



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 22 2006**
EAC-03-098-50644

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

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:
[REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a information technology consulting firm. It seeks to employ the beneficiary permanently in the United States as a Software Analyst Consultant. 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 the beneficiary was ineligible for an immigrant visa approval because of section 204(c) of the Immigration and Nationality Act (the Act), pertaining to marriages entered into in order to evade immigration laws.

The procedural history of this case is documented in the record and is incorporated into this decision. A detailed summary of the procedural history appears below.

As set forth in the director's September 4, 2004 decision denying 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.

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 July 24, 2002.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

On appeal counsel submits a brief and additional evidence, consisting of copies of an amended I-485 application of the beneficiary and of an amended G-325A biographical form of the beneficiary; a copy of a transmittal letter for those forms from counsel to the director; and color copies of photographs of the beneficiary and his wife together in several settings, including apparent photographs of their wedding. On appeal counsel also submits additional copies of evidentiary documents which were submitted previously for the record. A complete listing of relevant evidentiary documents in the record appears below.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the beneficiary never entered into a marriage to obtain an immigration benefit. Counsel states that the beneficiary's wife later withdrew the I-130 petition because the strain of the I-130 proceedings was too great and because it appeared that the beneficiary had a reasonable chance of obtaining permanent residence through an I-140 petition filed by his employer. Counsel also states that after the marriage ended there was no reason for the couple to retain joint financial evidence, and that affidavits from acquaintances are therefore the best form of evidence available. Counsel states that the fact that the affidavits recite few particularized facts about the beneficiary's marriage is due to the lapse of time between the marriage and the affidavits. Counsel states that the director improperly considered the omission from the beneficiary's second I-485 application and the accompanying Form G-325A of any information about the beneficiary's wife to be negative evidence concerning the beneficiary's marriage. Counsel states that at the

time those documents were being prepared the beneficiary was going through a divorce and was unsure how to refer to his marriage. Counsel states that an amended I-485 and an amended Form G-325A have been submitted, which the director should have considered.

Relevant facts and procedural events are set forth below. Documentary sources in the record for the events noted are cited in parentheses, unless the source is evident from the text.

For simplicity of references in this decision, the I-130 petitioner, who is now the beneficiary's former wife, will be referred to herein as the beneficiary's wife for events on all dates, including prior to, during and after her marriage to the beneficiary.

The beneficiary's wife was born in New York, New York, on September 11, 1941. Her name at birth was [REDACTED]. She married [REDACTED] on July 16, 1960 and was divorced from him on February 3, 1976. She [REDACTED] on a date not specified in the record. She obtained a judgment of divorce from [REDACTED] in New Jersey on May 18, 1978. After her divorce [REDACTED] she continued to use his last name, so that her name was Irene Vaughn. After her marriage to the beneficiary on September 23, 2001 she used the [REDACTED] (Birth Certificate issued November 10, 1999; Judgment of Divorce, Superior Court of New Jersey, February 3, 1976; Final Judgment of Divorce, Superior Court of New Jersey, Chancery Division – Sussex County, May 18, 1978; I-130 petition, Part B. 3. & 4).

The beneficiary was born on February 28, 1970 in Bombay India. (I-130 petition, Part C. 3. & 4; Birth Certificate issued August 10, 2001).

The beneficiary began working in the United States in December 1996 as a software engineer with a firm in Edison, New Jersey. (Form G-325A, September 24, 2001)

Prior to the filing of the I-130 petition the beneficiary's most recent entry into the United States was as an H1-B temporary worker on April 21, 2001. (I-130 petition, Part C. 14.; Beneficiary's Passport, I-94 card).

The beneficiary and his wife met online. The beneficiary helped her with her computer. The date of their meeting is not specified in the record. (CIS Officer's interview notes, February 4, 2002).

The beneficiary and his wife were married on September 23, 2001 in the Township of Hardyston, New Jersey. (Marriage Certificate, State of New Jersey, issued October 2, 2001).

The beneficiary's wife submitted an I-130 visa petition on his behalf on September 25, 2001 and the beneficiary concurrently submitted an I-485 application to adjust status to permanent resident status. Those initial submissions were rejected by CIS and were then resubmitted on October 12, 2001. (I-130 petition, with one CIS receipt stamp on the back and one on the front; I-485 petition, with two CIS receipt stamps on the back). The reason for the initial rejection by CIS of the September 25, 2001 submissions was apparently the absence of certain required documents. (Letter from beneficiary, October 10, 2001).

An interview on the I-130 petition was held at the CIS Newark district office on February 4, 2002. (CIS Officer's interview notes, February 4, 2002).

