

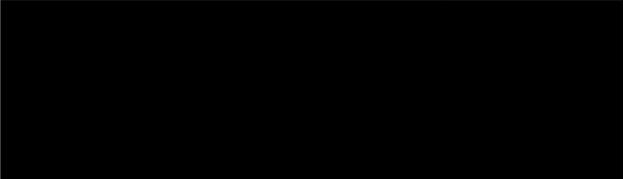
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

36



FILE: [REDACTED]  
EAC-00-228-52999

Office: VERMONT SERVICE CENTER

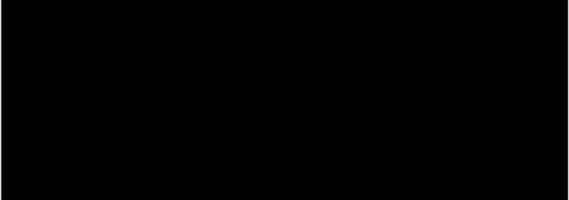
Date: AUG 22 2006

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought and served the petitioner with notice of intent to revoke the approval of the petition. The director subsequently revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The petitioner filed a motion to reconsider or reopen. The director issued a decision granting the motion and affirming his prior revocation decision. The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO issued a decision dismissing the appeal. The petitioner then filed a motion to reopen or reconsider. The motion will be granted and the previous decision of the AAO will be affirmed. The petition will remain revoked.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a driving school. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that a family-based immigrant petition had been denied based on a written request of the sponsor and on a failure of the beneficiary to establish that his marriage was not entered into solely in order to procure immigration benefits. The director stated that based on section 204(c) of the Act, no other immigrant petition may be approved. The director subsequently revoked the approval of the I-140 petition.

As set forth in the director’s May 14, 2003 decision granting the petitioner’s motion to reopen or reconsider and affirming the revocation of the petition, the single issue in this case is whether the evidence establishes that the beneficiary is ineligible for an immigration visa approval because of section 204(c) of the Act.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Employment-based immigrant visa petitions depend on priority dates. A petition’s priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 23, 2001.

Relevant facts and procedural events are as follows.

The beneficiary was born on January 13, 1958 in Issa, Ivory Coast. (I-130 petition, Part C, Items 3 & 4).

The beneficiary’s former wife, [REDACTED], was born in Silver Spring, Maryland on March 29, 1963. (I-130 petition, Part B, Items 3 & 4; Birth Certificate in I-130 record). For simplicity, Ms. [REDACTED] will be referred to below as the beneficiary’s wife, regardless of the date of the event in question, and regardless of whether she used her maiden name or her married name of Reshell Nadje at that time.

The beneficiary entered the United States on August 4, 1984 at New York as a student (I-130 petition, Part C, Item 14; I-485, Part 3. A.).

The beneficiary began working at the Henley Park Hotel in Washington, D.C., on July 5, 1986 (Letter from hotel Controller, November 22, 1989).

██████████ was working at the Henley Park Hotel as of at least 1986. She met the beneficiary at the hotel in that year. (Affidavit of ██████████, December 9, 2004.)

The beneficiary and Reshell Johnson married on May 22, 1989 before the clerk of the Circuit Court, Montgomery County, Maryland. (Marriage Certificate, May 22, 1989).

██████████ submitted an I-130 petition on behalf of the beneficiary on July 14, 1989. (I-130 petition).

The beneficiary concurrently filed an I-485 Application for Permanent Residence on July 14, 1989. (I-485 filed July 14, 1989).

An interview was held on the I-130 petition in the Baltimore CIS district office (then known as the INS district office) on November 29, 1989. (Interview notes, non-record side of the file).

The I-130 petition was approved on November 29, 1989 (I-130 petition, approval stamp).

The beneficiary's I-485 application for permanent residence was also approved on November 29, 1989. (I-485 filed July 14, 1989, approval stamp)

On October 31, 1991 the beneficiary and his wife filed a Form I-751 Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status.

An interview on the removal of the conditional basis of the beneficiary's permanent residence status was held in the Baltimore CIS district office on December 18, 1991 (Interview notice, November 17, 1991, with officer's interview notes). On that date, a Form I-72 request for additional documentation was issued to the beneficiary requesting copies of federal and state tax returns. (I-72, December 18, 1991).

