GARLAND, *ET AL.*

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

Godfrey Y. Muwonge
Attorney of Record
Law Office of Godfrey Y. Muwonge, LLC.
3333 N. Mayfair Road, Suite 312
Wauwatosa, WI 53222
Tel: (414) 395-3230
gymscribe@yahoo.com

Attorneys for Petitioner

TABLE OF APPENDICES

OPINIONS BELOW

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

REGULATORY PROVISION INVOLVED

OTHER SOURCES

Appendix A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 5, 2024

Before

Kenneth F. Ripple, *Circuit Judge*

David F. Hamilton, *Circuit Judge*

William B. Brennan, *Circuit Judge*

No. 23-2874

MARIA E. SMITH	Appeal from the
Plaintiff-Appellant	United States
	District Court for
v.	the Eastern District
	of Wisconsin.
MERRICK B. GARLAND,	No. 23-cv-0490-bhl
Attorney General of the	
United States, et al.	Brett H. Ludwig,
Defendants-Appellees.	*Judge.*

ORDER

On consideration of the petition for rehearing and for rehearing en bane filed by Plaintiff-Appellant on July 18, 2024, no judge in active service has requested a vote on the

petition for rehearing en banc,[1] and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

[1] Circuit Judge Nancy L. Maldonado did not participate in the consideration of the petition for rehearing en bane.

Appendix B

No. 23-2874

United States Court of Appeals, Seventh Circuit

Smith v. Garland

103 F.4th 1244 (7th Cir. 2024)

Decided Jun 3, 2024

No. 23-2874

06-03-2024

Maria E. SMITH, Plaintiff-Appellant, v. Merrick B. GARLAND, Attorney General of the United States, et al., Defendants-Appellees.

Godfrey Y. Muwonge, Attorney, Law Office of Godfrey Y. Muwonge LLC, Wauwatosa, WI, for Plaintiff-Appellant. Olga Y. Kuchins, Attorney, Department of Justice, Office of Immigration Litigation - Appellate Section, Washington, DC, for Defendants-Appellees.

Brennan, Circuit Judge.

*1249 Appeal from the United States District Court for the Eastern District of Wisconsin. No. 23-cv-00490- BHL — Brett H. Ludwig, *Judge*. Godfrey Y. Muwonge, Attorney, Law Office of Godfrey Y. Muwonge LLC, Wauwatosa, WI, for Plaintiff-Appellant. Olga Y. Kuchins, Attorney, Department of Justice, Office of Immigration Litigation - Appellate Section, Washington, DC, for Defendants-Appellees. Before Ripple, Hamilton, and Brennan, Circuit Judges. Brennan, Circuit Judge.

United States immigration authorities denied Maria Elvia Smith, a native and citizen of Mexico, legal status in the U.S. Smith sued, alleging the agencies

responsible for this decision violated the Administrative Procedure Act, agency regulations, and the Fifth Amendment. The district court correctly dismissed her complaint, so we affirm.

I. Background

A. Smith's Visa Petition and Agency Investigation

Under the Immigration and Nationality Act, a United States citizen may petition for the allocation of a visa to his noncitizen spouse. 8 U.S.C. §§ 1153(a), 1154(a). To do so, the citizen files a Form I-130, called a Petition for Alien Relative, to classify his noncitizen spouse as an immediate relative. *Id.* §§ 1151(b)(2)(A)(i), 1154(a) (1)(A)(i). Should the citizen die while the I-130 petition is pending, the petition automatically converts to an I-360, Widow(er) Petition, as long as the surviving noncitizen spouse was not legally separated from the citizen at the time of death and did not remarry. 8 C.F.R. § 204.2(i)(1)(iv). This appeal involves Smith's unsuccessful I-360 petition and her legal challenges to that determination.

From 1973 to 2001, Smith was married to Francisco J. Hernandez Rico, also a Mexican native and citizen. They had a son. Just after their marriage dissolved, Smith and Rico tried to enter the United States on May 13, 2002, at the Hartsfield International Airport in Atlanta, Georgia. Immigration inspectors detained and questioned them. The inspectors later reported that they presented themselves as a married couple. Immigration authorities denied Smith and Rico admission into the country and gave them the opportunity to withdraw their application for

admission.

Two years later, Smith and Rico applied for nonimmigrant visas at the United States consulate in Mexico City, again presenting *1250 themselves as a married couple. Officials issued the visas, and both traveled to the United States.

After arriving in this country, Rico married an American citizen. That citizen then filed a Form I-130 on Rico's behalf, which was denied by the U.S. Citizenship and Immigration Services. USCIS noted that during Rico's marriage to the American citizen, Smith and Rico shared a joint bank account and a residence in Wauwatosa, Wisconsin. Rico sought immigration status as the spouse of a U.S. citizen again in 2011. His petition stated he and Smith lived together from January 2006 through March 2011 in Wauwatosa, though at a different address than previously identified by USCIS.

Smith herself married a United States citizen—Arlo Henry Smith, Sr.—in December 2012.[1] Five months later, Arlo filed an I-130 petition to classify Smith as his immediate-relative spouse based on their marriage. Smith submitted 20 items in support of this petition, including information that she lived at the same Wauwatosa residence as Rico from May 2008 through October 2009. Arlo died in February 2014, and Smith's I-130 petition automatically converted to an I-360 petition. *See* 8 C.F.R. § 204.2(i)(1)(iv).

[1] We refer to Mr. Smith as Arlo to avoid confusion between him and the appellant.

Rico later sought a divorce from his U.S. citizen spouse. During the divorce proceedings, Rico said he resided at an apartment in Milwaukee, Wisconsin. A few months later, Rico filed an I-130 petition on behalf of the son he shared with Smith, using that apartment address. In June 2014, an immigration officer visited the apartment. No one was home, but the mailbox listed the names of Rico, Smith, and their son. Immigration authorities also obtained a copy of the lease agreement from the apartment's registered agent; that agreement listed Rico, Smith, and their son as living at the residence and contained their names and signatures. In a July 2015 interview, Smith provided USCIS a sworn statement that she, Rico, and their son lived (and continued to live) at the Milwaukee apartment together before she married Arlo.

B. Immigration Proceedings

On August 19, 2015, USCIS issued Smith a Notice of Intent to Deny her I-360 petition. In the Notice, USCIS described 14 of the 20 items Smith submitted in support of her visa petition as evidence of Smith's "continued [] close relationship" with Rico during her marriage to Arlo that continued "long after [her] nominal divorce[ ]" from Rico. That evidence included the two times Smith and Rico presented themselves to immigration officials as a married couple, as well as their living together at the different Wisconsin residences from 2006 to 2014.

This supported the conclusion that Smith's marriage to Arlo was "invalid for immigration purposes."

The Notice provided that Smith could submit further evidence to support her petition and to counter the

proposed denial. Smith submitted three additional documents, including affidavits from her and Rico. USCIS found this additional evidence unpersuasive, as Smith's and Rico's statements about the couple's interactions with immigration officials at the Atlanta airport in 2002 "lack[ed] credibility." In particular, Smith's response that Rico was travelling with her to provide English-language assistance was contradicted by Rico's sworn statement to immigration inspectors and other evidence from the inspectors. USCIS also explained that Smith "provided false and misleading information to USCIS officers in hopes of obtaining immigration benefits" at her July 2015 USCIS interview. *1251 In the interview, Smith denied ever traveling with Rico after their 2001 divorce. But her assertion was contradicted by the pair's travel together to Atlanta in 2002.

So, in April 2019, following a "careful and complete review of the record and testimony," USCIS denied Smith's I-360 petition. The agency concluded that Smith failed to prove by a preponderance of the evidence that her marriage to Arlo was bona fide for immigration purposes. Though Smith had submitted some documents to establish a marriage, in light of the false and misleading information she provided to immigration officers in 2002 and in 2015, she was "not considered to be credible."

Smith appealed to the Board of Immigration Appeals. Conducting its own de novo review of USCIS's decision, the Board affirmed the denial of Smith's I-360 petition. After considering all the information Smith submitted, the Board confirmed USCIS's conclusion that Smith could not meet her burden to

prove a bona fide marriage because Smith's evidence could not "overcome the derogatory information detailed in the [Notice] of [Smith's] continued cohabitation with her prior spouse."

C. District Court Proceedings

Smith sued the United States Attorney General, USCIS, and the Board, alleging that the agencies improperly denied her I-360 petition and violated her Fifth Amendment right to due process. The government moved to dismiss her complaint and attached the Notice.

The district court granted the motion, finding she did not plausibly allege that USCIS and the Board: (1) acted improperly in denying her petition; (2) acted without observance of the procedure required by law; and (3) substantively violated the Fifth Amendment's Due Process Clause. On its first finding, the district court reasoned that the agencies' decision rested on facts established in the record and supplied sufficient rationale based on those facts. In doing so, the agencies applied the proper standards and burden of proof and validly elected not to credit Smith's statements in light of her past untruthfulness. As to its second finding, the district court rejected Smith's argument that the agencies improperly ignored eight pieces of evidence. The record did not show that the agencies ignored the evidence, and "failure to mention is not failure to consider," so Smith could not plausibly allege that the agencies failed to follow proper procedures in dismissing her I-360 petition. For its third finding, the district court reasoned, "non-citizens have no historically recognized right to reside in the United States with their citizen

spouses, much less reside in the United States after their citizen spouses have died." So, Smith could not plausibly allege a substantive due process claim.

The district court entered judgment dismissing the case, and Smith timely appealed.

II. Discussion

This court reviews de novo a dismissal for failure to state a claim. *See Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020). "[T]he plaintiff must allege 'more than a sheer possibility that a defendant has acted unlawfully.'" *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). While all well-pleaded facts are taken as true and viewed in the light most favorable to the plaintiff, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Camasta* *1252 *v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014) (cleaned up).

The Administrative Procedure Act provides for judicial review of final agency actions, like the denial of an I- 360 petition. *See* 5 U.S.C. §§ 702, 704. This court reviews agency determinations with great deference, *see F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009), and the court cannot substitute its judgment for that of the agency, *see Dep't of Com. v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 2571, 204 L.Ed.2d 978 (2019).

The APA authorizes us to set aside decisions that are, among other things, arbitrary, capricious, or not

supported by substantial evidence. *See* 5 U.S.C. § 706(2). Agency action is arbitrary and capricious if the agency:

> [R]elied 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.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Said another way, the arbitrary and capricious standard requires an agency to do its homework; decisions that overlook relevant record evidence or lack a satisfactory answer do not pass muster. *See id.*; *see also F.C.C. v. Prometheus Radio Project*, 592 U.S. 414, 423, 141 S.Ct. 1150, 209 L.Ed.2d 287 (2021) ("A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). Substantial evidence is what "a reasonable mind would find adequate to support [the challenged] conclusion." *Ghaly v. I.N.S.*, 48 F.3d 1426, 1431 (7th Cir. 1995).