The beneficiary apparently departed the United States at some point after the I-130 interview, for the record indicates that he made another entry into the United States as an H1-B temporary worker on March 31, 2002. (I-485 application #2, submitted April 5, 2003, Part 1).

In a decision issued June 5, 2002, the district director denied the I-130 petition. (I-130 Decision, June 5, 2002).

The I-130 petitioner (the beneficiary's wife) filed an appeal to the Board of Immigration Appeals on July 2, 2002. (EOIR-29).

The beneficiary's employer submitted the above-mentioned ETA 750 application for labor certification on July 24, 2002.

On October 21, 2002, the beneficiary filed an I-140 petition on his own behalf, checking Part 2, box "i," as an alien applying for a national interest waiver of the labor certification requirement of the Act. (I-140 petition #1).

The Department of Labor certified the ETA 750 on January 15, 2003.

A second I-140 petition on behalf of the beneficiary was submitted on February 4, 2003. On the second I-140 petition, the petitioner was the beneficiary's employer. (I-140 petition #2).

In a decision dated February 14, 2003, the Board of Immigration Appeals determined that some, but not all, of the evidentiary matters relied upon by the district director in his decision on the I-130 petition had been adequately addressed on appeal. The Board remanded the I-130 petition to the district director to allow the I-130 petitioner to submit additional evidence. (BIA decision, February 14, 2003).

On April 5, 2003, the beneficiary submitted a second I-485 application to adjust status to permanent resident status, checking Part 2, box "a," as an alien for whom an immigrant petition giving him an immediately available immigrant visa number has been approved. (I-485 application #2, April 5, 2003).

In a letter dated May 21, 2003, the beneficiary's wife withdrew the I-130 petition.

In a notice of intent to deny (ITD) dated June 29, 2004, the director of the Vermont Service Center notified the I-140 petitioner of the director's intent to deny the second I-140 petition on the ground that the beneficiary had attempted or conspired to enter into a marriage for the purpose of evading immigration laws.

In response to the ITD, the I-140 petitioner submitted additional evidence, including affidavits from four friends or acquaintances of the beneficiary and his wife. The petitioner's submissions in response to the ITD were received by the director on July 26, 2004.

In a decision dated September 7, 2004, the director found that the evidence submitted in response to the ITD failed to overcome the grounds for denial cited in the ITD. The director therefore denied the second I-140 petition.

The petitioner for the second I-140 petition filed a timely appeal on October 7, 2004. (I-290B, received October 7, 2004).

In a decision dated December 20, 2004, the director of the Vermont Service Center denied the first I-140 petition on the grounds that the beneficiary had failed to establish his eligibility for a national interest waiver and on the grounds that the beneficiary had conspired with a United States citizen to enter into a marriage for the purpose of circumventing immigration laws.

The matter before the AAO on appeal is the appeal of the beneficiary's employer from the September 7, 2004 denial of the second I-140 petition.

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 purpose of evading the immigration laws.

Act § 204(c).

The regulation at 8 C.F.R. § 204.2(a)(1)(ii) states as follows:

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

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. The evidence relevant to section 204(c) of the Act as it may apply to the beneficiary's marriage is listed below. The statements below indicating when the documents were submitted are based on the order of the documents in the record.

With the I-130 petition, the following evidence was submitted:

- a copy of a birth certificate of the beneficiary issued on August 10, 2001 showing his birth on February 28, 1970 in Bombay, India;
- a copy of a judgment of divorce of the beneficiary's wife issued on February 3, 1976 by the Superior Court of New Jersey showing her divorce from [REDACTED];
- a copy of a divorce decree of the beneficiary's wife issued May 18, 1978 by the Superior Court of New Jersey showing her divorce from [REDACTED];
- a copy of the United States passport of the beneficiary's wife issued on March 20, 2001;

With the concurrently filed I-485 application of the beneficiary, the following evidence was submitted:

- copies of several pages of the beneficiary's passport;
- a copy of a pay statement of the beneficiary dated September 10, 2001;
- a copy of a pay statement of the beneficiary's wife dated September 20, 2001;
- copies of Form 1040 individual income tax returns of the beneficiary's wife for 1998, 1999, and 2000, with accompanying Form W-2 wage and tax statements.
- a copy of a Citibank retirement account statement dated January 21, 2002 of the beneficiary;
- a copy of a First Union checking account statement dated January 23, 2002 of the beneficiary's wife and her daughter;
- a copy of a Citibank Form 1099-INT statement for 2001 for a certificate of deposit in the beneficiary's name; and
- a cover letter dated October 10, 2001 from the beneficiary's wife resubmitting the I-130 petition with additional required documentation.

