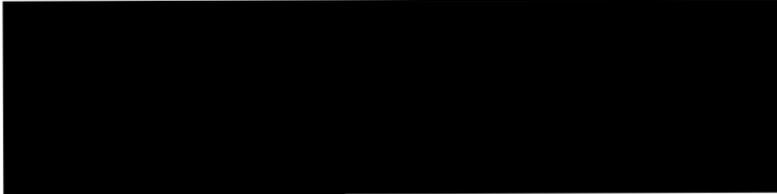


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FILE: [Redacted] Office: VERMONT SERVICE CENTER
EAC 04 009 50697

Date: APR 20 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a floor and maintenance supply company. It seeks to employ the beneficiary permanently in the United States as a wood floor installer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The acting director determined that the petitioner had previously sought to adjust to permanent resident status pursuant to a fraudulent marriage, and denied the visa petition pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petition must be denied pursuant to Section 204 of the Act.

Section 204(b) states, in relevant part,

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3)¹, the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petitioner is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition

Section 204(c) of the Act states,

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

Section 212(a)(6)(c)(i) the Act states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

¹ Section 203(b) of the INA is the statute pursuant to which the instant Form I-140 visa petition was filed.

The record contains a Form I-130 Petition for Alien Relative filed on February 24, 1995 by [REDACTED] on behalf of the beneficiary, [REDACTED] born July 4, 1963 in Campestrinho, Brazil. The basis of that application was the beneficiary's alleged marriage to [REDACTED] on August 16, 1994 in New York.

That petition was supported by a Certificate of Marriage that purports to have been issued on August 16, 1994 in North Hempstead, Nassau County, New York. On a G-325A Biographic Information form submitted with the Form I-130 the beneficiary stated he had not previously been married.

The record also contains a Form G-325A Biographic Information form, submitted with a Form I-485 Application to Adjust Status, in which the beneficiary stated that he was married to [REDACTED] on June 12, 1982 in Pocos de Caldas, Brazil, and to [REDACTED] in Valhalla, New York on March 20, 2001. The record contains a Brazilian decree dated August 26, 2003 divorcing the beneficiary and [REDACTED]

On May 25, 2004 the acting director issued a notice of intent to deny in this matter. That notice states that CIS had determined that the marriage relied upon was invalid because the beneficiary was already married on August 16, 1994. The record shows that the beneficiary married [REDACTED] in Brazil on June 12, 1982 and divorced her approximately two years after purporting to contract a marriage to [REDACTED] in New York. The petitioner was informed of those facts and accorded an opportunity to respond.

In response counsel submitted an affidavit from the beneficiary in which he stated that, in seeking employment authorization, he met with a woman named [REDACTED] and signed forms he did not understand because they were written in English, which he neither spoke nor read. The beneficiary stated that he had no idea the documents sought adjustment of status by reason of marriage to a U.S. citizen, and believed that the documents sought to accord him employment authorization pursuant to U.S. law.

The acting director determined that the response submitted did not overcome the evidence that the beneficiary sought to enter into a marriage for the purpose of evading immigration law and, on August 30, 2004, denied the petition. The acting director found that, absent any documentation in its support, the beneficiary's version of events did not constitute clear and convincing evidence that the instant petition is approvable.

On appeal, counsel asserted that the statutes and regulations merely require (1) that the petitioner be a U.S. employer, (2) that the petitioner establish its ability to pay the proffered wage, (3) that the petitioner establish that the beneficiary is qualified for the proffered position, and (4) that the beneficiary intends to accept the employment. Counsel asserted,

[CIS] based its denial on extraneous grounds to those listed as relevant in the processing of an I-140 Petition. This was an error as a matter of law and should be reversed.

As was noted above Section 204(c) of the Act states that a petition pursuant to section 203(b)(3) of the Act, such as the instant petition, may not be approved if the alien has ever either entered into a marriage or sought to enter into a marriage for the purpose of evading immigration laws. This office finds that the beneficiary

did, in fact, seek to enter into a marriage for that purpose. Counsel's argument that this basis for denial is "extraneous" is spurious. The petition was correctly denied on the basis of section 204(c) of the Act, which basis has not been overcome on appeal.

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.