More specific standards govern visa-petition proceedings. The petitioner bears the burden of establishing eligibility for the benefit sought by a preponderance of the evidence. *See* 8 U.S.C. § 1361; *see also*, *e.g.*, *Matter of Brantigan*, 11 I. & N. Dec.

493, 493 (B.I.A. 1966). To establish a spouse's eligibility for classification as an immediate relative based on marriage, the marriage must be bona fide. *See Matter of Laureano*, 19 I. & N. Dec. 1, 2 (B.I.A. 1983). The test for a bona fide marriage is whether, at the inception of the marriage, "the two parties have undertaken to establish a life together and assume certain duties and obligations." *Lutwak v. United States*, 344 U.S. 604, 611, 73 S.Ct. 481, 97 L.Ed. 593 (1953). The agency and "courts look to both the period before and after the marriage" when assessing the couple's intent at the time of the marriage. *Surganova v. Holder*, 612 F.3d 901, 904 (7th Cir. 2010).

As here, in the adjudication of I-360 petitions, USCIS may issue a Notice of Intent to Deny before issuing its decision on the petition. 8 C.F.R. § 103.2(b)(8)(iii). The written Notice "will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond." *Id*. § 103.2(b)(8)(iv). Where "the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is *1253 rendered" *Id*. § 103.2(b)(16)(i); *see Ogbolumani v. Napolitano*, 557 F.3d 729,

735 (7th Cir. 2009). "A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is

disclosed to the applicant or petitioner" except when such information is classified. 8 C.F.R. § 103.2(b)(16)(ii).

Smith argues her complaint plausibly alleges that (1) USCIS and the Board acted improperly in denying her I-360 petition; (2) USCIS and the Board acted without observance of procedure required by law; and (3) USCIS and the Board violated her procedural and substantive due process rights under the Fifth Amendment.[2]

A. Agency Action

Smith asserts the agencies improperly ignored evidence and acted arbitrarily and capriciously in denying her I- 360 petition. Neither claim has merit.

First, Smith argues the Board ignored at least eight items of documentary evidence because USCIS "does not mention" this evidence. Under the APA, the agency "need only *consider* the evidence;" it need not mention every piece of evidence it considered. *Perez-Fuentes v. Lynch*, 842 F.3d 506, 512 (7th Cir. 2016) (emphasis in original); *see also Vergara-Molina v. I.N.S.*, 956 F.2d 682, 685 (7th Cir. 1992) (noting that an agency "need not. . . write an exegesis on every contention") (citation omitted).

Here, USCIS did just that. The agency attested to "a careful and complete review of the record and testimony," and the Board confirmed after "de novo

[2] Smith abandons her arguments that the agencies made a marriage fraud finding and applied the incorrect standards and burdens of proof. She waives these arguments by failing to raise or meaningfully present them in her opening brief. Bradley v. Vill. of Univ. Park, 59 F.4th 887, 897 (7th Cir. 2023).

review of the evidence of record." Nothing in the regulations or guidelines that Smith alludes to imposes any additional requirements. Thus, the district court correctly concluded that "[n]othing in the Complaint or record before [it] suggests that USCIS and the [Board] did not satisfy this minimal requirement" to consider the evidence.

Contrary to Smith's claim, the agencies specifically mention four of the eight items Smith alleges they ignored. The district court correctly found that the only evidence not mentioned in the Notice or the denial decisions were four declarations from friends and family (not six as Smith alleges).

Smith does not challenge this finding but avers that "the absence of any discussion of six statements by credible witnesses" was arbitrary and capricious. The agencies did not discuss each of the six statements. But in light of the other record facts, it was not unreasonable for those statements to be given less weight. The agencies possessed ample evidence of Smith's continued relationship with Rico. Paired with Smith's inconsistent statements to immigration officers about her relationship with Rico (as early as 2002 and as late as 2015), this information casts a shadow over the statements.

Moreover, the contention that the agencies failed to consider certain evidence is a quibble with how the agencies weighed the evidence. But we cannot reweigh the agencies' own balancing of the evidence. *See Fox Television Stations*, *Inc.*, 556 U.S. at 513, 129 S.Ct. 1800 (reaffirming that "a court is not to substitute its judgment for that of the agency."). The agencies fulfilled their obligation by considering the

evidence in Smith's case and announcing the legal basis for its decision. *See Ogbolumani*, *1254 557 F.3d at 735. The district court correctly dismissed this claim.

Next, Smith claims the agencies acted arbitrarily and capriciously by concluding that she had a continued relationship with her ex-husband, which meant her marriage to Arlo was not bona fide. Again, under APA review, an agency decision must stand if a "reasonable mind would find adequate [ ] support" for the decision. *Ghaly*, 48 F.3d at 1431; *Ogbolumani*, 557 F.3d at 733.

Smith initially argues the agency made a factual error. The agency (wrongfully, Smith says) found she was cohabitating with her ex-husband while married to Arlo. But it does not matter who is correct. Neither USCIS nor the Board expressly made or relied on this precise finding. And the agencies still could have concluded that other evidence of her close relationship with Rico, plus her inconsistent statements about that marriage, undermined her assertion that her marriage to Arlo was bona fide.

The agencies' decision is not arbitrary and capricious. All the court must do to make such a reasonable finding is have "a rational connection between the facts found and the [determination] made." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, 103 S.Ct. 2856 (quotation omitted). Here, the facts—Smith's inconsistent statements (hindering her credibility) and evidence of a continued relationship with Rico (including shared addresses, and her own acknowledgement that she lived with Rico and their son)—support the district court's determination that

"[n]othing in [ ] Smith's Complaint plausibly alleges the agencies' credibility determinations fell outside a zone of reasonableness."

Smith's related argument that the agencies did not adequately articulate their reasons also fails. Under the APA, the agencies need only "examine the relevant data and articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). USCIS and the Board provided rational explanations—anchored in the record—describing why Smith's evidence did not establish a bona fide marriage. The agencies' conclusions are rationally connected to Smith's continued, close relationship with her ex-husband despite their divorce in 2001 and her provision of false and misleading statements to immigration officials. So, the agencies' decision was reasonable.

B. Agency Procedure

Smith argues next that the agencies failed to observe the procedures required by law. Specifically, she asserts that USCIS violated 8 C.F.R. §§ 103.2(b)(16)(i) and (ii) by providing her with only a summary—as opposed to the full documentation—of the adverse information on which it based its denial of her I-360 petition.

When USCIS intends to issue an adverse decision based on derogatory information unknown to the petitioner, it must "advise[ ] [petitioner] of this fact and offer[ ] an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered.' 8 C.F.R. § 103.2(b)(16)(i).

Additionally, the agency's decision must "be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner…" 8 C.F.R. § 103.2(b)(16)(ii). This section does not command the production of the actual "record of proceeding"; it directs the agency to disclose only the "information" that is "contained in the record of proceeding." 8 C.F.R. § 103.2(b)(16)(ii). USCIS complies with this regulatory requirement when it provides visa petitioners with a summary *1255 of a sworn statement against them. *See*, *e.g.*, *Ghaly*, 48 F.3d at 1434-35.

In *Ghaly*, this court addressed the same argument Smith raises. There, the court clarified that the "regulations do not mandate that [petitioners] must be provided an opportunity to view each and every sworn statement." *Id.* at 1434. Rather, a summary suffices to provide notice to a petitioner regarding the grounds of the agency's decision—even if "summarized in a single sentence." *Id.* at 1435. As the court explained, the regulation mandates the agency "explain[ ] its intentions plainly and clear[ ]" to permit an applicant's rebuttal of the derogatory information. *Id.* Moreover, the submission of rebuttal evidence in response to the agency's intent to revoke its approval of the petition was evidence that the summary was sufficient. *Id.*

This court reached a similar conclusion in *Ogbolumani*. Recognizing that a court's "review is deferential, and nit-picking the exact characterization of the evidence would overstep" its role, the court concluded 8 C.F.R. § 103.2(b)(16)(i) "does not require USCIS to provide, in painstaking detail, the evidence of fraud it finds." *Ogbolumani*,

557 F.3d at 735. Rather, a notice is sufficient under § 103.2(b)(16)(i) when it provides enough information to permit a petitioner to "rebut the evidence." *Id.*

Here, USCIS acted in accord with its responsibilities under § 103.2(b)(16)(ii) when it disclosed to Smith—in its denial decision incorporating the Notice—the information on which it relied. This information included a description of the 2002 Atlanta airport encounter when Smith and Rico presented themselves to immigration inspectors as a married couple. USCIS complied with the procedures required by law, defeating Smith's second argument.[3]

C. Fifth Amendment

Smith also alleges that the USCIS violated her procedural and substantive due process rights under the Fifth Amendment.

Procedural Due Process Claim. Smith avers the agency procedurally erred when it "denied [her] the meaningful hearing the Constitution requires" by failing to provide her with her ex-husband's sworn statement from the Atlanta airport encounter.[4]

To properly state a procedural due process claim, a

---

[3] Smith contends, without more, that the district court failed to address her inability to obtain the record of the Atlanta airport interaction with immigration officials via a Freedom of Information Act request. But governing regulations did not require the agency to do so.

[4] Smith argues first that she holds a procedural due process interest in Arlo's I-130 petition because "the adjudication of an I-130 [petition] isn't committed by Congress to the agencies' discretion." In her reply brief, she reframes it as an interest in the fair and proper adjudication of Arlo's I-130 petition. Regardless, Smith did not raise the argument below and has waived it. Bradley, 59 F.4th at 897.

plaintiff must establish: (1) a deprivation of a protected liberty or property interest; and (2) the deprivation occurred without due process. *Rock River Health Care, LLC v. Eagleson*, 14 F.4th 768, 773 (7th Cir. 2021) (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999)). A statutorily conferred, nondiscretionary benefit may be a protected property or liberty interest. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 1256L.Ed.2d 658 (2005) (a liberty or property interest is "created" and *1256 "defined by existing rules or understandings that stem from an independent source such as state law" but "is not a protected entitlement if government officials may grant or deny it in their discretion."). But "hope for a favorable exercise of administrative discretion does not qualify." *Portillo-Rendon v. Holder*, 662 F.3d 815, 817 (7th Cir. 2011).