An interview notice was issued on January 16, 1992 to the beneficiary for an interview to be held on September 22, 1992 at the Baltimore CIS district office. (Interview notice, January 16, 1992).

Another interview notice was issued on January 22, 1992 to the beneficiary for an interview to be held on February 12, 1992 at the Baltimore CIS district office. This notice apparently superceded the interview notice which had been issued on January 16, 1992. (Interview notice, January 22, 1992).

A second interview on the Form I-751 petition was held at the Baltimore CIS district office on February 12, 1992. (Interview notes, February 12, 1992; Record of Sworn Statement of beneficiary, February 12, 1992; Record of Sworn Statement of Reshell Nadjé, February 12, 1992). On that date, another Form I-72 request for additional documentation was issued to the beneficiary requesting copies of documents pertaining to car insurance, health and life insurance, car registration and other matters. (I-72, February 12, 1992).

Following the second I-72 request, the petitioner submitted additional documentation, which was received by CIS on March 24, 1992.

A third interview on the Form I-751 petition was held at the Baltimore CIS district office on September 22, 1992. At that interview the beneficiary's wife signed three documents. One was a waiver of her right to counsel. The second was a hand-written statement withdrawing the Form I-751 and stating that she had not lived with the beneficiary at two specified addresses, that she had filled out the paper only to help him out and

not for any money, and that she and the beneficiary had never lived together as man and wife. The third document was an affidavit on a preprinted form, with hand-written notations stating that she was only married to the beneficiary on paper, that she had done so only to help him out, and that she and the beneficiary had never lived together as husband and wife. (Statements and affidavit of beneficiary's wife, September 22, 1992).

The beneficiary also signed an affidavit form on September 22, 1992, but the only factual assertion made in that affidavit was that the beneficiary needed to talk with his lawyer. (Beneficiary's affidavit, September 22, 1992)

On September 22, 1992, CIS denied the Form I-751 Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status.

In a letter dated December 22, 1992, the CIS district director notified the beneficiary that the Form I-751 was denied. The district director stated that the evidence established that the beneficiary's marriage was entered into for the sole purpose of obtaining immigration benefits.

The file records no further actions pertaining to the beneficiary until the above-mentioned Form ETA 750 Application for Alien Employment Certification was submitted on June 13, 1997 by the employer which would later submit the instant I-140 petition.

A judgment of absolute divorce was granted to the beneficiary and his wife on March 22, 1999 by the Circuit Court, Montgomery County, Maryland. (Judgment of Absolute Divorce, Mar 22, 1999).

The Form ETA 750 was certified by the Department of Labor on May 31, 2000.

The instant I-140 petition was filed on July 17, 2000.

In a request for additional evidence (RFE) dated November 16, 2000, the director requested additional evidence pertaining to the petitioner's ability to pay the proffered wage and pertaining to the beneficiary's qualifications for the offered position. In response to the RFE, the petitioner submitted additional documentation. The petitioner's submissions in response to the RFE were received by CIS on January 12, 2001.

The I-140 petition was approved on January 17, 2001.

On May 23, 2001 the beneficiary submitted an I-485 Application to Register Permanent Residence or Adjust Status.

Upon further review, on June 27, 2002 the director issued a notice of intent to revoke (ITR) the approval of the I-140 petition, based on a finding that a family-based immigrant petition had been denied based on a written request of the sponsor and on a failure of the beneficiary to establish that his marriage was not entered into solely in order to procure immigration benefits. The director stated that based on section 204(c) of the Act, no other immigrant petition may be approved. No response was received to the ITR.

On November 8, 2002 the director issued a decision stating that no response had been received to the ITR and revoking the approval of the I-140 petition.

On November 20, 2002 the petitioner submitted a Motion to Reconsider/Reopen to the director.

On May 14, 2003, the director issued a decision granting the motion to reconsider or reopen and then affirming his prior decision of November 8, 2002 to revoke the approval of the I-140 petition.

On June 4, 2003 the director denied the beneficiary's I-485 application to adjust status to permanent residence.