At the interview on the I-130 petition held February 4, 2002, the I-130 petitioner submitted the following evidence:

- a copy of a pay statement of the beneficiary dated September 10, 2001;
- a Citibank retirement account statement dated December 31, 2001 for an IRA of the beneficiary;
- the original of the First Union checking account statement dated January 23 2002 of the beneficiary's wife and her daughter, of which a copy was submitted previously;
- a photograph of the beneficiary's wife and a photograph of a former girlfriend of the beneficiary, copies of which photographs are now in the file, apparently made by the CIS interviewing officer;
- a Florida driver's license of the beneficiary's wife issued on April 18, 2000 with expiration date of September 11, 2006 showing an address in Pal Beach Gardens, Florida and a New Jersey driver's license of the beneficiary issued on September 26, 2001 with expiration date of March 31, 2005 showing an address in Stockholm, New Jersey, copies of which licenses are now in the file, apparently made by the CIS interviewing officer;
- a copy of the marriage license and marriage certificate of the beneficiary and the beneficiary's wife, showing their marriage on September 23, 2001 in Hardyston, New Jersey;
- a copy of a certificate dated October 2, 2001 showing the marriage of the beneficiary and the beneficiary's wife on September 23, 2001; and
- a copy of a birth certificate issued on November 10, 1999 showing the birth date of the beneficiary's wife on September 15, 1941.

Following the denial of the I-130 petition on June 5, 2002, the beneficiary's wife submitted an appeal of the I-130 petition to the Board of Immigration Appeals on July 2, 2002. With the EOIR-29 notice of appeal, the following documents were submitted:

- a cover letter dated June 18, 2002 from the beneficiary's wife;
- a letter dated June 17, 2002 from the beneficiary's wife addressing the points in the I-130 denial decision;
- a copy of a letter dated March 11, 2002 from the beneficiary to Senator [REDACTED];
- a copy of a statement dated March 19, 2002 by the beneficiary describing her complaints about the I-130 interview;
- pay statements dated September 20, 2001 and October 4, 2001 of the beneficiary's wife issued by The [REDACTED];
- a First Union checking account statement dated May 21, 2002 of the beneficiary's wife, her daughter and the beneficiary;
- a printout of an electronic mail communication dated June 10, 2002 from the IFA Insurance Company to the beneficiary's wife giving a rate quote for insurance on a 1995 Mercury Mystique, showing an address of the beneficiary's wife in Stockholm, New Jersey; and
- a letter dated June 14, 2002 from the accounting manager at The Wayne Manor, Wayne, New Jersey, stating the full time employment of the beneficiary's wife since 1993.

With the first I-140 petition, filed by the beneficiary on his own behalf on October 21, 2002, no evidence relevant to the beneficiary's marriage was submitted.

With the second I-140 petition, filed by the beneficiary's employer on February 4, 2003, no evidence relevant to the beneficiary's marriage was submitted.

With the beneficiary's second I-485 application, filed on April 5, 2003, the beneficiary submitted a Form G-325A biographical information form dated February 25, 2003 showing no present wife and no former wife. No other evidence relevant to the beneficiary's marriage was submitted with the second I-485 application.

In response to a June 29, 2004 notice of intent to deny the second I-140 petition on the ground of section 204(c) of the Act, a letter from counsel dated July 23, 2004 was submitted, along with additional evidence relevant to the beneficiary's marriage. The petitioner's submissions were received by the director on July 26, 2004, and included the following evidentiary documents:

- a letter dated May 21, 2003 from the beneficiary's wife;
- a copy of a Form I-847 report of complaint submitted by the beneficiary's wife concerning the February 4, 2002 interview on the I-130 petition, with an attached unsigned statement, apparently by the beneficiary's wife;

- a copy of a letter dated March 11, 2002 from the beneficiary's wife to the Office of Internal Audit, Immigration and Naturalization Service (now CIS);
- a copy of an undated letter dated from [REDACTED] with a copy of a Constituent Waiver Form and additional copies of the letter dated March 11, 2002 from the beneficiary's wife to [REDACTED] and of the beneficiary's written statement dated March 19, 2002 describing her complaints about the I-130 interview;
- a letter dated July 22, 2004 from the beneficiary's wife;
- a copy of a First Union checking account statement dated November 21, 2002 for an account of the beneficiary's wife, her daughter and the beneficiary;
- a copy of a letter dated October 22, 2001 from the Municipal Clerk, Township of Hardyston, Stockholm, New Jersey;
- a copy of a [REDACTED] account statement dated April 27, 2003 for an individual retirement account of the beneficiary;
- copies of Citibank accounts dated November 6, 2001 and June 6, 2002 for combined accounts of the beneficiary;
- an additional copy of the beneficiary's New Jersey driver's license and a copy of a Bank One Visa card of the beneficiary's wife with expiration date of October 2006;
- an ING Direct statement dated March 31, 2003 for a savings account of the beneficiary;
- a copy of an affidavit dated July 20, 2004 by [REDACTED] of Hopatcong, New Jersey;
- a copy of an affidavit dated July 22, 2004 by [REDACTED], of Closter, New Jersey;
- a copy of an affidavit dated in July 2004 with a partially illegible date of the month by [REDACTED] of Closter, New Jersey; and
- a copy of an affidavit date July 21, 2004 by [REDACTED] of Stockholm, New Jersey.