Smith's problem—even assuming she has adequately stated a protected liberty interest—is that she has received all the process due to her. Agency procedures require notice and an opportunity to respond. *See* 8 C.F.R. § 103.2(b)(16). The agencies afforded Smith both. *See Ghaly*, 48 F.3d at 1434-35 (an agency complies with its regulatory obligations when it provides notice of the information it relied on and an explanation of its decision). Smith was advised through the Notice of the derogatory information detrimental to the petition and USCIS's intent to deny it. Then she was given the opportunity to respond with countervailing evidence and to appeal to the Board. Smith took up both offers. And now, she does not identify what additional procedures were required. So, her procedural due

process argument fails.

Substantive Due Process Claim. Smith alleges the Board violated her rights by denying her petition and making it impossible for her to remain in the United States. Specifically, she asserts that because Arlo "had a liberty interest in family and a home in this country which survives him and went to [her,]" she has a "fundamental liberty interest in family and a home in the United States."

A substantive due process claim may proceed where the plaintiff asserts a deprivation of a right that is "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Reno v. Flores*, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (citation and quotation marks omitted). Plaintiffs must provide a "'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal citations omitted). Anything less than a careful description is insufficient, because "extending constitutional protection to an asserted right or liberty interest… place[s] the matter outside the arena of public debate and legislative action." *Id.* at 720, 117 S.Ct. 2258.

Smith's asserted liberty interest is that of a United States citizen residing in the United States with a noncitizen spouse. But the Supreme Court has not recognized this interest as fundamental. And a plurality of the Court has rejected a U.S. citizen's claim that the government's denial of her noncitizen husband's visa application violated her constitutional rights, precisely because it would run afoul of Congress's constitutionally prescribed power to

regulate immigration generally and spousal immigration more specifically. *Kerry v. Din*, 576 U.S. 86, 88, 95- 97, 135 S.Ct. 2128, 192 L.Ed.2d 183 (2015). Our court has declined to take a position on this issue. *See Yafai v. Pompeo*, 912 F.3d 1018, 1021 (7th Cir. 2019). We do not see this case as the vehicle to do so.

* * *

For these reasons, we see no error in the agencies' denial of Smith's I-360 petition, and we AFFIRM the district court's dismissal of Smith's complaint.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARIA ELVIA SMITH,

Plaintiff,

Case No. 23-0490-bhl

v.

MERRICK GARLAND, et al.

Defendants.

ORDER GRANTING MOTION TO DISMISS

Federal immigration law allows for the issuance of a visa to "an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death." 8 U.S.C. § 1151(b)(2)(A)(i). But a visa will only issue if the alien spouse establishes the bona fides of the marriage. In this case, both the United States Citizenship and Immigration Services (USCIS) and Board of Immigration Appeals (BIA) concluded that Plaintiff Maria Elvia Smith failed to demonstrate a bona fide marriage to her late husband, Arlo Henry Smith, Sr., and therefore denied her I-360 Petition. She has appealed to this

Court under the Administrative Procedure Act (APA), 5 U.S.C. § 702. Defendants, a collection of government officials, now move to dismiss on the grounds that Mrs. Smith has failed to state a claim. For the following reasons, Defendants' motion will be granted.

BACKGROUND[1]

On December 12, 2012, Maria Elvia Smith (*née* Moreno) married Arlo Henry Smith, Sr. in Racine, Wisconsin. (ECF No. 1 ¶¶1, 14.) Less than six months later, Mr. Smith filed a Form I-130 Petition asking the government to classify Mrs. Smith as his immediate-relative spouse. (*Id.* ¶14.) Mrs. Smith concurrently filed a Form I-485 to register as a permanent resident. (*Id.*) Unfortunately, Mr. Smith died with the applications still pending. (*Id.* ¶15.) Following his death, the I-130 Petition he filed automatically converted to an I-360 Petition. *See* 8 C.F.R. § 204.2(i)(1)(iv). An I-360 Petition (like an I-130 Petition) is a request for the government to classify an alien as the immediate relative of a United States citizen, eligible for lawful admittance or permanent residence status under 8 U.S.C. § 1151. USCIS decides whether to approve the petition. *See* 8 C.F.R. § 103.2(b)(8).

On August 19, 2015, USCIS issued Mrs. Smith

[1] These facts are derived from Mrs. Smith's Complaint, (ECF No. 1), the allegations in which are presumed true, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007), as well as documents referenced in the Complaint and attached to the Complaint and Defendants' Motion to Dismiss. *See Wright v. Assoc. Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) ("[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [her] claim.").

a Notice of Intent to Deny (NOID) her requested benefits. (ECF No. 1 ¶19.) A NOID is not a final decision. Rather, it is a means through which USCIS communicates an intent to deny benefits while granting the petitioner an opportunity to respond. *See* 8 C.F.R. §§ 103.2(b)(8)(iii), (iv). Here, the NOID informed Mrs. Smith that USCIS doubted her marriage's bona fides because of her continued relationship with her ex-husband, Francisco Javier Hernandez-Rico, whom she divorced on May 25, 2001, in Mexico. (ECF No. 1 ¶¶19, 23.) According to the NOID, about a year after their divorce, Mrs. Smith and Hernandez-Rico "attempted to enter the United States at the Hartsfield International Airport in Atlanta, Georgia," where they inaccurately "presented [themselves] as a married couple." (ECF No. 14-1 at 3.) Two years later, USCIS found the ex-spouses had again presented themselves as a married couple when applying for nonimmigrant visas at the American Consulate in Mexico City. (*Id.*) The NOID also cited evidence showing that, four months *before* she married Mr. Smith, Mrs. Smith had "signed a lease to share an apartment with [Hernandez-Rico] and" the child they had together. (*Id.* at 4.) Four months after Mr. Smith's death, an immigration officer noticed Mrs. Smith's name (alongside Hernandez-Rico's and their son's) on the apartment mailbox. (*Id.* at 3.) And, as of July 13, 2015, Mrs. Smith herself confirmed that she lived with Hernandez-Rico and her son. (*Id.* at 4.) Based on this information, USCIS preliminarily concluded that Mrs. Smith had not established a bona fide marriage to Mr. Smith because she "continued to have a close relationship with [her] former husband

during [her] marriage to [Mr. Smith] and long after [her] nominal divorce." (*Id.*)

Mrs. Smith responded to the agency's findings. She first submitted a sworn affidavit, denying that she and Hernandez-Rico presented as a married couple at the Hartfield International Airport or that they applied for a visa together in 2004. (ECF No. 1 ¶27.) Hernandez-Rico submitted his own sworn affidavit, attesting to the same. (*Id.* ¶28.) Mrs. Smith also produced a funeral home bill showing that she paid for Mr. Smith's funeral expenses; various declarations attesting to her marriage's bona fides; correspondences addressed to her and Mr. Smith; a joint tax return the couple filed in 2012; and a tax return she filed in 2014 as Mr. Smith's surviving spouse. (*Id.* ¶34.) This added to her prior submissions, including documents showing that she was a beneficiary of Mr. Smith's pension plan; had received survivor benefits; took Mr. Smith to doctor visits; and was a joint tax return filer with him in 2013. (*Id.* ¶33.)

Despite Mrs. Smith's efforts, USCIS maintained its position and denied her petition. On April 4, 2019, it issued six-page decision, concluding that she had "not met [her] burden by the preponderance of the evidence that [she] and Mr. Arlo Smith were in a bona-fide marriage for immigration purposes." (*Id.* at 66.) USCIS refused to fully credit Mrs. Smith's or Hernandez-Rico's affidavits because both had a history of "provid[ing] false and misleading information to USCIS officers in hopes of obtaining immigration benefits." (*Id.*)[2] This

[2] After considering her rebuttal evidence, USCIS maintained

adverse credibility determination proved fatal to Mrs. Smith's petition. As USCIS put it: "While some documents showed [Mrs. Smith was] the beneficiary of [Mr. Smith's] Post-Retirement Beneficiary Pension Plan and that [she] received survivor benefits, that [she] accompanied [Mr. Smith] to medical appointments, [and the couple] jointly filed tax returns for 2013, these documents alone [did] not establish a bona-fide marriage especially considering that [Mrs. Smith had] provided false and misleading information to U.S. immigration officers on at least two occasions." (*Id.*) Thus, "[t]he evidence [Mrs. Smith] submitted in response to the NOID did not overcome the derogatory information presented in the NOID." (*Id.*)

Mrs. Smith appealed USCIS's decision to the BIA on May 2, 2019. (*Id.* ¶35.) It took four years, but finally the BIA issued a three-paragraph decision, affirming USCIS "for the reasons stated in [USCIS's]

---

that Mrs. Smith and Hernandez-Rico presented as a married couple at the Atlanta International Airport in 2002. (ECF No. 1 at 65.) But USCIS withdrew its preliminary conclusion that Mrs. Smith and Hernandez-Rico applied together for visas at the American Consulate in Mexico City in 2004. (*Id.* at 66.) Mrs. Smith suggests that this split decision undermines the agency's credibility. Invoking the common law maxim "*falsus in uno, falsus in omnibus*," she contends that USCIS is not trustworthy because it "admits that it made a factual claim in the NOID that turn[ed] out to [be] a total fabrication." (ECF No. 17 at 7-8.) But the entire purpose of the NOID is to give the petitioner a chance to rebut an agency's initial conclusion. A successful rebuttal of a part of the NOID does not render the entire NOID discreditable. If anything, accepting at least some of a petitioner's argument on rebuttal suggests the kind of thoughtful, self-critical review necessary for the immigration system to properly function.

decision and" the NOID. (*Id.* at 85-86.) According to the BIA:

> Upon our de novo review of the evidence of record, we agree with [USCIS] that the evidence submitted in support of the instant visa petition does not demonstrate that the burden of proof has been met. While the petitioner argues that a preponderance of the evidence standard has been met with evidence such as joint tax returns, life insurance, letters, and beneficiary payments, we disagree. . . . [I]n this case, the evidence of record, including the evidence submitted in response to the NOID, is insufficient to overcome the derogatory information detailed in the NOID of the petitioner's continued cohabitation with her prior spouse.

(*Id.*) Mrs. Smith timely appealed the BIA's decision to this Court on April 14, 2023.