On June 16, 2003 the petitioner submitted an I-290B Notice of Appeal of the director's May 14, 2003 decision revoking the approval of the I-140 petition.

On November 10, 2004, the AAO dismissed the petitioner's appeal.

On December 9, 2004 the petitioner filed a motion to reopen or reconsider the AAO's decision, which is the motion now pending before the AAO.

The regulation at 8 C.F.R. § 103.5(a)(1) states in part as follows:

(i) *General* Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242 and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision. . . .

(ii) *Jurisdiction* The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. . . .

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part as follows:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence:

The instant motion is accompanied by affidavits by the beneficiary, his former wife, his former wife's sister, and by the owner of the I-140 petitioner. The motion is timely and it meets the requirements of the regulation at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion will be granted.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b) [referring to adjudications of immigrant visa petitions] 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 [director] to have been entered into for the purpose of evading the immigration laws or

(2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purposes of evading the immigration laws.

Act § 204(c).

The evidence in the record relevant to section 204(c) is listed below. The dates on which the documents were submitted have been determined based on their order in the file. Most documents are found on the record side

of the file, but some of the documents are found on the non-record side of the file, for reasons which are not explained in the file.

The relevant evidence which was submitted prior to or at the November 29, 1989 interview on the I-130 petition consists of the following documents:

- two undated photographs of the beneficiary and his wife sitting and lying on a bed;
- a Washington, D.C. driver's license of the beneficiary issued February 10, 1989;
- a Maryland driver's license application of the beneficiary dated November 22, 1989;
- an account balance statement from the American Security Bank dated November 22, 1989 for an account of the beneficiary and his wife;
- an affidavit dated November 28, 1989 by [REDACTED], an acquaintance of the beneficiary;
- a letter dated November 22, 1989 from [REDACTED];
- an affidavit dated November 28, 1989 by [REDACTED], an acquaintance of the beneficiary;
- an affidavit dated November 28, 1989 by [REDACTED], an acquaintance of the beneficiary;
- a Form I-648 Memorandum of Record of Interview made in Examinations Section dated November 29, 1989, signed by the beneficiary and his wife.

The following additional relevant evidence was submitted with the Form I-751 Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status, submitted on October 31, 1991:

- a copy of an American Security Bank statement dated May 6, 1991 for an account of the beneficiary and his wife;
- a copy of an American Express Gold Card Summary of Account dated September 13, 1991 for the beneficiary and his wife;
- an affidavit dated October 19, 1991 by Rev. [REDACTED], an acquaintance of the beneficiary and his wife;
- an affidavit dated October 22, 1991 by [REDACTED], an acquaintance of the beneficiary and his wife.

A first interview on the Form I-751 Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status was held on December 18, 1991, but no additional relevant evidence was submitted prior to or at that interview.

A second interview on the I-751 petition was held on February 12, 1992. The additional relevant evidence submitted prior to or at that interview consists of the following documents:

- copies of several pages of the beneficiary's Ivory Coast Passport;

- a photocopy of a Washington, D.C. driver's license of the beneficiary's wife issued on August 12, 1988 with expiration date of August 12, 1992;
- the original of an American Security Bank statement dated May 6, 1991 for an account of the beneficiary and his wife;
- the original of an American Express Gold Card Summary of Account dated September 13, 1991 for the beneficiary and his wife;
- a copy of an apartment lease dated May 1, 1989 between the beneficiary and the Housing Opportunities Commission of Montgomery County, Maryland for an apartment on Eastern Avenue, in Silver Spring, Maryland;
- a Record of Sworn Statement dated February 12, 1992 signed by the beneficiary, summarizing his testimony at the interview held that date;
- a Record of Sworn Statement dated February 12, 1992 signed by the beneficiary's wife, summarizing her testimony at the interview held that date.

