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

Amicus Invitation No. 17-01-12
Determination of Marriage Fraud

Request to Appear as *Amicus Curiae*

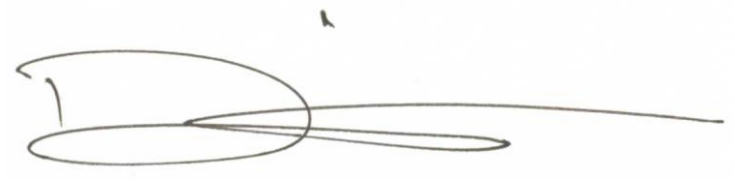
INTRODUCTION

Pursuant to Rules 2.10 and 4.6 of the Practice Manual of the Board of Immigration Appeals (Board), the Immigration Reform Law Institute (IRLI), on behalf of its client, the Federation for American Immigration Reform (FAIR), hereby requests leave to file an amicus curiae brief in response to *Amicus* Invitation No. 17-01-12. The *amicus curiae* brief is submitted with this motion.

FAIR is a nonprofit, public interest, membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. IRLI serves as counsel for FAIR in the submission of its *amicus curiae* brief to the Board.

The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See e.g.*, *Matter of Q— T— — M— T—*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., *amicus curiae* for FAIR and noting "The Board acknowledges with appreciation the brief submitted by *amicus curiae*."). Therefore, *Amicus* FAIR respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

Respectfully submitted,



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Amicus Invitation No. 17-01-12
Determination of Marriage Fraud

Brief of *Amicus Curiae* Federation for American Immigration Reform

ISSUE PRESENTED

The Board's issue presented:

> (1) Is a determination of marriage fraud in a prior visa petition proceeding alone sufficient to deny a subsequent visa petition submitted on behalf of the same beneficiary in a subsequent visa petition proceeding, or is the USCIS District Director obligated to conduct an independent determination as to whether there was a prior fraudulent marriage?

SUMMARY OF THE ARGUMENT

The common law doctrine of *collateral estoppel* applies when a subsequent visa petition proceeding addresses an issue decided in a previous visa petition hearing. Restatement (Second) of Judgments § 83 (1982). If marriage fraud (or its absence) was determined in a prior adversarial visa proceeding, that determination is conclusive in a subsequent visa proceeding provided (1) that the determination of marriage fraud was a grounds for the denial of the initial visa petition, and (2) the petitioner had a full and fair opportunity to contest the determination. *See id.*

If there was no adversarial proceeding, the Director may rely on a determination of marriage fraud in a prior proceeding if the record contains clear, unequivocal, and convincing evidence supporting that determination.

ARGUMENT

The effect of a prior determination of visa fraud depends upon the nature of proceedings. *Cospito v. Attorney Gen. of the United States*, 539 F.3d 166, 171 (3d Cir. 2008). A determination made by an immigration judge is judicial in nature and has more authority than a decision made by an agency official. *Id.* Under the doctrine of collateral estoppel, "A final decision by an immigration judge has a preclusive effect on future litigation and agency decisions." *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013). However, the federal

courts do not apply collateral estoppel to a decision by an agency official. *Cospito*, 539 F.3d at 175. At the present time, agencies decide how much preclusive effect their prior, non-judicial determinations have in subsequent proceedings. *Compare Lee v. U.S. Postal Service*, AT-0752-12-0618-B-1 (M.S.P.B. Aug. 13, 2015) (applying collateral estoppel to agency determination) with *Matter of Tawfik*, 20 I.&N. Dec. 166, 168 (B.I.A. 1990).

I. As a general rule, claim preclusion under the doctrine of collateral estoppel would make a determination of marriage fraud in a prior adjudicated visa proceeding binding in a subsequent visa proceeding.

Under the common law doctrine of *collateral estoppel*, the same parties are generally prohibited from relitigating an issue decided in one proceeding in a subsequent proceeding. *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Collateral estoppel is closely related to the broader doctrine of *res judicata*. *Offiiong v. Holder*, 864 F. Supp. 2d 611, 617 (S.D. Tex. 2012) (citing as authority *In re Shuler*, 722 F.2d 1253, 1255 (5th Cir. 1984)). "Whereas *res judicata* forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit." *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). Courts frequently apply the broader doctrine of *res judicata* when the narrower doctrine of collateral estoppel would apply. *See e.g.*, *Ghaly v. Reno*, 41 F. Supp. 2d 830, 832 (N.D. Ill. 1999).

Collateral estoppel applies to administrative proceedings, even when they

have not been reviewed and affirmed by a court. Restatement (Second) of Judgments § 83 and cmt. a (1982); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986). Additionally, the failure of a party to appeal an administrative decision does not preclude the application of collateral estoppel. *Medina v. INS*, 993 F.2d 499, 501, 503 n.15 (5th Cir. 1993).