With the response to the notice of intent to deny were also submitted additional copies of some evidentiary documents relevant to the beneficiary's marriage which had been submitted previously, as well as evidentiary documents and other documents relevant to other issues pertaining to the I-140 petition.

Following the September 7, 2004 denial of the second I-140 petition, the beneficiary's employer filed a timely appeal to the AAO, which was received by the director on October 7, 2004. With the I-290B notice of appeal, the following evidentiary documents relevant to the beneficiary's marriage were submitted:

- a copy of a letter from counsel to the director transmitting amended Forms I-485 and G-325A to the director;
- copies of an amended I-485 application of the beneficiary and an amended G-325A biographical information form of the beneficiary, each dated July 26, 2004; and

color copies of photographs of the beneficiary and the beneficiary's wife and of three other adults and three children beside a swimming pool in an apparent wedding ceremony, and color copies of photographs of the beneficiary and his wife in several other settings together.

The non-record side of the file also contains the originals of several photographs of the beneficiary and his wife in several settings, including one photograph which appears to have been taken immediately after the wedding ceremony, which bears a date stamp of "9-22-'01." None of the other photographs or copies of photographs bears date stamps. The file does not indicate the date on which the original photographs were submitted, nor the reason for placing them on the non-record side of the file.

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 evidence in the record shows that at the time of the marriage of the beneficiary and his wife the beneficiary was 31 years old and his wife was 60 years old, a 29-year difference in age. CIS has previously noted age differences between fiancées in a study of potential fraud in K-1 visa petitions for fiancée visas. In a study of 741 fiancée petitions, CIS identified 41 cases as either definite fraud or probable fraud, pertaining to "mail-order brides" whom the petitioners had never met. In those 41 cases, the U.S. citizen petitioners were all male. The study found that the median age difference between the U.S. citizen petitioners and the female beneficiaries was 15 years, with the greatest age difference being 41 years in one case. In two cases the male petitioners were two years younger than their fiancées. CIS, *International Matchmaking Organizations, Report to Congress, Appendix B*, (February 1999), <http://www.uscis.gov/graphics/aboutus/repstudies> (updated January 20, 2006).

In the instant case, the petitioner on the I-130 petition was a female United States citizen, who was 29 years older than the mail beneficiary as of the date of the marriage. Although the age difference was not specifically cited in the director's decision as one reason for denying the petition, it is clear from the record that the interviewing officer noted the age difference as one reason for examining very closely the other evidence pertaining to the marriage. Moreover, it is also clear from the record, including the letters from the beneficiary's wife submitted after the I-130 interview, that the beneficiary's wife was well aware that the age difference was considered by CIS as a significant fact requiring a close examination of the evidence. In those letters the beneficiary's wife conceded that because of the age difference her marriage to the beneficiary was very unusual and she attempted to explain why the marriage was nonetheless entered into in good faith.

It may be noted here that the statutory prohibition of section 204(c) of the Act does not require a finding that both parties to the marriage intended to evade immigration laws. The language of section 204(c)(1) leaves open the issue of whether both parties must be found to have intended to evade immigration laws, since that subsection applies to "a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws" Act § 204(c)(1). However, the following subsection provides an alternate ground for finding a violation, where "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)(2). Therefore, even if the U.S. citizen entered into the marriage in good faith, a violation of section 204(c)(2) of the Act could still be established based on negative evidence about the alien's intentions in entering into the marriage.

As noted above, the I-130 petition submitted by the beneficiary's wife and the beneficiary's concurrently-filed I-485 application to adjust status to permanent residence were initially submitted on September 25, 2001, which was two days after the marriage of the beneficiary and his wife. Since those documents were submitted by mail, they were therefore mailed no later than September 24, 2001, the day after the marriage. The reason for the initial rejection by CIS of the September 25, 2001 submissions was apparently the absence of certain required documents, namely a copy of a birth certificate of the beneficiary and a copy of the divorce decree from the first marriage of the beneficiary's wife. The initial submission also apparently lacked the proper amount for the total filing fees. (Letter from beneficiary, October 10, 2001). The I-130 petition and the I-485 application were resubmitted and were received by the district director on October 12, 2002.