In response to a Form I-72 issued on February 12, 1992 requesting additional documentation the beneficiary and his wife submitted additional evidence. The CIS receipt stamp for those documents is misaligned. Part of the receipt stamp appears on the front of the original I-72 and the other part of the stamp appears on the back of a copy of a Maryland motor vehicle registration certificate which was among the documents submitted in response to the I-72. The portion of the stamp with the date of receipt appears on the back of the registration certificate, showing receipt by CIS on March 24, 1992. The following documents were submitted as the petitioner's response to the February 12, 1992 Form I-72:

- a copy of an automobile insurance application dated February 26, 1992 with a signature which appears to match the signature of the beneficiary on other documents in the record;
- a Maryland Department of Transportation, Motor Vehicle Administration, Registration Certificate with an expiration date of February 26, 1993 for a Ford station wagon in the name of the beneficiary and his wife;
- a letter dated February 19, 1992 from the Rooms Division Manager of the Henle Park Hotel;
- an envelope with a postage meter stamp of February 27, 1992 from Blue Cross and Blue Shield of the National Capital Area addressed to the beneficiary's wife at an address on Eastern Avenue, Silver Spring, MD;
- a letter dated March 2, 1992 from Rev. [REDACTED], a minister who had counseled the beneficiary and his wife;
- an American Security Bank statement dated March 5, 1992 for an account of the beneficiary and his wife;
- an undated letter from the Maryland Department of Transportation, Motor Vehicle Administration, to the beneficiary's wife, at an address on Eastern Avenue, Silver Spring, Maryland;

- a copy of a Form 502 Maryland Tax Return of the beneficiary and his wife for 1989, with attached Form W-2 Wage and Tax Statement of the beneficiary from the Henley Park Hotel;
- a copy of a Form 502 Maryland Tax Return of the beneficiary for 1990, with attached Form W-2 Wage and Tax Statements of the beneficiary from the Henley Park Hotel and from Minney System, Inc., of New York, New York;
- copies of Form 1040 U.S. Individual Income Tax Returns of the beneficiary for 1989 and 1990, each marked as married filing separate return and each showing the name of the beneficiary's wife in the space indicated for spouse;
- a copy of a receipt of payment dated February 26, 1992 from Nationwide Insurance company in the names of the beneficiary and his wife as policyholders.

The additional relevant evidence which was submitted prior to or at the third interview on the I-751 petition, held on September 22, 1992 is the following:

- a Potomac Electric Power Company (PEPCO) electric bill dated January 2, 1992 for the beneficiary at the address on Eastern Avenue, Silver Spring, Maryland;
- a waiver of counsel statement dated September 22, 1992 by the beneficiary's wife;
- a handwritten statement dated September 22, 1992 by the beneficiary's wife;
- an affidavit dated September 22, 1992 by the beneficiary's wife;
- an affidavit dated September 22, 1992 by the beneficiary.

No further documents relevant to the validity of the beneficiary's marriage were submitted until after the director of the Vermont Service Center had issued the decision dated November 8, 2002 revoking the approval of the instant I-140 petition. Following that decision, the I-140 petitioner submitted a Motion to Reconsider/Reopen on November 20, 2002. The relevant evidence which was submitted with that motion is the following:

- a copy of a Judgment of Absolute Divorce dated March 22, 1999 for the beneficiary and his wife issued by the Circuit Court, Montgomery County, Maryland;
- an affidavit dated July 25, 2002 by the beneficiary;
- an affidavit dated July 25, 2002 by the beneficiary's wife.

No additional relevant evidence was submitted with the I-290B notice of appeal.

With the instant motion to reopen or reconsider the following relevant evidence was submitted:

- an affidavit dated December 9, 2004 by the beneficiary's wife;
- an affidavit dated February 2, 2004 by the beneficiary, though the correct date is probably December 9, 2004, as discussed below;

an affidavit dated December 9, 2004 by the owner and president of the I-140 petitioner;

In addition to the documentary evidence submitted by the I-130 petitioner and by the I-140 petitioner, the file contains interview notes of the interviews held at the Baltimore district office. For one interview, the file also contains a memorandum, dated February 12, 1992, summarizing the interview held that day.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal. In its decision of November 10, 2004 dismissing the appeal the AAO used language which suggested that the director's decision on appeal was entitled to some unspecified measure of deference by the AAO. The AAO stated, "At the outset, it is noted that although the director could have examined the evidence more closely, the AAO cannot find that his decision to revoke the approval of the I-140 was erroneous." (AAO decision, November 10, 2004, at 3). Later the AAO stated, "In the instant case, there is sufficient relevant evidence in the record to support the director's decision to revoke the approval of the I-140, pursuant to section 204(c) of the Act, based on the original determination and evidence that the marriage between Ms. [REDACTED] and the beneficiary was entered into in order to procure an immigration benefit." (AAO decision, November 10, 2004, at 4). To the extent that the foregoing language suggests any deference on the part of the AAO to the director's decision it is inconsistent with a review of the evidence *de novo* on appeal.