LEGAL STANDARD

When deciding a Rule 12(b)(6) motion to dismiss, the Court must "accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff['s] favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016) (citing *Lavalais v. Village of Melrose Park*, 734 F.3d 629, 632 (7th Cir. 2013)). A complaint will survive if it "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Under the APA, an agency is generally liable for misconduct only if it acts arbitrarily or capriciously. 5 U.S.C. § 706(2)(A). Thus, to survive a motion to dismiss, something in the complaint or administrative record must raise a plausible inference that the agency action in question was arbitrary or capricious. Agency action is arbitrary and/or capricious if the agency "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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ANALYSIS

Mrs. Smith asserts three claims: (1) USCIS and the BIA violated the APA through action that was arbitrary, capricious, an abuse of discretion, and not in accordance with law; (2) USCIS and the BIA violated the APA by acting without observance of procedure required by law; and (3) USCIS and the BIA violated the Fifth Amendment's Due Process Clause. (ECF No. 1 ¶¶39-72.) Defendants have moved to dismiss. Because Mrs. Smith's Complaint does not state any viable claims, that motion will be granted.

I. The Complaint Does Not Plausibly Allege that USCIS and/or the BIA Acted

Improperly.

Mrs. Smith first alleges that the agencies violated 5 U.S.C. § 706(2)(A), which requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." She pinpoints three possible errors: (1) the agencies wrongly concluded that Mrs. Smith continued to cohabit with Hernandez-Rico even during her marriage to Mr. Smith; (2) "BIA did not provide a single, cogent reason . . . why the marriage between [Mr. and Mrs. Smith] was not bona fide"; and

(3) USCIS improperly withheld derogatory information. (ECF No. 1 ¶¶39-62.) Any one of these errors, she argues, is sufficient to state a claim under the APA. The Court will address them in turn.

A. The Cohabitation Allegation.

Mrs. Smith believes the "BIA's decision is wrought with error" because it adopts USCIS's charge that she "continued to cohabit with [Hernandez-Rico] even during her marriage to Mr. Smith." (*Id.* ¶40.) This assertion misstates the agencies' rulings. Neither USCIS nor the BIA found that Mrs. Smith resided with Hernandez-Rico "during her marriage to Mr. Smith." The NOID stated: "[Mrs. Smith] continued to have a close relationship with [Hernandez-Rico] during [her] marriage to [Mr. Smith] and long after [her] nominal divorce." (ECF No. 14-1 at 4.) USCIS stated in its decision that evidence showed Mrs. Smith and Hernandez-Rico had a "history of residing together with [their] child in common in Wisconsin over the

years after [their] divorce from each other and during" *Hernandez-Rico's* subsequent marriage. (ECF No. 1 at 66.) And the BIA's affirmance merely noted Mrs. Smith's "continued cohabitation with [Hernandez-Rico]." (*Id.* at 86.) In short, neither agency ever necessarily found that Mrs. Smith and Hernandez-Rico cohabited *during* the former's marriage to Mr. Smith. Rather, the BIA and USCIS observed that Mrs. Smith and Hernandez-Rico lived together at various times after their 2001 divorce, a factual proposition that Mrs. Smith admits is true. (*Id.* at 34.) The agencies' reference to established facts in the record is not arbitrary or capricious.

B. The Bona Fide Marriage Conclusion.

Both USCIS and the BIA concluded that Mrs. Smith failed to establish a bona fide marriage to Mr. Smith by a preponderance of the evidence, but Mrs. Smith argues that neither agency provided a valid rationale for reaching that conclusion. She did, after all, submit evidence to rebut the NOID's preliminary inference that her continued cohabitation with Hernandez-Rico undercut her claim to a bona fide marriage with Mr. Smith. In fact, both she and Hernandez-Rico swore that they "cohabited platonically in the United States for the sake of their common son." (ECF No. 1 ¶41.) Nothing in either agency decision directly addresses why this is not a plausible explanation.

But an agency need not "'write an exegesis on every contention' raised." *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009) (quoting *Rashiah v. Ashcroft*, 388 F.3d 1126, 1130 (7th Cir. 2004)). It "need only 'announce its decision in terms sufficient

to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" *Id.* (quoting *Rashiah*, 388 F.3d at 1130-31). In this case, the agencies rejected Mrs. Smith's explanation not because it was inherently outlandish but because they found that she and Hernandez-Rico "lack[ed] credibility." USCIS explained its reasons for reaching this determination, noting that both had previously "provided false and misleading information to USCIS officers in hopes of obtaining immigration benefits." (ECF No. 1 at 65-66.) This credibility finding would violate the APA only if it was implausible or delivered from left field. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) ("[W]e will uphold a decision . . . if the agency's path may be reasonably discerned."); *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) ("A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). Nothing in Mrs. Smith's Complaint plausibly alleges the agencies' credibility determinations fell outside a zone of reasonableness. The very record she attached to her complaint shows she made inconsistent statements. At one time, she told USCIS that she had *never* traveled with Hernandez- Rico after their divorce. (ECF No. 1 at 37.) On another occasion, she admits that she and Hernandez-Rico traveled to Atlanta together one year after their divorce was finalized. (*Id.* at 33.) This contradiction establishes at least "a 'rational connection between the facts found and the [credibility] choice [the agencies] made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 43 (quoting

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

The agencies also did not, as Mrs. Smith alleges, apply the wrong standard and burden of proof when assessing her marriage's bona fides. (ECF No. 1 ¶44.) The initial burden to establish a bona fide marriage falls on the petitioner seeking benefits, not the agency. *See Brantigan*, 11 I. & N. Dec. 493 (BIA 1966). "If the petitioner's application does not demonstrate by a preponderance of the evidence that the petitioner and beneficiary intended to establish a life together, the . . . petition will be denied." *Wong v. Mayorkas*, No. 19-CV-8427, 2023 WL 2751118, at *3 (N.D. Ill. Mar. 31, 2023). USCIS can also deny a petition under 8 U.S.C. § 1154(c) if it finds "substantial and probative evidence" of marriage fraud. 8 C.F.R. § 204.2(a)(1)(ii). "That determination is separate and distinct from the agencies' determination regarding whether the petitioner has sustained [her] burden [of] establishing a bona fide marriage." *Cassell v. Napolitano*, No. 12-CV-9786, 2014 WL 1303497, at *10 (N.D. Ill. Mar. 31, 2014).

Mrs. Smith argues that USCIS did not produce "substantial and probative evidence" of marriage fraud, so the BIA should have reversed. But neither USCIS nor the BIA accused Mrs. Smith of marriage fraud. While the NOID did use language suggesting USCIS *might* make a marriage fraud finding, the agency's actual decision never went that far—and it did not need to. The BIA, similarly, did not cite marriage fraud as the basis for its affirmance. Instead, both agencies concluded that Mrs. Smith did not meet her "burden by the preponderance of the evidence that [she] and [Mr. Smith] were in a bona-

fide marriage for immigration purposes." (ECF No. 1 at 66, 85-86.) That was the proper burden applied to the proper standard.

C. The Derogatory Information.

Mrs. Smith next alleges that USCIS acted arbitrarily and capriciously when it provided only a three-sentence summary of the derogatory information it ultimately used, in part, to make its adverse credibility determination. (ECF No. 1 ¶¶49-53.) Under 8 C.F.R. § 103.2(b)(16)(i), if a "decision will be adverse to the . . . petitioner and is based on derogatory information . . . of which the . . . petitioner is unaware, [she] shall be advised of this fact and offered an opportunity to rebut the information and present information in [her] behalf before the decision is rendered." The regulation's next paragraph makes clear that an eligibility determination may "be based only on information contained in the record of proceeding which is disclosed to the . . . petitioner." *Id.* at (ii).

Mrs. Smith's position is that USCIS denied her the opportunity to inspect the record allegedly created during her detention at the Atlanta International Airport in 2002 and this failure to disclose the report meant the agency could not rely on it in making its eligibility determination. Of course, USCIS *did* base its eligibility determination on information contained in the 2002 report—it cited the report as evidence to undermine Mrs. Smith's and Hernandez-Rico's credibility. (ECF No. 1 at 65-66.) But Section 103.2 "does not require USCIS to provide, in painstaking detail, the evidence of fraud it finds." *Ogbolumani*, 557 F.3d at 735. Disclosure,

under the statute, does not mean production; a summary can suffice. *See Ghaly v. INS*, 48 F.3d 1426, 1434-35 (7th Cir. 1995). The question is whether the summary provides notice to the petitioner of the grounds USCIS intends to employ to deny her petition and affords her "a full opportunity to rebut the information on which" the decision will be based. *Id.* at 1435. In *Ghaly*, the Seventh Circuit upheld even a single-sentence summary where the summary made the agency's "intentions plain[] and clear[]" and the petitioner submitted evidence evincing an understanding of the agency's position and an intent to rebut it. *Id.*

Mrs. Smith's response to the NOID indicates that she understood the significance of the derogatory information USCIS uncovered. Indeed, the affidavit she submitted in response directly disputed the NOID's allegation that she and Hernandez-Rico presented themselves as a married couple at Atlanta International Airport in 2002. (ECF No. 1 at 33.) That the agencies elected not to credit her statements in light of her prior untruthfulness does not establish a violation of the applicable regulations. Her complaint, therefore, fails to state a plausible claim to relief on this issue. *See Mazinda v. U.S. Dep't of Homeland Sec.*, No. 1:15-CV-00752-SEB-TAB, 2016 WL 6156224, at *12 (S.D. Ind. Sept. 29, 2016).

II. The Complaint Does Not Plausibly Allege that USCIS and the BIA Acted Without Observance of Procedure Required by Law.

Mrs. Smith's second claim contends the agency

actions were taken "without observance of procedure required by law" within the meaning of 5 U.S.C. § 706(2)(D). She argues the agencies improperly ignored eight pieces of evidence she submitted in support of her claim. (ECF No. 1 ¶64.)[3] This evidence included:

- "A funeral-home bill addressed to [Mrs. Smith,] showing that the funeral expenses for Mr. Smith have been paid";
- "A declaration by Ma. del Socorro Sandoval attesting to the bona fides of the marriage between [Mr. and Mrs. Smith]";
- "A joint declaration by Gustavo Ramirez and Lisbeth Soto attesting to the bona fides of the marriage between [Mr. and Mrs. Smith]";
- "A declaration by Arlo Henry Smith, Jr., attesting to the bona fides of the marriage between his late father and [Mrs. Smith]";
- "A declaration by Laura Ann Smith, Smith, Jr.'s wife, attesting to the bona fides of the marriage between her late father-in-law and [Mrs. Smith]";
- "Copies of correspondence addressed to

[3] Mrs. Smith also reprises her "marriage fraud" argument, claiming that the agencies lacked "substantial and probative" evidence indicative of marriage fraud. (ECF No. 1 ¶¶65-67.) As already discussed, the agencies never concluded that Mrs. Smith committed marriage fraud, so this argument has no merit.