An examination of the evidence in the record shows that as of the February 4, 2002 interview on the I-130 petition, no documentary evidence had been submitted showing any joint financial assets of the beneficiary and his wife. Each of the financial documents submitted up to that point pertains only to the beneficiary or only to the beneficiary's wife. On the First Union checking account statement of the beneficiary's wife submitted as of February 4, 2002, her daughter also appears as an account holder.

During the I-130 interview, the interviewing officer noted several inconsistencies between the testimony of the beneficiary and his wife, who were interviewed separately. The inconsistencies pertained to which room the couple they normally sleep in, whether they own a television, what furniture is in the basement, whether the beneficiary has any relatives in the United States, whether the beneficiary had a key to the house, the identity of a woman whose photograph the beneficiary had with him at the I-130 interview, and which room in their house the couple had slept in on the night preceding the interview.

Concerning the photograph of the woman mentioned above, the beneficiary's wife states in a letter dated June 17, 2002 to the Board of Immigration Appeals that she had been initially told by the beneficiary that he had a cousin who lived in Spain, whose name was [REDACTED]. The wife states that the woman came to visit the United States and that she met the woman only once. Concerning that meeting, the beneficiary's wife states that "it was not a very pleasant experience." (Letter from beneficiary's wife, June 17, 2002, at 3). The beneficiary's wife states that after the departure [REDACTED] for Spain she approached her husband about his relationship [REDACTED] and he then told the wife facts which she had already assumed upon meeting [REDACTED] namely that "she was a girlfriend and not his cousin." (Letter from beneficiary's wife, June 17, 2002, at 4). In her June 17, 2002 letter, the wife states that by the time [REDACTED] visited the United States her husband had strong feelings for her (his wife), and that had not explained the true nature of his relationship with [REDACTED] because he did not want her to get upset.

In the decision denying the I-130 petition, the district director states that at the I-130 interview when initially questioned about a picture of the woman, the beneficiary's wife had testified that it was a picture of her husband's cousin [REDACTED] who lives in Spain, and that the beneficiary's wife had met her only once. The decision states that the wife had earlier testified that had never met any of her husband's relatives. The decision states that during the questioning of the beneficiary, he had stated [REDACTED] was really his former girlfriend and had testified that his wife was fully aware of that situation. The decision states that in her own testimony, the beneficiary's wife had reiterated that she [REDACTED] only as her husband's cousin, and did not know that she is a former girlfriend.

The officer's interview notes, which are a part of the record, are consistent with the decision's summary of the wife's testimony about [REDACTED]. The notes show that the wife was specifically asked about the picture of the woman twice during the interview, and that she both times asserted [REDACTED] was a cousin of her husband. In her second response, according to the notes, the wife also stated that she did not know [REDACTED] was an ex-girlfriend of her husband.

In her June 17, 2002 letter, the beneficiary's wife attempts to explain her inconsistent testimony about [REDACTED] by stating, "At the time of the interview when questioned about her it was an automatic response as always to say it was a cousin." (Letter from beneficiary's wife, June 17, 2002, at 4).

The explanation offered by the beneficiary's wife for her testimony at the interview fails to adequately explain the inconsistencies between her own testimony and that of her husband about [REDACTED] or the inconsistencies with her own later statements in her June 17, 2002 letter. The letter states that the wife's meeting [REDACTED] caused the wife to believe that her husband's previous statements to her [REDACTED] was his cousin were false, and that [REDACTED] was actually a girlfriend. Her husband in fact later admitted his duplicity to her, giving as his explanation that he did not want to get her upset. The events concerning the visit [REDACTED] the beneficiary and his wife and the beneficiary's false statements [REDACTED] to his wife cannot be viewed as insignificant events in the marriage of the beneficiary and his wife. Therefore, the wife's claim in her June 17, 2002 letter that her testimony at the I-130 interview that [REDACTED] was her husband's cousin was "an automatic response" to the question [REDACTED] is not a credible explanation. Rather, her testimony about [REDACTED] the I-130 interview must be considered as deliberately false testimony about an issue of great importance to her marriage.

