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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted]  
EAC 04 031 50305

Office: VERMONT SERVICE CENTER

Date: **AUG 20 2007**

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a telecommunications service. It seeks to employ the beneficiary permanently in the United States as an installation technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. On November 10, 2004, the director denied the petition based upon the determination that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and denied the petition pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c). The director also determined that based upon the evidence presented, the beneficiary did not have the qualifying experience listed on the Form ETA-750 for the offered position.

Section 204 of the Act governs the procedures for granting immigrant status. 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 ... [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.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

*Fraudulent marriage prohibition.* Section 1040 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 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.

Section 212(a)(6)(c)(i) of 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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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

On appeal, counsel submits a legal brief and additional evidence.

The I-140 employment based petition was filed on November 7, 2003. Accompanying the petition was the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the annual report for the petitioner dated 2002; and, a job reference dated March 25, 2001 stating that the beneficiary was employed by Telecom Technology, as a technician in the Network System and Telephony from January 28, 1994 to May 15, 1998 in Brazil (the job reference had an incomplete address section).

The director issued a notice of intent to deny the petition on August 4, 2004. The director found that the beneficiary was ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and denied the petition approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c). The director also determined that based upon the evidence presented, the beneficiary did not have the qualifying experience listed on the Form ETA-750 for the offered position.

In response to the notice counsel submitted copies of the following documents: an explanatory letter dated September 2, 2004; an affidavit from the beneficiary attested September 1, 2004; a "no record of marriage certification" for the period January 1, 1994 to December 31, 1994 from the County of Nassau, State of New York; the case precedents of *Matter of Concepcion*, 16 I&N Dec. 10 (BIA 1976) and *Matter of Anselmo*, 16 I&N Dec. 152 (BIA 1977); a certificate of marriage between the beneficiary and [REDACTED] on April 9, 2001, that occurred at Marlborough, Massachusetts; certificates of birth for the children of the beneficiary and [REDACTED] and the personal U.S. federal income tax returns, form 1040, for the beneficiary and spouse for the years 2000, 2001, 2002 and 2003.

The director denied the petition on November 10, 2004 based upon the determination that the beneficiary was ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and denied the petition approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c). The director also determined that based upon the evidence presented, the beneficiary did not have the qualifying experience listed on the Form ETA-750 for the offered position.

Prior to the filing of the above employment-based petition, there was another immigrant petition filed for the beneficiary alien by his putative United States citizen (USC) wife.<sup>1</sup> The Form I-130 marriage based petition was filed on January 3, 1995. The signed petition was denied since the alien and his spouse did not appear for the necessary adjustment interview that is part of the process leading to the approval and issuance of permanent residency status.

Counsel submitted a Form I-290B appeal in this matter. In the section reserved for the basis of the appeal, counsel asserts in pertinent part that the marriage to United States citizen [REDACTED] never took place, although evidence of the reputed marriage was used by the beneficiary to support a prior marriage based petition. Therefore, counsel asserts that in the absence of an actual valid marriage, section 204(c) is inapplicable, and he requests that the denial of the beneficiary's adjustment application be re-opened along with the denial of the I-140 petition.

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<sup>1</sup> The occurrence of this marriage is now denied by the beneficiary in the petitioner's employment based petition.

In the prior marriage based petition, the signed Form G-325A submitted by the beneficiary identified United States citizen [REDACTED] as his spouse. The marriage based immigrant petition is in the record of proceeding of this case. The record contains a marriage certificate from the Town of North Hempstead, County of Nassau, State of New York stating that the beneficiary was married to [REDACTED] a United States citizen on December 12, 1994.

On December 9, 2004, counsel submitted a brief in the matter and additional evidence mentioned below.

Counsel asserts that since the beneficiary's asserted marriage to [REDACTED] never took place, that the Director's determination of marriage fraud based upon a prior marriage to [REDACTED] in the absence of an actual valid marriage, section 204(c) is inapplicable. At the time the Director made the decision, on November 10, 2004, the record of proceeding evidenced that the beneficiary was married to [REDACTED] a United States citizen on December 12, 1994. According to a marriage certificate submitted into evidence in the subject employment based petition matter, the beneficiary later married [REDACTED] on April 9, 2001. No evidence was submitted that the beneficiary ever divorced [REDACTED].

According to the record of proceeding, at the time of the director's decision in this matter, there was evidence of a marriage to a United States citizen, [REDACTED] and, a prior (to the subsequent and current employment based petition) marriage based immigrant petition submitted on behalf of the alien by his putative spouse, [REDACTED].

The beneficiary failed to disclose this prior petition in the present employment based petition and adjustment application. On the present Form I-485 prepared by counsel and submitted by the beneficiary, Part 3 on that form, states "Have you [the beneficiary] ever applied for permanent resident status in the U.S.?" This question is answered "No" on the employment based adjustment application prepared under penalty of perjury and signed by the alien beneficiary on October 30, 2003.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

As mentioned above, it is undisputed that on the date of the director's decision to deny the present petition, the record of proceeding contained documentary evidence to show that the beneficiary had been married since December 12, 1994 to a United States citizen, [REDACTED]. The record contains a marriage certificate from the Town of North Hempstead, County of Nassau, State of New York stating that the beneficiary was married to [REDACTED], a United States citizen on December 12, 1994.

In support of the appeal, the beneficiary prepared an affidavit. In this statement, the beneficiary contends that, although he paid for the preparation of the marriage based petition, he later discovered he was misled by the individual who prepared the petition. This individual was known to the beneficiary only as [REDACTED] "a well known lady in the community." According to the beneficiary's account, he believed that [REDACTED] was submitting an amnesty application for him. We find this explanation to be not credible.