[Mr. and Mrs. Smith], jointly";

- "A joint tax return for 2012 for [Mr. and Mrs. Smith]"; and
- "Tax returns from 2014 that [Mrs. Smith] filed as Mr. Smith's surviving spouse".

(*Id.* ¶34.)

"A claim that [the BIA] has completely ignored the evidence put forth by a petitioner is an allegation of legal error." *Perez-Fuentes v. Lynch*, 842 F.3d 506, 512 (7th Cir. 2016) (quoting *Iglesias v. Mukasey*, 540 F.3d 528, 531 (7th Cir. 2008)). But a failure to mention evidence is not the same as ignoring that evidence. The BIA "is not required to mention each piece of evidence in its decision; [it] need only *consider* the evidence." *Id.* Nothing in the Complaint or record before this Court suggests that USCIS and the BIA did not satisfy this minimal requirement.

Out of the eight pieces of evidence Mrs. Smith alleges the agencies ignored, only the declarations went completely unmentioned across the NOID, USCIS decision, and BIA affirmance. (*See* ECF No. 14-1 at 2-3.) But failure to *mention* is not failure to *consider*. USCIS attested to "a careful and complete review of the record and testimony." (ECF No. 1 at 66.) Likewise, the BIA confirmed "de novo review of the evidence of record." (*Id.* at 85-86.) The complaint does not plausibly allege that the agencies lied when they announced their comprehensive reviews; it merely emphasizes that USCIS's decision did not specifically mention eight individual pieces of evidence. (*Id.* ¶34.) But, of course, the agency was not

required to cite every iota of evidence. The failure to reference a handful of declarations is not, therefore, in and of itself, enough to state a claim for relief under Section 706(2)(D). *See Hassan-McDonald v. Mayorkas*, No. 21-C-3931, 2022 WL 170045, at *4 (N.D. Ill. Jan. 19, 2022) ("While the BIA did not discuss all of the evidence before it in detail, it cannot be said that it 'ignored' the evidence Plaintiff adduced in support of her petition.").

III. USCIS and the BIA Did Not Violate the Fifth Amendment's Due Process Clause.

Mrs. Smith's final claim is that the agencies' decisions violated her "fundamental liberty interest in family and a home in the United States," in contravention of the Fifth Amendment Due Process Clause. (ECF No. 1 ¶71.) But no such fundamental liberty interest exists. In *Kerry v. Din*, 576 U.S. 86, 88 (2015), a plurality of the United States Supreme Court rejected the notion that non-citizens have any constitutional right to live in the United States with their citizen spouses.

The Seventh Circuit has "avoided taking a position on this issue in the past." *Yafai v. Pompeo*, 912 F.3d 1018, 1021 (7th Cir. 2019). But it is enough, for present purposes, that non-citizens have no historically recognized right to reside in the United States with their citizen spouses, much less reside in the United States after their citizen spouses have died. In the substantive due process realm, courts only protect rights and liberties "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993) (quoting *United States v. Salerno*, 481

U.S. 739, 751 (1987)). Surely a right that a plurality of the Supreme Court denies exists and that the Seventh Circuit refuses to recognize is not "rooted in the traditions and conscience of our people." Other courts have reached similar conclusions. *See Bright v. Parra*, 919 F.2d 31, 33 (5th Cir. 1990) (holding that a citizen "has no constitutional right to have her alien spouse remain in the United States") (citations omitted); *Almario v. Att'y Gen.*, 872 F.2d 147, 151 (6th Cir. 1989) ("[T]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in this country."); *Owusu-Boakye v. Barr*, 376 F. Supp. 3d 663, 680 (E.D. Va. 2019), *aff'd*, 836 F. App'x 131 (4th Cir. 2020) ("[I]n the substantive due process context, courts have rejected the theory that an individual pursuing an I-130 petition has a fundamental right to reside in the United States with his non-citizen relatives[.]") (citations omitted).

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss, (ECF No. 13), is **GRANTED**, and the case is **dismissed**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, WI, September 15, 2023.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

Appendix D

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Maria Elvia SMITH, A204-827-691
Petitioner, as widow of Arlo Henry Smith

FILED

March 24, 2023

ON BEHALF OF PETITIONER: Stephen Berman, Esquire
ON BEHALF OF DHS: Scott J. Langerman, Associate Counsel

IN VISA PETITION PROCEEDINGS

On Appeal from a Decision of the Department of Homeland Security, Milwaukee, WI

Before: Mann, Appellate Immigration Judge

MANN, Appellate Immigration Judge

The petitioner bas appealed the Field Office Director's April 4, 2019, decision denying her Petition fur Amerasian, Widow(er), or Special Immigrant, Form I-360.[1] The Department of Homeland Security

[1] The Petition for Alien Relative (visa petition), Fonn 1-130, was automatically converted to a Form 1-360 petition upon the

(DHS) opposes the appeal[2] We review all questions arising in appeals from decisions of United States Citizenship and Immigration Services (USCIS) officers de novo. *See* 8 C.F.R. § 1003.l(d)(3)(iii). The appeal will be dismissed.

In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the immigration benefit sought. *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 (BIA 1989). When filing a widow visa petition, the petitioner must establish that the marriage with the deceased United States citizen was legally valid and bona fide at its inception *See Matter of Laureano,* 19 I&N Dec. 1, 2-3 (BIA 1983).

We affirm the Director's decision to deny the visa petition for the reasons stated in the decision and in the August 19, 2015, Notice of Intent to Deny (NOID). *See Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994). Upon our de novo review of the evidence of record, we agree with the Director that the evidence submitted in support of the instant visa petition does not demonstrate that the burden of proof bas been met. While the petitioner argues that a

---

death of the United States citizen spouse. 8 C.F.R. § 204.2(i)(l)(iv).

[2] The DHS argues that the appeal is untimely, noting that the decision was dated June 22, 2021, and that the appeal was not received until August 10, 2021. However, the record reflects that the decision is dated April 4, 2019, and the Notice of Appeal was received on May 2, 2019. It appears that a duplicate notice of decision was sent on April 23, 2021.

preponderance of the evidence standard has been met with evidence such as joint tax returns, life insurance, letters, and beneficiary payments, we disagree. Where there is a reason to doubt the validity of marital relationship, the petitioner must present sufficient evidence to overcome the derogatory information *Matter of Phillis,* 15 I&N Dec. 385 (BIA 1975). Specifically, in this case, the evidence of record, including the evidence submitted in response to the NOID, is insufficient to overcome the derogatory information detailed in the NOID of the petitioner's continued cohabitation with her prior spouse.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

Appendix E

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Milwaukee Field Office
310 E. Knapp Street
Milwaukee, WI 53202

April 4, 2019

DECISION

A207-816-148
MSC1591715236

Maria Elvia Smith
5000 S 107th Street, Apt. 206
Greenfield, WI 53228

Dear Maria Smith:

A Petition for Alien Relative, Form 1-130, was submitted on your behalf to U.S. Citizenship and Immigration Services (USCIS) on May 23, 2013, by Mr. Arlo Henry Smith (the petitioner). Records indicate that Mr. Arlo Henry Smith died on February 6, 2014.

Generally, to demonstrate that an individual is eligible for approval as the beneficiary of a petition filed under INA 20l(b), a petitioner must:

- Establish a bona fide relationship to certain alien relatives who wish to immigrate to the United States;

- Establish the appropriate legal status (i.e., U.S. citizenship or lawful permanent residence) to submit a petition on the beneficiary's behalf.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the requested immigration benefit sought under the INA. *See Matter of Brantigan*, 11 l&N Dec. 493, 495 (BIA 1966); Title 8, Code of Federal Regulations (8 C.F.R.), section I03.2(b). You must demonstrate that the beneficiary can be classified as your spouse. See 8 C.F.R. 204.2(a). The petitioner must show, by a preponderance of the evidence, *that* the marriage was legally valid and bona fide at its inception, and "not entered into for the purpose of evading the immigration laws." *Matter of Laureano*, 19 l&N Dec. I, 3 (BIA I983). Although evidence to establish intent at the time of marriage can take many forms, some of those forms include: "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, shared residence, and experiences." *See Laureano*, *supra.*

When there is reason to doubt the validity of a marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading immigration law. *See Matter of Phillis*, I5 l&N Dec. 385, 386 (BIA 1975). To demonstrate that the purpose of the marriage was not to evade immigration law, a petitioner may

submit documentation showing, for instance, joint ownership of property, joint tenancy of a common residence, commingling of financial resources, birth certificates of children born to the union, and sworn or affirmed affidavits from third parties with personal knowledge of the marital relationship. See 8 CFR 204.2(a)(l)(iii)(B).

Records indicate that you (the beneficiary) are a citizen and national of Mexico. You last entered the United States as a B-2 Visitor on or about October 30, 2004. You stated you have been married two times. You married the petitioner on December 12, 2012, in Racine, Wisconsin. On May 23, 2013, the petitioner filed Form 1-130 on your behalf. On August 15, 2013, you and the petitioner appeared for an interview in connection with your pending Forms 1-130 and 1-485. On February 6, 2014, the petitioner died. When the petitioner died, his Form 1-130 automatically converted to a Petition for Widow, Form 1-360.

On August 19, 2015, USCIS issued you a Notice of Intent to Deny your petition (NOID). The NOID listed evidence you and the petitioner provided in support of your marriage as well as derogatory information gathered connected your immigration history. In addition, the NOID listed in detail evidence you provided in support of your marriage to the petitioner covering periods of time before and after his death.

The NOID also stated the following, in-part (paraphrased):

USCIS records indicate that you had one prior marriage to Francisco J. Hernandez Rico, a Mexican

national who was born on September 13, 1949. You married Francisco J. Hernandez Rico (your former husband) on January 6, 1973 in Mexico, and divorced him in Mexico on May 25, 2001. On May 13, 2002, you and your former husband attempted enter the United Stales at the Hartsfield international Airport in Atlanta, Georgia. You were both detained and questioned by Immigration Inspectors who indicated on their report that you and your former husband presented yours as a married couple. You were both found to be inadmissible to the United States pursuant to section 212(a)(7)(A}(I) of the Immigration and Nationality Act (INA), and provided the opportunity to withdraw your application/or admission.

On July 6, 2004, both you and your former husband applied for nonimmigrant visas at the American Consulate in Mexico City. You both presented yourselves as a married couple to the visa issuing officials. After you and your former husband obtained your nonimmigrant visa, you both traveled to the United States.