The interviewing officer's notes provide some additional details about how the photograph of [REDACTED] came to be part of the record. In a reference to the photograph [REDACTED] which is now part of the record, the interviewing officer states, "I got this picture because he [the beneficiary] was trying to take out the photo of his wife & I noticed him trying to hide something." (I-130 interview notes, February 4, 2002). The notes therefore indicate that the beneficiary carried with him not only a picture of his wife, but also a picture of a woman he claimed was a former girlfriend. It may be noted that the picture in the record of [REDACTED] shows a woman who appears to be approximately the same age as the beneficiary. The fact that at the I-130 interview the beneficiary tried to hide the picture [REDACTED] from the interviewing officer indicates that the beneficiary was continuing his pattern of deception about [REDACTED] as he had done previously with his wife, as recounted in her statements in her June 17, 2002 letter.

In her June 17, 2002 letter, the beneficiary's wife also offers explanations for each of the other inconsistencies in testimony noted in the director's decision. Some of those explanations may be plausible, but none of them concern matters which can be corroborated by independent documentation in the record. Inconsistencies over the placement of furniture in different rooms of the house, the ownership of furniture by different family members, and the practices of household members on using either keys or garage door openers to enter the dwelling are matters which are described only in the testimony of the beneficiary and his wife and in her written statements submitted after the I-130 decision. Written statements submitted after a decision are entitled to less evidentiary weight than testimony given during an interview because written statements can be carefully crafted to give supposed explanations for any negative evidence mentioned in the decision.

On appeal of the I-130 decision to the Board of Immigration Appeals, the Board found the beneficiary's explanations to be persuasive on some points, but not on others. The Board found that the evidence in the record on appeal was not sufficient either to support a denial of the I-130 petition or to support an approval of the I-130 petition. The Board particularly noted the lack of documentation relating to the mutual intent of the beneficiary and his wife to establish a life together, and the Board listed as examples of possible relevant evidence "insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences." (Board of Immigration Appeals decision, February 14, 2003, at 2).

The Board remanded the petition to the district director to allow the petitioner to submit additional evidence to establish that the petitioner and the beneficiary had the intent to establish a life together at the time of their marriage. As noted above, following the decision of the Board, the petitioner withdrew the I-130 petition and submitted no further evidence to the district director relevant to her marriage.

As of the date of the decision of the Board of Immigration Appeals, the only document in the record indicating shared financial resources of the beneficiary and his wife was a First Union checking account statement dated May 21, 2002 of the beneficiary's wife, her daughter and the beneficiary. The account number on that statement is the same as that on a First Union checking account statement dated January 23, 2002 of the beneficiary's wife and her daughter, a copy of which was submitted previously with the beneficiary's I-485 application concurrently filed with the I-130 petition. The original of the January 23, 2002 account statement was submitted at the I-130 interview on February 4, 2002. The name of the beneficiary was evidently added to the checking account after the I-130 interview, sometime prior to the May 21, 2002 statement for that same account.

In the proceedings on the instant I-140 petition, another First Union checking account statement on that same account was submitted, dated November 21, 2002. Like the May 21, 2002 statement, it shows the account holders as the beneficiary's wife, her daughter and the beneficiary. The record contains no evidence of shared financial resources of the beneficiary and his wife other than the First Union checking account statements dated May 21, 2002 and November 21, 2002. Those account statements show no significant increases of activity after the beneficiary's name was added to the account when compared with the earlier statement for that account dated January 23, 2002. All three account statements show deposits of about \$400.00 or \$500.00 each week, with about 20 checks drawn on the account each month. The information on those statements fails to establish that the beneficiary and his wife were in fact sharing the use of that account even after his name was added to the account.

Counsel states on appeal that the beneficiary's wife later withdrew the I-130 petition because the strain of the I-130 proceedings was too great and because it appeared that the beneficiary had a reasonable chance of obtaining permanent residence through an I-140 petition filed by his employer. Counsel states that after the marriage ended there was no reason for the couple to retain joint financial evidence. However, counsel's assertions do not explain the failure of the beneficiary or his wife to submit evidence about their joint financial assets while the I-130 petition was still pending and while they were still married.

Also submitted in the proceedings on the instant I-140 petition were copies of four affidavits, each dated in July 2004. Each affidavit identifies the affiant, gives his or her date of birth, and states his or her address. Other than those items, the content of each affidavit is identical. The language merely states that the affiant attended the marriage of [REDACTED] on September 23, 2001, with no last names of the couple given, and states that the affiant visited them on several occasions while they were residing together as husband and wife. The language then states "When I saw them together [REDACTED] appeared to be a typical married couple." (Affidavits of [REDACTED] The affidavit [REDACTED] adds the specific date of one of her visits to the couple, September 23, 2001, which was the date of their marriage. None of the affidavits gives any further information about the affiant's relationship to either the beneficiary or his wife, about the occasions on when the affiant visited the couple, nor any other information. It is noteworthy that none of the affiants even asserts an opinion that the marriage between the beneficiary and his wife was bona fide. Each affidavit merely states that the beneficiary and his wife "appeared to be a typical married couple."