The interview notes in the file and the February 12, 1992 memorandum summarizing the interview held that day are not part of the record. Neither the I-130 petitioner nor the I-140 petitioner was informed about any derogatory information in those documents as would be required by the regulation at 8 C.F.R. § 103.2(a)(16) if the information in the notes or in the memorandum were to be relied upon as a basis for a decision adverse to either petitioner.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

*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 [CIS] 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.

Subparagraphs (b)(iii) and (b)(iv) provide exceptions to the disclosure of derogatory information to an applicant or a petitioner where the information is classified under Executive Order No. 12356 (47 FR 14874; April 6, 1982). Nothing in the file in the instant petition raises any issue under either of those subparagraphs.

The interview notes and the February 12, 1992 memorandum summarize testimony of the beneficiary and his wife. If those summaries could be presumed to be accurate, no need would arise under the foregoing regulation to inform the I-130 petitioner about any derogatory information in the notes or in the memorandum, since the petitioner and the beneficiary were the only witnesses and since the petitioner may be assumed to know what she and the beneficiary testified to. However, the record provides no means to

determine whether the interview notes and the February 12, 1992 memorandum accurately summarize the witnesses' testimony. Although in the February 12, 1992 memorandum the interviewing officer suggests that another interview be conducted with a video tape being made of the interview, that was not done.

In a letter dated December 22, 1992, the CIS district director notified the beneficiary that the Form I-751 was denied, based on the statements the beneficiary's wife had signed at the interview on September 22, 1992. The district director stated that in addition to the statements signed by the beneficiary's wife, "there is clear and convincing evidence that indicates the marriage was entered into for the sole purpose of obtaining immigration benefits . . ." The director makes no further reference to that evidence, nor was the I-130 petitioner informed by any other method of the evidence which the director was relying on.

For the foregoing reasons, any derogatory information in the various sets of interview notes and in the February 12, 1992 memorandum cannot be used to support the finding that the beneficiary's marriage was entered into for the sole purpose of obtaining immigration benefits, absent a notification to either the I-130 petitioner or to the I-140 petitioner of that derogatory information under 8 C.F.R. § 103.2(b)(16)(i). Therefore, only derogatory information which is known to one of those petitioners may be relied upon for any adverse decision concerning the purpose of the beneficiary's marriage.

One document known to the I-130 petitioner containing potentially derogatory information is a copy of an apartment lease for the address on Eastern Avenue in Silver Spring, Maryland. That lease is signed by the beneficiary and by an official of the Housing Opportunities Commission of Montgomery County, Maryland. The dates beside the signatures of the commission official are each clearly legible as 5-1-89, but the dates beside the signatures of the beneficiary are not legible for the final digit of the date, and read "04-01-8?", with the last digit perhaps a 7 or a 9.

On the first page of the apartment lease, the occupancy date is stated to be "07/01/87." That date is circled in red on the copy in the file, indicating that the CIS examining officer considered the date to be significant, perhaps because that date appears to be inconsistent with the signing date of May 22, 1989. However, the length of term of the lease is stated in the next section of the lease, also on the first page, which states, "This lease shall be for the term of month by month, commencing on the 1<sup>st</sup> day of May, 1989, and fully ending at midnight on the last day of April, 1990." That lease term is consistent with a signing date of May 22, 1989. The lease therefore appears to be a renewal of a previously existing tenancy of the beneficiary, and the lease contains no derogatory information concerning the good faith of the beneficiary's marriage.