On May 12, 2005 your former husband married a United Stales citizen. On March 2, 2006, the United States citizen filed a Form1-130, Petition for Alien Relative on your former husband's behalf. On September 30, 2009, the Form l-130 was denied. The USCIS officer's denial indicated that during his marriage to a United States citizen, you and your former husband continued to have a joint bank account and shared a residence located at 528 N. 62nd Street, Wauwatosa, WI 53212-4170.

On June 22, 2011, after his first unsuccessful attempt, your former husband again sought status as a spouse of a United States citizen. The evidence he submitted in support of his petition (Form G-325) again indicated that you and your former husband shared the same place of residence; from January 2006 through March 2011 your former husband resided at 2223 N. 115th Street, Wauwatosa, WI.

The evidence you submitted in support of your petition (Form G-325) filed on May 20, 2013 indicates thar you lived at the same residence; from May 2008 through October 2009 you resided at the same address, 2223 N. 115th Street, Wauwatosa, WI.

On August 23, 2013, your former husband petitioned for a divorce from the United States citizen. During the divorce, he indicated that he resided at 5101 N. Lovers Lane Road, Apt. 22, Milwaukee, WI. On January 21, 2014, your former husband filed a petition (Form1-130) on behalf of his son, Francisco Javier Hernandez Moreno, using the address 5151 N. Lovers Lane Road, Apt. #22, Milwaukee, WI.

On June 6, 2014, an immigration officer conducted an onsite visit to 5101 N. Lovers Lane Road, Apt. #22, Milwaukee, WI. The occupants of the apartment were not home but the officer noted that your name, your former husband's name, and your son's name were listed on the apartment mailbox. Furthermore, a copy of the lease agreement provided by the registered agent indicated that you, your former husband. and your son were residing together at 5101 N. Lovers Lane Road, Apt. #22. Moreover, the lease agreement dated August 10, 2012, contains your

name and signature, your former husband's name and signature, and your son's name and signature.

On July 13, 2015, you appeared for an interview at the USCIS Milwaukee Field Office. During the interview you provided a sworn statement in which you indicated that your son and your former husband, Francisco J. Hernandez Rico, both live in the United States at 5101 North Lovers Lane Rd, Apt. 22, Milwaukee, WI. You also indicated that you, your son and your former husband lived together this residence before your marriage to the United States citizen petitioner.

The evidence on record indicates that while claiming to be divorced, you and your former husband presented yourselves as a married couple to United States Immigration Inspectors and State Department Officers on two different occasions. After you both entered the United States, your former husband married a United States citizens who filed a petition on his behalf. In spite of his marriage to a United States citizen, your former husband and you continued to maintain your relationship more than 11 years after your nominal divorce. About four months before your marriage to the petitioner, on August l 0, 2012, you signed a lease to share an apartment with your former husband and your son.

You first responded to the NOID on September 17, 2015, and submitted a letter from an attorney requesting additional time to respond to the NOID as you filed a Freedom of Information/Privacy Act Request, Form G-639.

On December 29, 2016, you submitted a supplemental response to the NOID. In this second

response you submitted a notarized affidavit that you completed, a notarized affidavit from your former spouse Francisco Hernandez Rico, and a photocopy of a Focus on Energy form - Efficient Heating & Cooling Residential Cash-Back Reward Program dated January 16, 2009.

In your notarized affidavit you claim that you did not present yourself as married to Francisco J. Hernandez Rico to former INS at the Atlanta airport in 2002. You claim that you and Francisco were residing at different addresses in Mexico at the time and that Francisco only traveled with you to help you with the English language. In Francisco's notarized affidavit, he too denies you presented yourselves as a married couple at the Atlanta airport in 2002. In contrast to these affidavits, immigration inspectors clearly indicated that you both presented yourselves as a married couple. In addition, Francisco participated in a sworn statement taken during that time at the Atlanta airport with INS officers. In his statement he referred to you as his wife and stated his purpose for coming to the United States was for business and pleasure. He did not indicate that his purpose was to provide English interpretation for you. Based on the records of the former INS, you and Francisco have now provided false and misleading information to USCIS in hopes of you obtaining an immigration benefit. Your notarized statement and Francisco's notarized statement lack credibility.

The NOID referenced that you participated in a sworn statement at the USClS Milwaukee Field Office on July 13, 2015. During the sworn statement you were asked if you and your former spouse Francisco had ever traveled together after you were

divorced. During your sworn statement you stated, "No". As outlined above, you and Francisco were traveling together in May 2002, approximately one after your divorce. You again have provided false and misleading information to USCIS officers in hopes of obtaining immigration benefits.

ln your notarized affidavit and Francisco's notarized affidavit, you both maintain that you did not apply together for visa at the American Consulate in Mexico City on July 6, 2004. You both listed different dates of being issued your visas. USCIS accepts these separate dates of visa issuance as you claim.

Your affidavits explain your history of residing together with your child in common in Wisconsin over the years after your divorce from each other and during periods of time during Francisco's marriage to his petitioning United States citizen. You both stated you purchased homes together and were in business together. You both indicated that you maintained a bank account together post-divorce. The Focus on Energy statement has been reviewed. This statement lists you as a homeowner and a separate delivery address on places you and Francisco have each resided.

The evidence you provided in support of your marriage to Arlo has been reviewed and considered. While some documents showed you were the beneficiary of his Post-Retirement Beneficiary Pension Plan and that you received survivor benefits, that you accompanied Arlo to medical appointments, you jointly filed tax returns for 2013, these documents alone do not establish a bona-fide

marriage especially considering that you have provided false and misleading information to US immigration officers on at least two occasions. You are not considered to be credible. Francisco's affidavit submitted in response to the NOID also contains false and misleading information. He's statements in his affidavit are also not credible. No other evidence has been submitted in response to the NOID for consideration.

Based on a careful and complete review of the record and testimony, USCIS finds that you have not met your burden of proof in demonstrating that your petition should be approved. You have not met your burden by the preponderance of the evidence that you and Mr. Arlo Smith were in a bona-fide marriage for immigration purposes. The evidence you submitted in response to the NOID did not overcome the derogatory information presented in the NOID. You and Francisco have provided conflicting information regard an entry into the United States and how you presented yourselves to former INS officers by claiming to be a married couple. Therefore, USCIS denies your Form 1-130, which was converted to Form 1-360, as you have not met your burden by the preponderance of the evidence.

This decision will become final unless you appeal it by filing a completed Form EOlR-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 Milwaukee Field Office at the following address:

Milwaukee Field Office
310 E. Knapp Street
Milwaukee, WI 53202

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 to be 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/eoir.

If you need additional information, please visit the USCIS Web site at www.uscis.gov or call our National Customer Service Center toll free at 1-800-375-5283.

Sincerely,

s/ Kay F. Leopold
Kay F. Leopold Field Office Director

cc: Attorney

Appendix F

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix G

8 U.S.C. § 1151 (2018)

Worldwide level of immigration.

(b) Aliens not subject to direct numerical limitations

Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows:

* * *

(2)(A)(i) Immediate relatives. -For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.
***

Appendix H

8 U.S.C. § 1154 (2018)

Procedure for granting immigrant status.

(a) Petitioning procedure.

(1)(A)(i) Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 1153(a) of this title or to an immediate relative status under section 1151(b)(2)(A)(i) of this title may file a petition with the Attorney General for such classification.

(ii) An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.

* * *

(b) Investigation; consultation; approval; authorization to grant preference status.

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) of this title or is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition and forward one copy thereof to the

Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

* * *

(l) Surviving relative consideration for certain petitions and applications.

(1) In general

An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) Alien described

An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was-

(A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 1151(b)(2)(A)(i) of this title) ***

Appendix I

8 C.F.R. § 103.2 (2024)

Submission and adjudication of benefit requests.

* * *

(b) ***Evidence and processing***—

* * *

(8) ***Request for Evidence; Notice of Intent to Deny***—(i) *Evidence of eligibility or ineligibility.* If the evidence submitted with the benefit request establishes eligibility, USCIS will approve the benefit request, except that in any case in which the applicable statute or regulation makes the approval of a benefit request a matter entrusted to USCIS discretion, USCIS will approve the benefit request only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the benefit request will be denied on that basis.

(ii) ***Initial evidence.*** If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) ***Other evidence.*** If all required initial evidence has been submitted but the

evidence submitted does not establish eligibility, USCIS may: deny the benefit request for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the benefit request and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

(iv) ***Process.*** A request for evidence or notice of intent to deny will be communicated by regular or electronic mail and will specify the type of evidence required, and whether initial evidence or additional evidence is required, or the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond. The request for evidence or notice of intent to deny will indicate the deadline for response, but in no case shall the maximum response period provided in a request for evidence exceed twelve weeks, nor shall the maximum response time provided in a notice of intent to deny exceed thirty days. Additional time to respond to a request for evidence or notice of intent to deny may not be granted.

* * *

(16) ***Inspection of evidence.*** An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

(i) ***Derogatory information unknown to petitioner or applicant.*** If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

(ii) ***Determination of statutory eligibility.*** A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except as provided in paragraph (b)(16)(iv) of this section.

(iii) ***Discretionary determination.*** Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the

Appendix J

8 C.F.R. § 204.2 (2024)

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.

(i) ***Marriage within five years of petitioner's obtaining lawful permanent resident status.***

* * *

(B) ***Documentation.*** The petitioner should submit documents which cover the period of the prior marriage. The types of documents which may establish that the prior marriage was not entered into for the purpose of evading the immigration laws include, but are not limited to:

(1) Documentation showing joint ownership of property;

(2) A 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 prior spouse;

(5) Affidavits sworn to or affirmed by third parties having personal knowledge of the bona fides of the prior marital relationship. (Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit; his or her relationship, if any, to the petitioner, beneficiary or prior spouse; and complete information and details explaining how the person acquired his or her knowledge of the prior marriage. The affiant may be required to testify before an immigration officer about the information contained in the affidavit. 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 prior marriage was not entered into in

order to evade the immigration laws of the United States.

Appendix K

CITY OF BURLINGTON, WI

Veritas

POLICE

Call Detail Report New **Printed Date: 04/06/23 15:03**

14-001867	**500 Lewis St; BU**	**Rescue Run (RR)**
Reported	: 02/06/14 22:30	Reported Location: 500 Lewis St; BU
Finished	: 02/07/14 00:57	
Units	904 – 073 – Wangnoss, Bryan F 905 – 118 – Baumhardt, Matthew R 906 – 119 – Sterr, Jacob A 909 – 037 – Fisher, John R	

Names

Activity	**Name**	**Race**	**Sex**	**DOB**
Complainant	Smith, Maria E	White	Female	10/09/46
Address:	500 Lewis St, Burlington, WI 53105			
Patient	Smith, Arlo H	White	Male	02/16/2944
Address:	500 Lewis St, Burlington, WI 53105			

Summary

RCC transferred a 911 call from Maria Smith stating her husband, Arlo Smith was unresponsive. Officers responded and administered CPR. Rescue continued CPR upon arrival and requested a Medix paramedic unit to the scene. Arlo was transported via rescue to BMHER and Paster Carson met with the family at BMH. Log entry only.