Collateral estoppel also may be invoked where a party was in privity with another party to a previous proceeding where an issue was adjudicated. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998). The question of whether parties are in privity is fact sensitive: "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of *res judicata* and collateral estoppel." *Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1468–69 (10th Cir. 1993) (quoting *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274–75 (10th Cir. 1989)).

Therefore the general rule is the determination of marriage fraud in a prior adjudicated immigration proceeding is binding in a subsequent visa proceeding.

A. There are exceptions to the general rule so that collateral estoppel might not apply in all cases where visa fraud has been determined in a prior proceeding.

While the Board's issue statement describes a situation where collateral estoppel would *generally* preclude relitigating the question of marriage fraud, the statement does not state all facts that would be necessary to conclude that collateral estoppel would apply in all cases. As a common law doctrine, the rule for collateral estoppel is settled: "[1] When an issue of fact or law is actually litigated and [2] determined by a valid and final judgment, and [3] the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a

different claim." *Id*. Restatement (Second) of Judgments § 83 (1982). Nonetheless, the circuits state the rule using different language using varying numbers of elements to define the effectively identical rule. *Compare White v. World Finance of Meridian*, 653 F.2d 147, 151 (5th Cir.1981) *with Bilali v. Gonzales*, 502 F.3d 470, 474 (6th Cir. 2007) and *Ramsay v. Immigration and Naturalization Serv.*, 14 F.3d 206, 210 (4th Cir. 1994).

Applying the elements of collateral estoppel to the issue statement reveals three factual gaps that would be necessary to conclude that a party would be precluded from relitigating the determination of marriage fraud in a prior proceeding. First, was the determination that the party had engaged in marriage fraud actually litigated? *See* Restatement (Second) of Judgments § 83. Putting this question in the administrative context, did the party have a full and fair opportunity to litigate the marriage fraud issue in the prior proceeding? *Cf. Aircraft Braking Sys. Corp. v. Local 856, Int'l Union*, 97 F.3d 155, 161 (6th Cir. 1996). If the party had the opportunity to contest the determination of marriage fraud, even he did not exhaust all appeals, the first element of collateral estoppel is satisfied. Restatement (Second) of Judgments § 83 and cmt. a (1982); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986); *Medina v. Immigration and Naturalization Serv.*, 993 F.2d 499, 501, 503 n.15 (5th Cir. 1993).

Second, was the petitioner's original visa petition denied or some other final decision reached on the petition? If the original visa petition had been withdrawn or there was only a conditional decision, there would be no final judgment to serve as the basis for issue preclusion. *See Bilali v. Gonzales*, 502 F.3d 470, 475 (6th Cir. 2007).

Finally, was the finding of marriage fraud a ground (or necessarily decided issue) for a final decision? If the prior visa petition had been denied and mar-

riage fraud had not been a necessarily decided issue to reach that denial, the fraud issue would not be precluded in a subsequent visa petition. *See* Restatement (Second) of Judgments § 83. The prior finding of marriage fraud does not need to be an express finding as part of the judgment to be preclusive; it need only be a necessarily decided issue. *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1247 (9th Cir. 2001).

Therefore, if there was a final decision on the prior visa petition, marriage fraud was determined, and that determination was necessary to the final decision, and the petitioner had the opportunity to contest that determination, the prior determination of marriage fraud would be binding in a subsequent visa petition made by the same petitioner. *See Ramilo v. U.S. Dep't of Justice*, 13 F. Supp. 2d 1055, 1058 (D. Haw. 1998) (holding a prior determination of marriage fraud by the Board of Immigration Appeals that could have been contested in the original proceeding was binding in a subsequent action in which the plaintiff's visa had been revoked); *Cf. Ghaly v. Reno*, 41 F. Supp. 2d 830, 832 (N.D. Ill. 1999) (holding that the plaintiff was barred from challenging the determination of marriage fraud in a previous visa petition in a subsequent visa petition under the doctrine of *res judicata*); *but see Amponsah v. Holder*, 709 F.3d 1318, 1327–28 (9th Cir. 2013) and *Amponsah v. Lynch*, 627 F. App'x 592, 595 (9th Cir. 2015) (declining to decide whether collateral estoppel applied when marriage fraud had been determined in a previous visa proceeding).