Another evidentiary document known to the I-130 petitioner (the beneficiary's wife) is a photocopy of a Washington, D.C. driver's license of the beneficiary's wife issued on August 12, 1988, with an expiration date of August 12, 1992. The original of the license was presented at the February 22, 1992 interview, a date several years after the beneficiary's wife claims to have been living with the beneficiary at an address on Eastern Avenue in Silver Spring, Maryland, following their marriage on May 22, 1989. On the I-130 petition, submitted on July 4, 1989, the beneficiary's wife states her residence and the beneficiary's address to be the address on Eastern Avenue in Silver Spring, Maryland. That same address was stated for both persons on the I-751 joint petition filed on October 31, 1991. A Maryland residence address on those dates is inconsistent with the wife's possession of a valid Washington, D.C., driver's license as of February 22, 1992.

Other evidentiary documents with derogatory information are a Record of Sworn Statement dated February 12, 1992, signed by the beneficiary and another Record of Sworn Statement of that same date signed by the beneficiary's wife. Each statement contains the individual's answers to questions posed by the interviewing officer as transcribed by the officer. Each page is signed by the witness and by the officer, signatures presumably affixed at the end of the testimony of each witness. In the records of sworn statements, the testimony of the beneficiary and of his wife is inconsistent on several points.

The beneficiary testified that their apartment has one telephone in the living room and one in the bedroom, but his wife testified that it has only one telephone, in the living room.

The beneficiary testified that his wife has a wedding ring and that she still has it. His wife testified that she lost her wedding nine months previously. The beneficiary testified that he has a wedding ring, but that it was at home at the time of the interview. Therefore, each witness testified that his or her wedding ring was not being worn during the interview. When asked to describe his wife's wedding ring, the beneficiary said it was gold, with designs, but that "the one she has today has little diamonds on it." (Beneficiary's Record of Sworn Statement, February 12, 1992, at 6). When asked to describe her own wedding ring, referring to the ring she purportedly had lost, the wife said that it was a plain gold band, and was smooth.

The beneficiary testified that on New Year's Eve he and his wife went to Red Lobster. His wife testified that they stayed home on New Year's Eve.

The beneficiary testified that he proposed to his wife at his apartment on Eastern Avenue. His wife testified that he proposed while they were riding in his car.

The beneficiary testified that for Christmas he gave his wife a green dress and a little diamond ring. His wife testified that for Christmas he gave her a green dress.

In addition to the inconsistencies between the two sworn statements, some information in the wife's sworn statements is inconsistent with information in affidavits she submitted later, as discussed below.

Other documents known to the I-130 petitioner include the written statements made by the beneficiary's wife at the third interview on the Form I-751 petition held at the Baltimore CIS district office on September 22, 1992. At that interview the beneficiary's wife signed three documents. One is a waiver of her right to counsel. The second is a hand-written statement withdrawing the Form I-751 and stating that she had not lived with the beneficiary at an address on C [REDACTED] E., Washington, D.C. nor at the address on Eastern Avenue in Silver Spring, Maryland. That hand-written statement further states that the beneficiary's wife had filled out "the paper" only to help him out and not for any money, and that she and the beneficiary have never lived together as man and wife. In that statement she also states that she is having a baby by a friend. The third document signed that date by the beneficiary's wife is an affidavit on a preprinted form, with hand-written notations stating that she only married the beneficiary on paper, that she had done so only to help him out, and that she and the beneficiary have never lived together as husband and wife. (Statements and affidavit of beneficiary's wife, September 22, 1992).

Evidence submitted on appeal attempts to explain the statements made on September 22, 1992 by the beneficiary's wife at the third interview on the I-751 petition.

In an affidavit dated July 25, 2002, the beneficiary's wife recants her statements of September 22, 1992 and asserts that she made them only because she was pressured to do so by the examining officer. In that affidavit, she states that as of September 22, 1992 she and her husband were in fact separated and that she was living at a different address, on Green Street, S.E., in Washington, D.C. She states that at the time she signed those statements she had a young daughter, and that under threat of criminal charges from the interviewing officer she made statements which were "blatantly untrue" in order to protect herself from criminal charges.

In an affidavit dated July 25, 2002 the beneficiary repeats most of the claims of his wife in her affidavit of that same date, based on what his wife told him about her experience at the September 22, 1992 interview.

