U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 15 2006
EAC-01-229-54199

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant 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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's consular processing procedures, the Acting Center Director (Director) served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). A subsequent motion to reconsider was dismissed by the director. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (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 restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. The petition was filed for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act) as a skilled worker. As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on February 22, 2001 and certified by DOL on April 12, 2001. The subsequently filed Form I-140 Immigrant Petition was approved on November 2, 2001 and forwarded to the National Visa Center. On July 29, 2003, the director issued a notice of intent to revoke (NOIR) the approval of the petition because the petition did not appear to have been approvable under the provisions of section 204(c) of the Act. The NOIR states that a petition for alien relative (Form I-130) was filed on May 28, 1996 by [redacted] for the beneficiary. The petition was denied on December 27, 1996, because an investigation revealed that [redacted] and the beneficiary did not marry to begin a life together as husband and wife. It was determined that the marriage was entered into with the sole intention of gaining immigration benefits for the beneficiary. The director gave the petitioner 60 days to submit evidence that would overcome the reasons for revocation. In response to the NOIR, counsel submitted an affidavit from the beneficiary arguing that the beneficiary never entered a marriage with [redacted] and he is a genuine victim of immigration fraud without his knowledge or participation. The director revoked the approval of the I-140 petition on May 14, 2004 determining that the beneficiary conspired to enter into a fraudulent marriage for the purpose of evading immigration laws. Counsel filed an appeal on June 3, 2004 and a motion to reopen/reconsider on July 2, 2004. On October 4, 2004, the director dismissed the motion per 8 C.F.R. § 103.5(a)(4) as untimely filed, but accepted the appeal as timely filed and forwarded to the AAO.[1]

On appeal, counsel submits a brief and additional evidence[2]. Counsel asserts in the brief accompanying with the appeal that the beneficiary had no knowledge or participation of the alleged filing of Form I-130 and I-

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[1] However, the director's revocation decision dated May 14, 2004 stated that: "[y]our notice of appeal must be filed within 15 days from the date of this notice, 18 days (if this notice was received by mail)." (Emphasis in original.) The instant appeal was received on June 3, 2004, 20 days after the decision.

[2] 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

485, that the beneficiary was never married to Betty Cortines anywhere, anytime, and that he was an innocent victim of an illegal act committed by someone else.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states in pertinent part:

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

The regulation at 8 C.F.R. § 204.2(c)(ii) states:

> *Fraudulent marriage prohibition.* 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 an immigrant visa classification filed on behalf of an alien for whom there is substantial and probative evidence of such an 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 revocation of the approval on the instant I-140 petition is in connection with the Form I-130 and concurrent Form I-485 filed on behalf of the beneficiary. The record shows that [redacted] an alleged United States citizen, filed a Form I-130 on behalf of the beneficiary as a citizen's spouse with INS (now CIS) New York office on May 28, 1996. The I-130 petition includes a Certificate of Birth [redacted] issued by The City of New York Department of Health Bureau of Vital Records for [redacted] on November 20, 1990, a Certificate of Marriage Registration [redacted] issued by The City of New York office of the City Clerk Marriage License Bureau for the beneficiary and [redacted] in Manhattan on October 13, 1994, Notarial Certificate of Birth for the beneficiary, copies of the beneficiary's passport and I-94 card and photos of the beneficiary and [redacted] On December 27, 1996 the New York District Director denied the petition because that: "[t]he documents submitted in support of your visa petition, to wit: Birth certificate [redacted] issued 11-20-90 in Manhattan, NY and Marriage certificate [redacted] issued 10/13/94 in Manhattan, NY have been verified, and found to be fraudulent." On appeal, counsel also submitted a letter from Patrick Synmoie, Counsel to the City Clerk of the City of New York, verifying that the "certificate of marriage for [redacted] and [redacted] is a fraudulent certificate." Therefore, the Form I-130 relative petition filed on behalf of the beneficiary, and applications for the adjustment of status and employment authorization document concurrently filed by the beneficiary in 1996 were based on a fraudulent marriage, and that the beneficiary has been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a United States citizen or the spouse of an alien lawfully admitted for permanent residence, by reason of a fraudulent marriage.