B. Some board precedent on issues decided in a prior proceeding is inconsistent with judicial interpretation.

In *Matter of Samsen*, an immigration judge had made a determination of marriage fraud in a prior proceeding. 15 I.&N. Dec. 28, 29 (B.I.A. 1974). The Director rejected a subsequent visa petition based upon that prior determina-

tion. *Id.* The petitioner appealed to the Board and the Board reversed. *Id.* Even though the original determination of marriage fraud had been made in a quasi-judicial forum, the Board rejected the director's decision and ordered the director "to make an independent determination regarding the beneficiary's prior marriage." *Id.* This rejection of the proposition that an issue determined in an adjudicated agency decision is precluded from being litigated in subsequent proceeding conflicts with judicial precedent. *E.g.*, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *but see Matter of Tawfik*, 20 I&N Dec. 166, 168 (B.I.A. 1990) (holding a determination of marriage fraud *by the Director* was not binding in a subsequent proceeding). Both *Samsen,* 15 I.&N. Dec. at 29 and *Tawfik*, 20 I.&N. Dec. at 168 state the rule for the preclusive effect of a prior marriage fraud decision nearly word-for-word identically even though the prior determinations at issue were made under different circumstances that the courts rely on to make a factual distinction. *E.g.*, *Cospito*, 539 F.3d at 171.

II. Board precedent allows the Director to rely on a finding of marriage fraud in a prior visa proceeding in a subsequent visa proceeding where the record contains clear, convincing, and unequivocal evidence of the fraud.

In recent decades *Matter of Tawfik*, has been the primary source of authority on the question of whether the Director may rely on the determination of marriage fraud in a prior petition. 20 I.&N. Dec. 166, 168 (B.I.A. 1990). The standard under *Tawfik* is:

> Ordinarily, the district director should not give conclusive effect to determinations made in a prior proceeding, but, rather, should reach his own independent conclusion based on the evidence before him. However, for example, in a case where the beneficiary has previously been found deportable based on a determination, supported by clear, unequivocal, and convincing evidence, that that beneficiary became a party to a fraudulent marriage

> for the purpose of entering the United States as an immigrant, it would be appropriate for the district director to rely on that finding of deportability in a determination that the beneficiary would be precluded by section 204(c) of the Act from obtaining an immigration benefit by virtue of a subsequent marriage.

I.&N. Dec. at 168 (internal citations omitted). It is important that these two sentences be read together because the first calling for an "independent conclusion" could be read as requiring the Director to conduct some kind of independent investigation of marriage fraud. *Id.* However, the second sentence clarifies that a record containing "clear, unequivocal, and convincing evidence" of prior marriage fraud may be relied on in a subsequent visa proceeding. *Id.* In *Tawfik*, the Director had denied a visa petition based upon a prior determination of marriage fraud but the Board reversed the decision because there was no documentation of the marriage fraud in the record. *Id.*

In practice, a determination of marriage in a prior visa proceeding fraud that is documented with substantial evidence to support an inference of that conclusion is conclusive in a subsequent visa proceeding. *E.g.*, *Matter of Agdinaoay*, 16 I.&N. Dec. 545, 547 (B.I.A. 1978) (a prior finding of marriage fraud based on "clear, convincing, and unequivocal evidence" may be relied on in a subsequent visa proceeding); *Matter of X*, 2014 Immig. Rptr. LEXIS 371, *16—17 (B.I.A. Jan. 15, 2014) (dismissing an appeal where visa was denied based upon a prior determination of marriage fraud supported by "substantive and probative evidence"); *In Re:*—, 2011 Immig. Rptr. LEXIS 9216, *6 (B.I.A. Dec. 1, 2011) (petitioner's file contained documentation providing a "reasonable basis" for concluding marriage fraud); *In Re:* —, 2010 Immig. Rptr. LEXIS 7927, *6 (B.I.A. May 19, 2010) (petitioner's file contained a confession of marriage fraud); *In re:* —, 2009 Immig. Rptr. LEXIS 11415, *10–11 (B.I.A. Nov. 9, 2009) (appeal sustained where was no "factual evidence in the

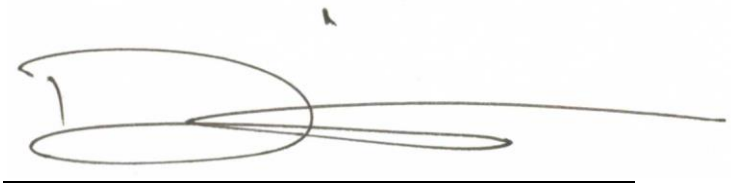
record from which it could be reasonably inferred that the beneficiary's marriage was fraudulent").

CONCLUSION

For the reasons stated above, a determination on marriage fraud in a prior visa proceeding is binding an a subsequent visa petition if the determination was made in an adversarial proceeding, if the determination of fraud was necessary to reaching a final decision in the prior petition and the party had the opportunity to contest that decision.

The Director may rely on a previous determination of marriage fraud if the record contains clear, unequivocal, and convincing evidence supporting that determination.

Respectfully submitted,



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