In another affidavit, dated December 9, 2004, the beneficiary's wife repeats her claims made in her July 25, 1992 affidavit and provides additional details. She again recants her written statements of September 22, 1992 and asserts that she made them only because she was pressured to do so by the examining officer. In the affidavit, she states that as of September 22, 1992 she and her husband were in fact separated and that she was living at a different address. She states that she lived with the beneficiary at "Easter" [sic] avenue until August 10, 1991, and that they filed a joint petition to remove the conditional basis of the beneficiary's permanent residence on October 28, 1991. The affidavit fails to explain why the Eastern Avenue address was stated on the form I-751 as the address for both the beneficiary and his wife, since she claims in her December 9, 2004 affidavit to have moved away from that address more than two months prior to October 28, 1991.

The December 9, 2004 affidavit of the beneficiary's wife also contains inconsistent information with that in her sworn statement dated February 12, 1992. On the sworn statement the wife again states that her present address is the apartment on Eastern Avenue in Silver Spring, Maryland, information which is inconsistent with her statement in the December 9, 2004 affidavit that she had moved from that address on August 10, 1991. (Wife's Sworn Statement, February 12, 1992, at 2).

In the December 9, 2004 affidavit, the beneficiary's wife states that part of the reason she felt pressured to sign the statements she made on September 22, 1992 was because she had a four-year-old daughter as of that date and that she did not want to expose herself to criminal charges. In her affidavit dated July 25, 2002 she also referred to her young daughter, without specify the girl's age in September 2002. However, the assertion of the beneficiary's wife that she had a four-year-old daughter as of September 22, 1992 is inconsistent with her sworn statement of February 12, 1992 in which she was asked if she had any children and in which she answered no. (Wife's Sworn Statement, February 12, 1992, at 2).

The December 9, 2004 affidavit does not state whether at the beginning of the interview on September 22, 1992 the beneficiary's wife volunteered the information that she was no longer living with her husband or whether she gave that information only after being questioned by the officer.

The record also contains an affidavit of the beneficiary dated February 4, 2004, although that date may be a typographical error, since the affidavit states that it is in support of a motion dated November 8, 2004 and since it also states that it is being executed on the same date as the affidavit of the beneficiary's wife, referring to the December 9, 2004 affidavit. In his affidavit, the beneficiary repeats many of the claims made by his wife, based on what she told him about the September 22, 2004 interview.

The record also contains a number of affidavits from acquaintances of the beneficiary and his wife and from a sister of the beneficiary's wife. All of the affiants state their beliefs that the marriage of the beneficiary and his wife was in good faith. Affidavits can provide some corroboration for the testimony of witnesses and for other documentary evidence, but affidavits provide no opportunities for questioning the affiants about the details of their knowledge and they provide no effective way to test the information in the affidavits for consistencies or possible inconsistencies with other evidence in the record.

The record also contains a number of bills and business correspondence. On some of those documents, only the name of the beneficiary appears, on some, only the name of the beneficiary's wife appears, and on some, the names of both the beneficiary and the beneficiary's wife appear. None of those documents are strong evidence in favor of the good faith of the beneficiary's marriage.

One document is an envelope from Blue Cross and Blue Shield of the National Capital Area addressed to the beneficiary's wife at the Eastern Avenue address in Silver Spring, Maryland. The envelope bears the pre-printed return address of Blue Cross and Blue Shield, bears a postage meter stamp for \$0.47 dated "February 27 92," and marked "presorted first class." The name of the beneficiary's wife and her address are written by

hand on the envelope. The record contains no information on the purported contents of that envelope which were mailed to the beneficiary's wife. Aside from the handwritten address on the envelope, the record contains no evidence that the beneficiary's wife had an insurance policy with Blue Cross and Blue Shield or that her address in the official records of that company was the address on Eastern Avenue.

The documents from the Maryland Motor Vehicle Administration indicate that the beneficiary's Ford station wagon was registered both in his name and in his wife's name, and that the beneficiary's wife made a visit to the Maryland Motor Vehicle Administration offices on an unspecified date. The Nationwide Insurance receipt dated February 26, 1992 shows the policy holder name as the beneficiary and his wife. The copies of state and federal tax returns for 1989 and 1990 state the name of the beneficiary's wife as the spouse of the beneficiary, but they show no income for the beneficiary's wife.