The record of proceeding contains two affidavits of the beneficiary dated and notarized on August 7, 2003 and June 11, 2004 respectively. Per the beneficiary's affidavit, he as a British National Overseas applied for a B1/B2 visa at the U.S. Consulate in Hong Kong. About two weeks after his arrival, he went to a driving school in Chinatown, New York to obtain a driver's license. Shortly after he started his driving classes, he asked the people of that driving school to help him to apply for work authorization and paid a $2,000 fee and

provided all the documents they asked for. The beneficiary applied for and was granted B1/B2 visa at the U.S. Consulate in Hong Kong. The B1/B2 visa prohibits the holders to work in the United States and are granted on the condition that the holders do not violate the US immigration law. The application he submitted to the consulate included such a promise. The beneficiary should have known that he could not obtain a work permit through the legal procedure with his B1/B2 visa at that time when he started to apply for work authorization two weeks after his arrival. If the beneficiary had intended to pursue employment authorization legally, he could have asked professional immigration lawyers or other immigration professional for assistance. However, the beneficiary chose a driving school to obtain a work permit. It may be that the beneficiary did not know the driving school would use a fraudulent marriage to help him to obtain a work permit at that time, but he may have known that they would obtain a work permit through some illegal method. Therefore, it appears that the beneficiary violated the B1/B2 visa regulation and pursued and benefited the work permit benefit evading immigration laws which illustrates his propensity to do so.

Counsel asserts in her brief accompanying the appeal that the beneficiary had no knowledge or participation of the alleged filing of Form I-130 and I-485 by a In his August 7, 2003 affidavit the beneficiary states that: "[t]hey gave me some blank forms to sign. I did not read English. I did not know what were the forms and what were the forms for. They told me that I could trust them. They just pointed to the places where I should sign my name." The beneficiary's June 11, 2004 affidavit states that: "[t]he name of the driving school I went to was: Fujian Driving Service Center. The person I contacted was ... When I told that I would like to apply for a C-9 card in order to work legally, he gave me papers to sign and took my photos." The beneficiary did not verify in his second affidavit whether gave him blank forms or completed forms to sign and none of them mentioned what forms the beneficiary signed. The record shows that on the same day the US citizen filed the Form I-130 with the CIS (then INS) New York office the beneficiary also concurrently filed his Form I-485 adjustment of status application with the same CIS office. The application filed by the beneficiary included Form I-485 and Form G-325 with the beneficiary's signature. The record does not contain any evidence showing that the beneficiary signed on blank or completed forms. In Part 2 on the first page of Form I-485, Box b says "My spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category which allows derivative status for spouses and children." When the form was given to the beneficiary for signature, that box should have reminded the beneficiary the application somehow related to marriage or a spouse. Additionally, despite listing a US citizen as his wife on Page 2 of the Form I-485, the beneficiary signed his name to the form. Even if as the beneficiary alleged in his affidavit the blank forms were given to him to sign, the title of the Form I-485 "Application to Register Permanent Residence or Adjust Status" should have reminded him that it was related to some greencard processing. The affidavit shows that the beneficiary had some knowledge of immigration, especially on the work permit based on pending adjustment of status application and he asked for a C-9 card. It is doubtful that a signatory to this form would believe it to be a work permit (C-9 card) application only instead of an application for lawful permanent residence (i.e., in lay person's terms, the "greencard").

Additionally on the one-page Form G-325 the US citizen's name as wife, date of marriage and place of marriage etc. clearly show on the same page above where the beneficiary needed to sign his name. The beneficiary could not have missed that before he signed the form. There is a space on the Form G-325A for choosing one of the three choices/boxes under "This Form is Submitted in Connection with Application for: Naturalization, Status as Permanent Resident and Other (specify)" left to the space of signature, and the box for Status as Permanent Resident is closest to the space for the beneficiary's signature. It would be difficult not to notice this part when signing the form G-325A. Therefore, the box for Status as Permanent Resident should have reminded the beneficiary that it was not a simple work permit application even when he signed

the blank forms.