Counsel states on appeal that the fact that the affidavits recite few particularized facts about the beneficiary's marriage is due to the lapse of time between the marriage and the affidavits. However, the time between the September 23, 2001 marriage and the July 2004 affidavits is less than three years. It is reasonable to expect that persons who were present at the marriage and who visited the beneficiary and his wife on several occasions would be able to provide details about their relationships with the beneficiary and his wife and about their visits with them.

Because of the lack of detail in the affidavits and the lack of any documentation corroborating the claimed visits of each affiant to the beneficiary and his wife, the affidavits can be given very little evidentiary weight. Moreover, even detailed affidavits would be entitled to less evidentiary weight than live testimony, since affidavits allow for no additional questions from an interviewing officer to test the affiant's knowledge about the events recounted therein or to probe for consistencies or inconsistencies with other documentary evidence in the record.

It is also noteworthy that the record contains no evidence from the beneficiary attempting to explain the inconsistencies between his testimony at the I-130 interview and that of his wife. The written statements and letters submitted after the district director's June 5, 2002 decision on the I-130 petition were all signed by the beneficiary's wife. Since she was the I-130 petitioner, it was of course appropriate for her to submit her responses to that decision. Nonetheless, she was free to submit an affidavit or other written statement from the beneficiary, but she did not do so. Nor during the proceedings on the instant I-140 petition has the beneficiary submitted any explanation for the inconsistencies mentioned above.

The evidence newly-submitted on appeal includes color copies of photographs of the beneficiary and his wife together in several settings, including apparent photographs of their wedding beside a swimming pool. No labels or other explanations accompany the photographs. The marriage certificate of the beneficiary and his wife states that the marriage occurred in Hardyston – Suffex, New Jersey, and that the person or officer performing the ceremony [REDACTED] New Jersey. However, no further information is found in the record concerning the location of the marriage or the type of ceremony. The photographs submitted on appeal provide some apparent corroboration of the fact of the beneficiary's marriage. However, the fact that the marriage occurred is not in dispute. The apparent photographs of the wedding show only the beneficiary and his wife, the presiding official, two other adults and three children. The affidavits mentioned above assert that at least four adults other than the presiding official were present at the wedding ceremony. However, no photographs of any other guests were submitted in evidence.

The non-record side of the file also contains the originals of several photographs of the beneficiary and his wife in several settings, including one photograph which appears to have been taken immediately after the wedding ceremony, which bears a date stamp of "9-22-'01." That date is inconsistent with the marriage certificates in the record, which show the date of the marriage as September 23, 2001. It is possible for some cameras manufactured in Asia to contain factory settings for the date which on photographs taken late in the day in the United States may show dates one day later than the current date in the United States, because the International Date Line is located in the mid-Pacific. But any such effect would not explain how a photograph showing a scene in daylight hours in New Jersey on September 23, 2001 could bear a date stamp showing a date one day earlier than September 23, 2001. In any event, the record contains no explanation for the inconsistency between the date stamp on the photograph and the September 23, 2001 date of marriage shown on the marriage certificates.

The record contains no indication that the foregoing inconsistency was brought to the attention of the beneficiary's wife. However, since the photographs were apparently submitted in evidence by the beneficiary's wife in support of the I-130 petition, any derogatory information in the photographs would not fall within the notification requirements of the regulation at 8 C.F.R. § 103.2(b)(16)(i), since that regulation pertains only to derogatory information unknown to a petitioner or applicant. The beneficiary's wife must be considered to be aware of the information found in the evidence she submitted. The beneficiary's wife is no longer a party to any petition pending before CIS, since she withdrew her I-130 petition on May 21, 2003. However, the record in the instant I-140 petition indicates that the beneficiary's wife has taken an active role in supporting the I-140 petitioner's efforts to obtain an approval of the I-140 petition, for the record contains letters to CIS from the beneficiary's wife urging approval of the I-140 petition. Therefore, on the record in the instant I-140 petition, it does not appear that the regulation at 8 C.F.R. § 103.2(b)(16)(i) would require

separate notification to the I-140 petitioner of derogatory information contained in the record of the I-130 petition which is already known to the beneficiary's wife, who was the petitioner in the I-130 petition.

Another piece of negative evidence which was cited by the director in his denial of the instant I-140 petition, was that with the beneficiary's second I-485 application, submitted on April 5, 2003, the beneficiary submitted a Form G-325A which failed to mention his wife either as his present wife or as a former wife. On that G-325A in the spaces for each of those items the beneficiary wrote "None." (G-325A, February 25, 2003). The record also shows that on the I-485 itself, in Part 3B, in the item for the name of the applicant's present husband or wife the beneficiary wrote "None." (I-485 application, February 25, 2003, Part 3B).