The contents of the marriage based petition and adjustment application (G-235A) contain beneficiary's personal data that is the same or similar information also contained in the employment based petition and adjustment application. The alien's birth certificate is attached to both. All the documents submitted to CIS bear his signature. We find the statements that the alien beneficiary was a non-participant in the preparation and submission of all the documents mentioned above not credible. *Matter of Ho*, 19 I&N Dec. 582, 591

(BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

The alien and his U.S. citizen spouse claimed that a visa was immediately available under a marriage based petition. A marriage certificate was introduced from the Town of North Hempstead, County of Nassau, State of New York and the petition was certified to be true and correct by the alien's spouse. There were no documents introduced in that marriage based petition process to withdraw the petition, or to correct information as submitted.

Now counsel, in this employment based petition, has introduced statements and a document to refute certified statements in the marriage based proceeding. There is substantial and probative evidence in the record of proceeding of the marriage based petition to support a reasonable inference that a marriage was entered into between [REDACTED] and the beneficiary<sup>2</sup> which the petitioner in the later employment based petition attempts to disprove. There is clear evidence that there was an attempt to enter into a sham or fraudulent marriage and there is documentary proof in the record of proceeding that the marriage occurred between [REDACTED] and the beneficiary based upon the marriage certificate in the record from the Town of North Hempstead, County of Nassau, State of New York.

According to counsel on appeal, this marriage certificate is not authentic and the marriage never occurred. Counsel has submitted a "no record of marriage certification" for the period January 1, 1994 to December 31, 1994 from the County of Nassau, State of New York to show that there is no record of a marriage between the beneficiary and [REDACTED] in 1994.<sup>3</sup>

We will not accept the "no record of marriage certification" as independent objective evidence that a marriage did not occur between the beneficiary and [REDACTED]. The record contains a marriage certificate from the Town of North Hempstead, County of Nassau, State of New York stating that the beneficiary was married to [REDACTED] a United States citizen on December 12, 1994. We have two contradictory documents that only point to inconsistencies in the record on this matter.

*Matter of Ho*, 19 I&N Dec. at 591-592 states: "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."

We find that the alien beneficiary by fraud or willfully misrepresenting a material fact, sought to procure or has sought to procure or has procured a visa, other documentation, or admission into the United States. The alien beneficiary is in violation of Section 212(a)(6)(c)(i) of the Act first mentioned above.

We also find that there is substantial and probative evidence of an attempt or conspiracy by the alien and other individuals who have attempted or conspired to enter into a marriage in violation of the regulation 8 C.F.R. § 204.2(a)(1)(ii) for the purpose of evading the immigration laws.

There is no evidence of innocent misrepresentations of the beneficiary in these regards in the record of

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<sup>2</sup> See *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990).

<sup>3</sup> Counsel has also submitted an affidavit from the beneficiary attested September 1, 2004, stating that no marriage occurred, but since the beneficiary's attested statements have been contradicted by the facts as presented here, we cannot rely on the beneficiary's affidavit as he has been found to be, by his attestations discussed above, not truthful or credible.

proceeding. Other than characterizing the beneficiary as an innocent in this affair, counsel offers no credible explanation for the beneficiary's conduct throughout the submission of two immigrant petitions. The beneficiary failed to alert immigration authorities of the fraudulent marriage scheme, identify the participants in it in such detail to cause their apprehension, or withdraw from the fraudulent scheme to receive permanent residency status by marriage.

Counsel cites the cases of precedents *Matter of Concepcion*, 16 I&N Dec. 10 (BIA 1976) and *Matter of Anselmo*, 16 I&N Dec. 152 (BIA 1977 ) in support of his contentions of the inapplicability of Section 204(c) of the Act. According to counsel, *Matter of Concepcion* stands for the proposition that Section 204(c) of the Act does not apply to case where there is no marriage in fact.<sup>4</sup> In that case, the alien was lawfully admitted for permanent residence by reason of a marriage later determined not to have occurred. However Section 204 (c) was amended by Section 4(a) of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639 100 Stat. 3637, 3593 (1989). Among other modifications, IMFA added Section 204(c)(2), 100 Stat. at 3543. "Paper" marriages are now covered by the "... attempted ... to enter into a marriage" language of the statute.

There is evidence of a series of willful misrepresentations<sup>5</sup> and fraudulent acts made by the beneficiary in the obtaining of the visitor's visa resulting in an overstay, the introduction of fraudulent documents which represented a marriage that he now asserts did not occur, the participation of the beneficiary in the scheme as a co-conspirator by failing to alert immigration authorities of the fraudulent marriage scheme, identify the participants in it in such detail to cause their apprehension, or withdraw from the fraudulent scheme to receive permanent residency status by marriage, and by the omission from the subject employment based adjustment application of any information concerning the prior marriage based petition for permanent residency.

We find that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c).

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.

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<sup>4</sup> The case of *Matter of Anselmo* follows the holding in *Matter of Concepcion*.

<sup>5</sup> The director also found in her decision that the evidence submitted demonstrated that the beneficiary's employment experience was falsified. In summary, the petitioner submitted into evidence a job reference dated March 25, 2001 stating that the beneficiary was employed by Telecom Technology, as a technician in its Network System and Telephony from January 28, 1994 to May 15, 1998 in Brazil. However an affidavit from the beneficiary attested September 1, 2004, contradicts this employment experience as the beneficiary recounts that he was in New York City, New York, on January 3, 1995, and that he returned to Brazil at the end of 1996 to return to the United States under a visitor's visa on May 11, 1998. Counsel has not responded to the director's finding in this regard.