Bank and credit card statements in the record show the names of the beneficiary and his wife on the accounts, but the record contains few copies of such statements, and therefore no analysis can be made concerning the activity on those accounts.

The only photographs of the beneficiary and his wife together are two photographs which were submitted prior to or at the November 29, 1989 interview on the I-130 petition. One of those photographs shows the two persons sitting on a bed, the other photograph shows them partially reclining on the bed, with the wife partly under the bed covers. Both persons appear to be fully clothed in the photographs, and the beneficiary is wearing his shoes in both photographs. The photographs appear to have been posed for the purpose of showing the beneficiary and his wife together, and the photographs prove nothing beyond the fact that they were together on a bed at some unspecified time.

The standard for reviewing Section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board of Immigration Appeals held that visa revocation pursuant to Section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. See also *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). That standard of proof appears to be intended by the Board as a higher standard than preponderance of the evidence, which is the normal standard in visa petition matters. See *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The inconsistencies in the record and the explicit written statements of the beneficiary's wife made on September 22, 1992, one of which statements was a sworn affidavit, are significant evidence that the beneficiary's marriage was entered into for the sole purpose of procuring immigration benefits. Although the beneficiary's wife later submitted two affidavits disavowing the statements she made on September 22, 1992, those affidavits raise further evidentiary inconsistencies, as discussed above. The beneficiary's own later affidavits also attempt to provide explanations for his wife's adverse statements made on September 22, 1992, but his information is based entirely on what his wife told him about what took place during her portion of the interview on September 22, 1992. Therefore, the beneficiary's later affidavits provide no significant additional information.

In the instant Motion to Reopen or Reconsider, counsel cites *Oddo v. Reno*, 17 F. Supp. 2d (E.D. Va. 1998), affirmed by the Fourth Circuit Court of Appeals as an unpublished decision decided on March 29, 1999. A copy of the unpublished Fourth Circuit decision is among the documents submitted in support of the motion. As an unpublished decision, that decision is not a binding precedent, as is noted on page two of the decision itself. Moreover, the holding of that case was to affirm a decision of the Immigration and Naturalization Service (INS, now CIS) to revoke a previously approved visa petition filed by an employer. The facts in that

case were similar to the facts in the instant case in several ways, including the fact that the petitioner and the beneficiary in the marriage petition had tried to conceal from INS investigators that they had separated. The decision of the Fourth Circuit to affirm the revocation of a later employment-based visa petition therefore provides no support to the petitioner's position in the instant motion.

Counsel also cites *Ghaly v. INS*, 48 F.2d 1426 (7<sup>th</sup> Cir. 1995). That decision is a published decision, but it also is not helpful to the petitioner in the instant motion. In that case, the Seventh Circuit affirmed a decision of the INS revoking an employment-based immigrant visa petition, based on information that the beneficiary had previously entered into a marriage for the sole purpose of evading immigration laws. The facts in that case were similar to those in the instant case, including the fact that the United States citizen who was a party to the previous marriage had admitted that the marriage was fraudulent and had then submitted an affidavit attempting to recant that admission. The only issue of controversy on appeal was whether the INS should have provided the petitioning employer with an actual copy of the United States citizen's statement admitting fraud, rather than providing only a summary of that statement. The court ruled that it would have been preferable to provide the employer with an actual copy of the statement, but held that the actions of the INS were sufficient to satisfy legal requirements. Like the Fourth Circuit decision discussed above, the case of *Ghaly v. INS* therefore provides no support to the petitioner's position in the instant motion.

Considered as a whole, the evidence in the record in the instant I-140 petition constitutes substantial and probative evidence that the beneficiary's marriage to Reshell Johnson was entered into for the sole purpose of evading immigration laws. Therefore, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the May 14, 2003 decision of the director. That decision reaffirmed the director's earlier decision to revoke the I-140 petition on the basis of section 204(c) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion to reopen or reconsider is granted. The prior decision of the AAO to dismiss the appeal is affirmed. The petition remains revoked.