In addition, all the immigration forms come with warning that severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact. A signatory to a form is responsible for contents and information in the form with his original signature. The Forms I-485 and G-325A in the instant case bear the beneficiary's original signature, and thus the beneficiary is responsible for contents of the forms. A signature on blank forms represents a power of attorney that the signatory to the form authorizes the agent to complete the forms as himself and on his behalf, and the signatory will be fully responsible for the contents of the forms as if he completes the forms himself. Therefore, counsel's assertion that the alleged marriage certificate and the filing of those immigration documents were obtained without the beneficiary's knowledge and/or consent is misplaced and the beneficiary's claim that he was unaware of the previously filed application is not credible.

Upon an independent review of the documentation in the record of proceeding the AAO finds that the record contains substantial and probative evidence to support a reasonable inference that the marriage between the beneficiary and was a marriage fraud and concurs with the director's conclusion that the beneficiary conspired to enter into a fraudulent marriage for the purpose of evading immigration laws in her decision dated May 14, 2004. Counsel's assertion on appeal cannot overcome the grounds for the revocation of the instant petition filed by the petitioner on behalf of the beneficiary. Therefore, the instant immigrant petition for alien worker (Form I-140) is not approvable under section 204(c) of the Act.

Beyond the director's decision and counsel's argument, the AAO notes there is another issue need to be discussed, that is whether the instant petitioner has established its continuing ability to pay the proffered wage beginning on the priority date with regulatory-prescribed evidence.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on February 22, 2001. The proffered wage as stated on the Form ETA 750 is $8.41 per hour ($17,492.80 per year). The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal years lasts from June 1 to May 31. On the Form ETA 750B, signed by the beneficiary on February 20, 2001, the beneficiary claimed to have worked for the petitioner since July 2000.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income tax Return for 1999 and bank statements for the petitioner's bank accounts for the period of December 1, 2000 to April 30, 2001 as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any evidence showing that the petitioner employed and paid the beneficiary any compensation beginning on the priority date to the present. Therefore, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage during the period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses or net current assets reflected on schedule L to the Form 1120.

The record of proceeding contains a copy of the petitioner's tax return for 1999, which covers its fiscal year from June 1, 1999 to May 31, 2000. The priority date in the instant case is February 22, 2001. Although the 1999 tax return shows that the petitioner had net income of $18,228, the 1999 tax return is not necessarily dispositive since it precedes the priority date. The petitioner did not submit its tax return or other regulatory-prescribed evidence for 2000 (for the fiscal year from June 1, 2000 to May 31, 2001, the year of the priority date in the instant case) with the initial filing in May 2001. The petitioner did not submit evidence of its continuing ability to pay at any point in these proceedings.[3] The director erred in not requesting evidence to establish the petitioner's ability to pay the proffered wage from the priority date in the RFE and approved the petition in error. However, as noted above, 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). In visa petition proceedings, the burden is solely on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner did not meet this burden with regulatory-prescribed evidence, and thus did not establish its continuing ability to pay the proffered wage beginning on the priority date and is an additional reason why revocation of the approval is appropriate in this case.

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[3] 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).

In addition, the petitioner had filed other Immigrant Petitions for Alien Worker (Form I-140) for three more workers[4] before the instant petition. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay all the wages at their priority dates and continued until each of the beneficiaries obtain the permanent resident status.

Counsel submitted the petitioner's bank statements for the period from December 1, 2000 to April 30, 2001. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner's net current assets.

The evidence in the record of proceeding does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The revocation of the approval is affirmed. The petition remains denied.

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[4] EAC-01-026-51853 filed on November 2, 2000 with the priority date of March 13, 2000 and approved on November 16, 2002; EAC-04-209-50400 filed on July 12, 2004 with the priority date of August 1, 2001 and approved on November 22, 2004, and EAC-05-009-51382 filed on October 12, 2004 with the priority date of March 13, 2000 and approved on December 16, 2005.