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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **APR 20 2005**  
SRC 02 263 52557

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a liquor retail sales business. It seeks to employ the beneficiary as a retail store manager. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because she determined that section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c) applied to the beneficiary, and, therefore, the beneficiary was not entitled to an immigrant visa.

On appeal, counsel submits a brief and additional evidence.

Section 204(c) of the Act states,

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Evidence in the record shows that, on March 8, 1993, [REDACTED] filed a Form I-130 petition for alien relative stating that she and [REDACTED] both a [REDACTED] Miami, Florida 33169, were married in Miami, Florida, on March 25, 1992. That Form I-130 petition further states that [REDACTED] is a United States citizen through naturalization.

The I-130 relative petition for the beneficiary was denied on December 6, 1994 based on the finding that the petitioner did not respond to a Notice of Intent to Deny (NOID), issued on October 11, 1994, after an interview with the petitioner and beneficiary on May 26, 1993.

The instant petition was filed on August 28, 2002. The petition was denied on February 4, 2003 pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

On appeal, counsel submits an affidavit from the beneficiary, his ex-wife, and four other individuals testifying to the authenticity of the beneficiary's prior marriage, a copy of a FOIA request, and a printout from the Social Security Death Index Search Results noting that the beneficiary's prior attorney died on June 1, 1994. Counsel states:

The notice [of intent to deny] was not responded to nor was the denial [I-130] appealed because the parties never received notification either from the attorney or the INS. The

petitioner in the instant case notified the post office of change of address and notified the attorney in April 1994 of the change of address.

The notice of intent to deny was dated October 11, 1994 and the denial was dated December 6, 1994. The attorney of record, [REDACTED] apparently passed away on June 1, 1994. Please refer to affidavit and printout of the report of the death on June 15, 1994 from the Social Security Death Index Search Results. The undersigned attorney contacted the Florida Bar regarding [REDACTED]. The Bar informed undersigned counsel that [REDACTED] had passed away on June 1, 1994. The Bar was notified via a letter dated June 7, 1994 of [REDACTED] demise on June 1, 1994. Please refer to affidavit of undersigned counsel.

No conclusive finding of the marriage being a sham marriage was made in the notice of intent to deny or in the denial of the I-130 and further the notice did not contain a stipulation that a failure to submit additional evidence will constitute a finding that the marriage was fraudulent.

Assuming arguendo, the conclusion made by the District Director in the prior proceeding was final, the Petitioner would submit that the prior determination made by the district director is not binding in the instant proceeding.

The 204(c) decision is to be made on behalf of the attorney General by the District Director in the course of his adjudication of the subsequent petition, in this case, the I-140 petition. Matter of Samsen, ID #2305 (BIA 1974). "in making that adjudication, the District Director may rely on any relevant evidence, including evidence having its origin in prior Service proceedings" involving the Petitioner.

The District Director should not ordinarily give conclusive effect to the determinations made in a prior proceeding, but, rather should reach his own independent conclusion Matter of F-, 9 I&N Dec. 684 (BIA 1962) and determine whether the evidence is "substantial and probative." Matter of Tawfik, Interim Decision #3130.

The evidence of the attempt or conspiracy to enter into a sham marriage must be **substantial and probative**. See Matter of Kahy, 19 I&N Dec. 803 (BIA 1988), Matter of Agdinaoay, 16 I&N Dec. 545 (BIA 1978). The evidence upon which the denial was based was neither substantial nor probative. The denial was based on discrepancies.

\* \* \*

They did not respond to the [sic] either the Notice of Intent to Deny or the Denial of the I-130 since they never received notification due to the fact that the attorney, [REDACTED] had passed away in the interim. The Petitioner only became aware of the denial of the prior visa petition when he was notified by undersigned counsel that his I-140 was denied due to the I-130 denial. . . .

Counsel's statement is not persuasive with regard to the beneficiary's receiving the NOID and the denial. In spite of prior counsel's death, it is still the responsibility of the alien to notify CIS of any address change within ten days of moving. All aliens in the United States are required by regulation (*See* 8 C.F.R. § 265) to notify USCIS of their change of address within 10 days of the change. Immigration petitioners and applicants with cases pending must keep USCIS notified of any change of address in order to receive important communications from USCIS about the processing of their case. Communications can include a request for evidence (RFE), notice to appear for fingerprinting, notice to appear for an interview, transfer of case processing to another USCIS office, and final determination on the case. Applicants and petitioners should file a Form AR-11 and notify in writing the local office processing their case of any change of address. Applicants and petitioners may choose the method of mailing their Form AR-11. Using certified, registered or receipt mail is not currently a USCIS requirement. However, it is advisable to send the AR-11 with a Return Receipt or some other method that will give the applicant or petitioner documentation to demonstrate that they did indeed mail the form to the USCIS, in case there should ever be a question. In the instant case, it is unreasonable to believe that the beneficiary would not contact CIS over the course of nine years to determine the status of his prior petition, even if his prior attorney was unavailable. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

CIS can only conclude that the petitioner of the I-130 and the beneficiary abandoned the petition by not responding. The regulation at 8 C.F.R. § 103.2(b)(15) states, in pertinent part: "A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under § 103.5." The regulation at 8 C.F.R. §103.5(a)(2) provides that denials due to abandonment may be challenged in a motion to reopen before the office that rendered the decision based on limited arguments.

Counsel states:

The District Director should not ordinarily give conclusive effect to the determinations made in a prior proceeding, but, rather should reach his own independent conclusion *Matter of F-*, 9 I&N Dec. 684 (BIA 1962) and determine whether the evidence is "substantial and probative." *Matter of Tawfik*, Interim Decision #3130.

The evidence of the attempt or conspiracy to enter into a sham marriage must be **substantial and probative**. See *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988), *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978). The evidence upon which the denial was based was neither substantial nor probative. The denial was based on discrepancies.

Counsel is correct in this instance. When evidence contained in the record is un rebutted, it could reasonably be inferred that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits. However, such a reasonable inference does not rise to the level of substantial and probative evidence requisite to the preclusion of approval of a visa petition in accordance with Section 204(c) of the Act. *See Matter of Tawfik, supra.*

Finally, on appeal, the beneficiary's evidence of a bona fide marriage consists of affidavits from himself, his ex-wife, and four other individuals. No verifiable evidence that supports the entire record was submitted on appeal (such as documentation showing joint ownership of property, a lease showing joint tenancy of a common

residence (other than the original lease filed with the I-130), documentation showing commingling of financial resources, birth certificate(s) of child(ren) born to the petitioner and prior spouse, or any other documentation that establishes that the prior marriage was not entered into in order to evade the immigration laws of the United States).

The regulation at 8 C.F.R. § 103.2 provides guidance in evidentiary matters. It states in pertinent part:

*(b) Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

In summary, the evidence in the record establishes that the beneficiary made no inquiries as to his status within the nine years from the filing of the I-130 petition to the date of filing of the I-140 petition and has provided no verifiable evidence with regard to his prior marriage.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the bona fides of his prior marriage and any other evidence the director may deem necessary. The director should reach an independent conclusion based on the relevant evidence, which may include evidence having its origin in prior CIS proceedings. The director may adjudicate the I-140 on its own merits or after reviewing the new evidence, may find that 204(c) applies. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's February 4, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.