Appendix L

AFFIDAVIT OF MARIA ELVIA SMITH

NOW COMES the Affiant, Maria Elvia Smith, and under penalty of perjury states:

1. My name is Maria Elvia Smith A 204 827 691

Atlanta Incident at Airport in Atlanta Georgia on 05/13/2002

2. Francisco and I did not present ourselves as husband and wife, to the former INS, in the incident of Atlanta Airport in 2002.

3. At that time, Francisco was living at Chimalpa #25, Privada Capri Casa #6, Col. Prados Coapa, Mexico City (it was the house during our marriage) or with his parents in Jalisco Mexico. I was living at Castilla #72 Col. Alamos, Mexico City one of the properties received in my inheritance.

4. We traveled together because I needed that Francisco join me and help with the English language in US. I needed to go to the U.S. to finish some business. We both needed to go to the U.S. for our own reasons, and we travelled together only because I needed Francisco's help with English.

5. After around two hours in the room at Atlanta Airport, an officer said to Francisco and me: "you will not enter to US and will be returned to Monterrey. Francisco replied him; why Monterrey, if we have our tickets to Mexico

City? The officer did allow us to take a flight back to Mexico City.

American Consulate in Mexico City on July 6, 2004

6. Francisco and I did not apply together for a visa at the American Consulate in Mexico City on July 6, 2004. We were not even there the same day. I had two interviews before they issued me the visa. Francisco was not with me for either interview.

7. Were not living in the same house in Mexico City at this time. We had been living separately since our divorce.

8. We did not present ourselves as married couple to the consular officer in Mexico City in 2004.

Joint bank account and shared a residence
528 N 62nd Street, Wauwatosa, WI 53212-4170

9. I had a joint checking account with my ex husband Francisco. We opened the account together with US Bank in about 2000. We opened another checking account together at Harris Bank formerly Lincoln State Bank in about 2003. This was over a year before Francisco married Eloisa Canales (Hereinafter "Eloisa").

10. I did live at the same address, 528 N 62nd Street, as my ex husband Francisco, and our son. But I was not living with Francisco as a spouse. We had separate bedrooms. Despite

our divorce, Francisco and I continued to do business together, and resided under the same roof.

11. Francisco lived at this address for about one year, before he married Eloisa. He continued to live there for a period of time even after he married her. He asked me to let him stay there while he located an apartment to rent, and I agreed to let him stay.

12. In April 2004 Francisco purchased the house at 528 N 62nd Street. But the money for the house was mine, not his. I also paid for everything including the mortgage, taxes, city expenses, etc. The reason I bought the house, in Francisco's name, was because Francisco had a social security number, and I did not. Francisco was kind enough to help me with that, but we both understood that it was my house and not his house.

13. I understand that my G-325 has some mistakes. When my husband, Arlo H Smith Sr and I went to a company on May 20,2013 to complete the immigration forms, including the G-325, the company mistyped 2223 N 115th Street instead 528 N 62nd Street on which I was living from 2004 to 2009; for this reason I am attaching a copy of the installation of a new furnace in 528 N 62nd Street Wauwatosa.

14. According to the NOID, on June 6, 2014, an immigration officer conducted an onsite visit to 5101 N Lovers Lane Road, Apt#22, Milwaukee, WI. There was nobody home, but the officer noted my name, my former

husband's name, and my sons name were listed on the apartment mailbox.

15. I do not dispute that my name was on the mailbox at 5101 N Lovers Lane Road. But I did not live there on June 6, 2014. Rather, I was receiving mail there.

16. The reason I got mail at 5101 N Lovers Lane Road, when I was living at 500 Lewis, is as follows. When my husband Arlo H Smith Sr passed away, I did not know what would happen to me in 500 Lewis Street, Burlington WI. The Union where my husband was a member, asked me for a mailing address in order to find me, because this Union which is at Racine WI and I was close to leave the Burlington house. For this, I gave them the address of my son which is the same of his father.

17. I did in fact reside, on June 6, 2014, at 500 Lewis Street, Burlington, Wisconsin, with Arlo Smith, my husband.

18. The lease agreement for 5101 N Lovers Lane Road, dated August 10,2012, contains my name and signature, my former husband's name and signature, and my son's name and signature. That is because I lived at 5101 N Lovers Lane Road on August 10, 2012. That is before I married Arlo Smith. I married Arlo December 12, 2012.

19. I have trouble speaking English, but I can read and comprehend English and I have read

and understood this affidavit. It is true and correct.

s/ Maria E. Smith
Maria E. Smith

SUBSCRIBED AND AFFIRMED
under penalty of perjury before
me this 21 day of December 2016

s/ Neisy Monteagudo
Notary Public

Appendix M

AFFIDAVIT OF
FRANCISCO JAVIER HERNANDEZ-RICO

NOW COMES the Affiant, Francisco Javier Hernandez-Rico, and under penalty of perjury states:

1. My name is Francisco Javier Hernandez-Rico (hereinafter "Francisco") and I am the ex-husband of Maria Elvia Smith, (hereinafter "Maria") file A 099 815 835.
2. Maria and I divorced in Mexico on May 25, 2001, not May 21, 2001.

Atlanta Incident at Airport in
Atlanta Georgia on 05/13/2002

3. I deny that Maria and I presented ourselves as a married couple in Atlanta on May 13, 2002. I denied that I ever referred to Maria as my wife during the incident at the airport that day.

American Consulate in Mexico City on July 6,2004

4. I did not apply for a visa together with Maria, at the U.S. Embassy in Mexico City on July 6, 2004. In fact, the U.S. Embassy issued my visa on September 14, 2004.
5. Maria and I did not present ourselves as a married couple, on July 6. 2004, in Mexico City, to the officials who issued the visas. We did not go together, and I am not aware of

anything I did, or that Maria did, to imply that were a married couple.

Eloisa

6. I did marry a United States citizen named Eloisa Canales (hereinafter "Eloisa") May 12, 2005. Eloisa filed a Form 1-130 for me. USCIS denied that first application.

Owning a Home at 528 N 62nd St Wauwatosa, WI

7. USCIS has expressed concern that Maria and I appeared to have a residence in common, at 528 N 62nd Street, Wauwatosa. This concern is unfounded.
8. My name was on the title to the property at 528 N 62nd Street, but Maria was the real owner. She paid for the property, she paid the mortgage and taxes, but I allowed my name to be on the title because Maria did not have a SSN. Maria received an inheritance, and had investments in USCY.
9. I did live at 528 N 62nd Street, Wauwatosa, with Maria, and our son. But all three of us had separate bedrooms. Maria and I continued to do business together, and reside under the same roof it was over a year before I married Eloisa Canales.
10. It is true that I had a joint checking account with my ex wife Maria E. Moreno. We opened the account together with US Bank in about 2000. We opened another checking account together at Harris Bank formerly Lincoln

State Bank in about 2003. This was over a year before I married Eloisa.

Joint Residence at 2223 N 115th Street, Wauwatosa

11. After our marriage on 05/12/2005 Eloisa was living at 2036 S 92nd Street, West Allis, WI. During that time I resided part of the week at 528 N 62nd St in Wauwatosa, and I stayed with Eloisa just a few nights a week. Otherwise, Eloisa told me that the building manager told her, that he would raise the rent. Eloisa never stayed overnight at 528 N 62nd Street, because my son and my ex wife Maria were living there, and we considered it Maria's house.
12. The NOID suggests that I lived with Maria at 2223 N. 115th Street in Wauwatosa from May 2008 to October, 2009. Here are the facts.
13. ln January, 2006 I purchased a house at 2223 N 115th Street, Wauwatosa. Eloisa and I moved our belongings in there about February, 2006. That is where we lived together as husband and wife. Maria did not live at 2223 N 115th St from May, 2008 until October, 2009. Rather, she lived at her own house at 528 N 62nd Street.
14. On August 23rd 2013 I petitioned for a divorce from Eloisa. I lived at 5101 N Lovers Lane Road Apt #22, Milwaukee, WI. Eloisa petitioned for a divorce over a year before on March 22nd 2012 without notifying me. I knew nothing about this until I got a letter informing, long after this, notifying me that I

was already divorced from Eloisa since December 24, 2012.

15. Maria also lived at 5101 N Lovers Lane Rd, until October 6, 2012. She then moved to 500 Lewis Street, Burlington WI with her husband Arlo. I understand that Maria remained there until about August 16, 2014. Arlo passed away, I understand, on February 6, 2014.
16. Maria and I did not live at the same address during her marriage with Arlo, from October 6, 2012 until August 16, 2014. Nor do we live together now.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 21, 2016

s/ Francisco Javier Hernandez-Rico
FRANCISCO JAVIER HERNANDEZ-RICO

Subscribed and affirmed under penalty of perjury before me this 21st day of December, 2016

s/ Neisy Monteagudo
Neisy Monteagudo
Notary Public

Appendix N

To Whom it may concern:

"I declare under penalty of perjury
that the foregoing is true and correct"

Executed on: Racine Wisconsin
Date: August 30, 2015

I am writing this letter as to it seems my late father and his widow relationship has come into question. My father (Arlo H Smith Sr.) met Maria one summer and they had a few dates and as time went on they had a few more and then it seemed like it became more serious. My father was in his late 60's and he didn't want to be alone and I lived about 45 minutes away from him and I really did not want him to be alone either, so I was glad he had a companion. When my father and Maria had met, he was not sick, I believe they met in summer 2012 and he had gotten cancer in late summer of 2013. He did have cancer in 2007 in which he was in remission from. My father had heart issues for a few years, and yes around the time they met he had a heart surgery, but his open heart surgery he had did make a lot better off health wise. I never believed Maria was there just to use my father, she genuinely cared for my father and was always there for him and I rested a little easier knowing that because I couldn't always be there.