On appeal counsel states that the director improperly considered the omission from the beneficiary's second I-485 application and the accompanying Form G-325A of any information about the beneficiary's wife to be negative evidence concerning the beneficiary's marriage. Counsel states that at the time those documents were being prepared the beneficiary was going through a divorce and was unsure how to refer to his marriage. Counsel states that an amended I-485 and an amended Form G-325A have been submitted, which the director should have considered. Copies of those amended forms have been submitted on appeal.

Counsel's assertions on this point are not supported by any affidavit of the beneficiary or by any other evidence attesting to the beneficiary's confusion about his marriage or about the status of his divorce. 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). In any event, any confusion by the beneficiary about the status of his divorce should have concerned merely whether to enter the name Irene Vaughn Ghatak on the Form G-325A as his present wife or whether to enter her name as his former wife. Stating "None" in the spaces for both of those items could not be true regardless of the state of his divorce. The record does not contain a copy of any divorce decree between the beneficiary and his wife, nor is the date of their divorce stated in the record. In a letter dated July 22, 2004, the beneficiary's wife states that as a result of serious difficulties in her family, including the illness of her daughter, she and the beneficiary separated for a time, and that they eventually filed for divorce. However, neither the date of the separation nor the date of filing for divorce is stated. The July 22, 2004 letter seems to suggest that the divorce became final at some point, but that fact is not explicitly stated in the letter or elsewhere in any evidentiary document.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Considered as a whole, the evidence in the record constitutes substantial and probative evidence that the beneficiary entered into his marriage with [REDACTED] in order to evade immigration laws. See *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). The evidence includes inconsistencies in testimony between the beneficiary and his wife at a CIS interview on February 4, 2002 concerning which room the normally sleep in, whether they own a television, what furniture is in the basement, whether the beneficiary has any relatives in the United States, whether the beneficiary had a key to the house and which room in their house the couple had slept in on the night preceding the interview. The evidence also showed that at the time of the marriage the beneficiary's wife was 29 years older than the beneficiary, a fact which the beneficiary's wife conceded made their marriage an unusual one.

The evidence also includes inconsistencies in testimony concerning the identity of a woman named [REDACTED] who was described by the wife as a cousin of the beneficiary, but by the beneficiary as a former girlfriend. Further inconsistencies were raised by statements of the wife in a June 17, 2002 letter offering explanations for her previous testimony. Moreover, in that same letter, the wife states that the beneficiary had lied to her about his

relationship [REDACTED] falsely telling her that [REDACTED] was his cousin, when in fact she had been a girlfriend of the beneficiary. The record also contains notes of the examining officer stating that at the interview on February 4, 2002 the beneficiary had attempted to conceal the picture [REDACTED] from the examining officer, which he was carrying with him at the interview.

Absent from the record is any evidence of shared financial resources, except for evidence that after the February 4, 2002 interview the beneficiary's name was added to a checking account of the beneficiary's wife and her daughter, though with no indication of any use of that account by the beneficiary or change of activity in the account after his name was added. Also absent from the record are any detailed affidavits from acquaintances familiar with the beneficiary and his wife. The affidavits in the record are all nearly identical in content, reciting merely each affiant's attendance at the wedding and unspecified visits to the beneficiary and his wife. Also absent from the record are photographs of the guests at the wedding which could corroborate the claims in the affidavits, since the wedding photographs show only the presiding officer, the beneficiary and his wife, two adults and three children, though affidavits were submitted from four adults attesting to their presence at the wedding.

The photographic evidence of the wedding includes a photograph with a date stamp which is one day before the date of the wedding as shown on the marriage certificate, an inconsistency which is unexplained in the record. Further adverse evidence is found in a G-325A biographical form submitted by the beneficiary submitted on April 5, 2003 in support of the beneficiary's second I-485 application. On the G-325A the beneficiary fails to state his wife either as his present wife or as a former wife, while on the I-485 itself in the item for the name of the applicant's present husband or wife the beneficiary wrote "none." The record lacks any copy of the divorce certificate of the beneficiary and his wife or any other documentation of their divorce.

The foregoing evidence is substantial and probative evidence that the beneficiary entered into his marriage with Irene Vaughn in order to evade immigration laws. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).

Therefore, the September 7, 2004 decision of the director was correct in finding that approval of the instant I-140 petition is barred by section 204(c) of the Act. The decision of the director to deny the instant I-140 petition was therefore correct. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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 appeal is dismissed.