My fathers previous 2 marriages, my mother and then I after her, were both with people that had a lot of health problems and my father did everything he could to care for and take care of them. My mother passed away in 1999, his second marriage to Karen lasted around 10 years or so before she passed away from cancer. My father went through a lot taking care of Karen and once she passed away he stayed with me for a couple of months, I helped him get back on his feet sort of speak after the loss of Karen. I have always had a good relationship with Maria, she has always been able to call me for anything she needs before and after my father passed away. She has been to my home multiple times since my father passed away and has come to my young daughters birthday parties and knows my family well. I have told her from the get go, she could always call me for anything, it wasn't like my father passed away and I never spoke to her again, we have remained in contact ever since the loss of my father. As far as my other siblings go, my father never really had a good relationship with my younger brother or my older sister the few years before he died, to this day I have not spoken with my sister since February of 2014 when father passed, and have not spoke with my brother since January of 2015. My father hasn't spoke to them often, nor I, so Maria has not spoken with them either, and they have never tried to speak to her that I know of. I'm

really not sure what else I could say to prove my fathers and Maria's relationship was real, I was around them, they were around me and my family and they seemed very happy being together. I have no reason to believe the Marriage between my father and Maria was not REAL.

s/ Arlo H. Smith Jr.
US Citizen Arlo H. Smith Jr.
2311 20th St
Racine, WI 53403
Telephone: 262-498-8316

Appendix O

To Whom it may concern:

"I declare under penalty of perjury that the foregoing is true and correct"

Executed on: Racine Wisconsin
Date: August 30, 2015

I have no reason to believe that the marriage with Maria and my father-in-law Arlo Smith Sr. wasn't real. Knowing my father-in-law he wouldn't marry anyone he didn't care about and seeing them together proved that. We have remained in contact with Maria since my father-in-law's passing in which she has come to my daughter's birthday parties and we have assisted her on many occasions.

When Maria married my father-in-law he was on remission from his Cancer and was not sick when they married. The cancer resurfaced in a Different form from his remission almost a year after they married. He had Open heart surgery but was doing well and not having any issues from that Surgery.

Sincerely,

s/ Laura Smith
US Citizen Laura Smith
2311 20th St
Racine, WI 53403
Telephone: 262-994-3165

Appendix P

10/01/2015

To whom it concern:

I DECLARE UNDER PENALTIES OF PERJURY, THE FOLLOWINS STATEMENT IS TRUE AND ACCURATE.

It is a pleasure to write this letter for Mrs. Maria Elvia Smith. To inform whom so ever, that we have been friends, for more than 10 years. During this period I have had sufficient time to get to know Mrs. Maria Elvia. And I know her to be a person responsible for her actions and very loyal and autstanding citizen

I have neither reason or the least doubt to question the validity of her matrimony. I am certain that Mrs. Maria Elvia is not capable of entering into matrimony if she were not truly in love.

I had the privilege to be invited to participate as a witness to her wedding on 12/12/2012. It gave me great joy to see the newly married couple completely in love and devoted to one another. I could see Mr. Smith bursting with joy and energy, both physically and mentally and extremely happy. After the ceremony we went to eat lunch to their local spot where the waitress knew them and congratulated them on their wedding. And also shared stories about how they would come in and always enjoy each others company.

s/ Maria Del Socorro Sandoval
U.S CITIZEN Ma Del Socorro Sandoval
1053 w Ogden Ave. Apt. 137,
Naperville IL, 60563

Appendix Q

To Whom it may concern:

"We declare under penalty of perjury that the foregoing is true and correct"

Executed on: Sussex, Wisconsin

Date: September 07, 2015

It is a pleasure to write this letter in reference to Maria Elvia Smith's application for U.S. residency. We have had the delight of knowing Maria Elvia for the past 15 years and we have no reason to believe that the marriage with Aro Smith Sr. was not real.

Knowing Maria Elvia she wouldn't marry anyone she didn't care about. We have been fortunate enough to have share many life events with our good friend Mrs. Smith: our youngest son's birth, our eldest daughter's college graduation, and her marriage to Arlo H. Smith Senior. On Wednesday, December 12th 2012 Arlo and Maria Elvia declared their love for each other and wed. We were so happy for the two and ecstatic they could start a new life together and at the same I Lisbeth was joining to Maria next day of Arlo's death because she was really devastated.

S/Gustavo A. Ramirez — s/Lisbeth Soto
Permanent Resident — Permanent Resident
Gustavo A. Ramirez — Lisbeth Soto
N59W23310 Clover Drive #203
Sussex, WI 53089
Telephone: 262-527-2406
262-309-4937

Appendix R

Aurora Cancer Care
of Aurora Health Care Metro, Inc.
2801 W. Kinnickinnic River Parkway
Suite 930
Milwaukee, WI 53215
T 414-384-51ll
F 414-384-5205

March 17, 2014

Re: Arlo H Smith
500 Lewis St
Burlington WI 53105-1022

To whom it may concern:

This is to certify that Arlo H Smith had been under my care for treatment of his squamous cell carcinoma of unknown primary origin. He began treatment with me on 10-11-13. He was treated with chemotherapy and had frequent appointments in the office for his infusions. He also had two hospitalizations in October of 2013. During his time of treatments and hospitalizations, his wife, Maria, was his primary caregiver until his death in February 2014. She would care for him in the home and bring him to and from his appointments, as he was unable to care for himself during this time. With any other questions on this matter, please do not hesitate to contact my office.

SIGNATURE: s/ Robert Taylor, 3/17/2014
Dr. Robert Taylor, MD

Dr. Robert Taylor, MD
Oncology/Hematology
St. Lukes POB
Suite 930
2801 W. Kinnickinnic River Parkway
Milwaukee, WI 53215
(414) 384-5111

Appendix S

Department of Homeland Security
Citizenship and Immigration Services
310 E. Knapp Street
Milwaukee, WI 53202

FILE NO: 204827691
ENEFICIARY'S NAME: Maria Elvia Smith
DATE: Monday, July 13 2015
EXECUTED AT: USCIS Milwaukee Field Office, Wisconsin

Before the following officer of the U.S. Citizenship and Immigration Services:

NAME and TITLE: Zbigniew Barczyk, ISO-2

In the English language.

I, Maria Elvia Smith, acknowledge that the above named officer has identified himself/herself to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He/she has informed me that he/she desires to take my sworn statement regarding my application to register permanent residence. He/she has told me that my statement must be made freely and voluntarily. I am willing to make such a statement. l swear or affirm that I will tell the truth, the whole truth, and nothing but the truth.

Q. Any statement you make must be given freely and voluntarily. Are you willing to answer my questions at this time?
A. Yes.

Q. What is your true, full, and complete name?
A. Maria Elvia Smith

Q. Have you ever used any other names?
A. Yes. Maria Elvia Moreno and Maria Elvia Hernandez.

Q. What is your place and date of birth?
A. Mirandas Guanajuato, Mexico, October 09, 1946.

Q. What is your country of citizenship?
A. Mexico.

Q. Do you make any claim to being a United States citizen? Are any of your parents citizens of the United States?
A. No, Just my husband.

Q. How many times have you been married?
A. Two times.

Q. What is the name of your first Husband?
A. Francisco Hernandez Rico.

Q. What is the date and place of your first marriage?
A. Mexico City, January 6, 1973.

Q. When did you divorce your first husband?
A. May 200l, the day I don't remember exactly.

Q. Where did the divorce take place?

A. In Mexico City.

Q. Were you and your former husband Francisco Hernandez Rico present at the courthouse in Mexico during the divorce proceedings?
A. Yes.

Q. Do you have any children from your marriage to your first husband, Francisco Hernandez Rico?
A. Yes, l have one.

Q. ls it a boy or girl?
A. Boy

Q. Does your son live with you in the United States?
A. With me no. He lives with his father in the United States.

Q. Since your divorce from Francisco Hernandez Rico, have you had any contact with him (physical, telephonic, via computer email, face book) or any other means?
A. Yes.

Q. What type of contact and how often?
A. By phone, from time to time we have met to resolve problems concerning my son.

Q. Since your divorce from your first husband, have you and your first husband ever traveled together?
A. No.

Q. Do you know whether your first husband Francisco Hernandez Rico lives in the United States?
A. Yes.

Q. Do you know where he lives?
A. Yes.

Q. Where does he live?
A. 5101 North Lovers Lane Rd., Apt#22 Milwaukee, Wisconsin.

Q. When was your last entry into the United States?
A. October 30, 2004.

Q. What was your purpose for coming to the United States?
A. I had a building, and my ex-husband sold it, we had a big problem about it, and I came to study child care at MATC.

Q. Did you travel to the United States by yourself?
A. Yes, many times.

Q. Did you apply for a visa before coming (o the United States?
A. Yes.

Q. When did you apply for the visa?
A. I think it was January 1st 2004.

Q. Where did you apply for the visa?
A. In the American Embassy in Mexico City.

Q. Did you apply for the visa by yourself, or were you accompanied by other people (friends, relatives, attorneys)?
A. I was alone.

Q. What did you indicate on the visa application for your marital status?
A. I think I put that I was divorced, or maybe single I don't remember.

Q. Where did you live after your entry into the United States?
A. I Milwaukee, Wisconsin.

Q. How long did you live in Milwaukee, Wisconsin?
A. Since I entered, continuously.

Q. How did you support yourself in the United States?
A. With my money.

Q. With your money that you brought over from Mexico?
A. An aunt raised me, when she died she left me all her money, I was the only heir.

Q. What was the name of your second husband?
A. Arlo Henry Smith Sr.

Q. What was your second husband's date of birth?

A. February sixth 1944.

Q. Where did you marry your second husband?
A. In Racine, Wisconsin.

Q. What is the date of your second marriage?
A. December 12, 2012, at noon.

Q. How long were you married to your second husband?
A. one year and two months, but before we married, I went to live with him.

Q. Did you and your second husband live together?
A. Yes.

Q. How long did you live with your second husband?
A. One year and a half.

Q. Where did you and your second husband live together?
A. In Burlington, Wisconsin.

Q. Did you at any time have any relationship with your first husband while you were married to your second husband?
A. Never.

Q. Did you at any time reside together with your first husband while being married to your second husband?
A. No, never.

Q. Did you ever live at 5101 N. Lovers Lane Rd., Milwaukee, WI 53225?
A. Yes, before I was married to my second husband.

Q. Who lived at this address with you?
A. My son and his father, Francisco Hernandez.

Q. Did you understand the questions 1 have asked you today?
A. Yes.

Q. Were all your statements given freely and voluntarily?
A. Yes.

Q. Do you wish to provide any other information to this sworn statement?
A. About my husband, when he passed away, l took care of him at home, and I stayed with him at the hospital 24 hours, and he died in my arms.

SIGNATURE AND DATE: s/ Maria E. Smith

WITNESS SIG & DATE: s/ Illegible Signature

INTERVIEWING OFFICER s/ Zbigniew Barczyk