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U.S. Citizenship  
and Immigration  
Services

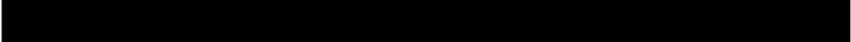
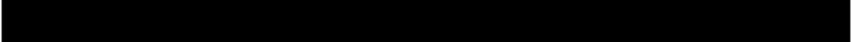
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*BC*

DEC 04 2007

FILE:  Office: VERMONT SERVICE CENTER Date:  
EAC 03 205 52559

IN RE: Petitioner:   
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:



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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The director subsequently 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). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director approved the petition on November 23, 2004. He subsequently determined that evidence in the record relating to a family-based petition filed on the beneficiary's behalf during 1995 established that the beneficiary and his U.S. citizen spouse had apparently entered into marriage for the sole purpose of evading immigration laws. Therefore, on June 17, 2005, the director issued a notice of intent to revoke the approval of the petition. He then revoked the approval of the instant petition on September 8, 2005 in accordance with section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

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

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

Notwithstanding the provisions of subsection (b) of this section 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.

The regulation at 8 C.F.R. § 204.2(a)(1)(ii) also provides:

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 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 single issue in this case is whether the record includes substantial and probative evidence that the beneficiary conspired to enter into a marriage with the purpose of evading the immigration laws of the United States.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). 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 record includes the following relevant evidence:

- A Form I-485 filed with the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), during 1995 which lists [REDACTED] as the beneficiary's current wife.
- The beneficiary's notarized affidavit dated July 13, 2005 which attests that the beneficiary and [REDACTED] had a *bona fide* marriage from June 1994 through June 1996, and that in June 1996 they separated.
- A notice of intent to deny the Form I-130, Petition for Alien Relative, dated October 30, 1995, filed on the beneficiary's behalf by his U.S. citizen (USC) spouse.
- Previous counsel's response to the October 30, 1995 notice of intent to deny the Form I-130 dated November 27, 1995.
- A denial of the Form I-130 dated July 8, 1998.
- A copy of a marriage license for the beneficiary and [REDACTED] dated June 8, 1994.
- A copy of an apartment lease agreement dated July 2, 1994 which indicates that the beneficiary and a woman named [REDACTED] would reside together as tenants in an apartment in Alexandria, Virginia. The lease is signed by the beneficiary and [REDACTED]. On the copy in the record, a third name, [REDACTED] is also listed on the lease agreement as someone who would reside in the apartment, but [REDACTED] did not sign the lease agreement. This copy of the lease was submitted with the response to the June 17, 2005 notice of intent to revoke the approval of the Form I-140.
- A copy of an apartment lease agreement also dated July 2, 1994 which, given that the signatures on the two copies match, is apparently only a photocopy of the lease above, not a second lease. However, on this copy the name [REDACTED] is also listed on the lease below the name of [REDACTED] as a fourth individual who would reside in the apartment. Again, [REDACTED] did not sign the lease agreement. The record indicates that this copy of the lease was submitted at the Form I-130 interview.
- Copies of the address page of telephone bills for six months of 1994 and 1995 which are addressed to [REDACTED] and [REDACTED] at the same address as that on the lease agreement above.

- A letter dated June 28, 1995 informing the beneficiary and [REDACTED] that the rent on the apartment listed on the lease agreement above would be increasing. The letter is on the letterhead of the landlord listed on the lease agreement.
- A copy of a Form 1040, U.S. Individual Income Tax Return, for 1994 for the beneficiary. It lists the beneficiary as married but filing separately from his spouse: [REDACTED]. The tax return lists the same address as that on the lease agreement and telephone bill above. In contradiction to the lease agreement above, the tax return also lists the names of two other women who were not listed on the lease agreement as those allowed to reside in the apartment, but whom the beneficiary claims as dependents/sisters-in-law residing in his home.
- Snapshot photos represented to be of the beneficiary, [REDACTED] and the beneficiary's children.
- Copies of checking account statements for various months in 1994 and 1995 for an account in the name of the beneficiary and [REDACTED].
- A letter dated October 24, 1995 on the letterhead of the bank which administers the checking account to which the statements above refer and which verifies that this account was opened on August 8, 1994 and that the balance in the account on the date of the letter is \$949.59. It also verifies that the account holders listed with the account are [REDACTED] and [REDACTED].
- A copy of a letter on National Insurance letterhead dated July 1, 1995 which indicates that the beneficiary on the instant petition had taken out a life insurance policy for which [REDACTED] is the beneficiary.
- The director's Notice of Intent to Revoke (NOIR) the instant petition dated June 17, 2005.
- Counsel's July 14, 2005 response to the NOIR.
- The director's revocation of the approval of the instant petition dated September 8, 2005.
- Counsel's appeal brief dated May 8, 2007.

The record of proceedings does not contain additional evidence directly relevant to the issue of whether or not the record includes substantial and probative evidence that the beneficiary conspired to enter into a marriage with the purpose of evading the immigration laws.

According to the October 30, 1995 notice of intent to deny the Form I-130, the Service intended to deny the Form I-130 because the beneficiary and his USC spouse gave conflicting responses when interviewed by the Service on October 26, 1995 regarding the *bona fides* of their marital union. For example, the October 30, 1995 notice of intent to deny (NOID) states that when an immigration officer asked the beneficiary during an October 26, 1995 interview with the Service when he had last seen his mother-in-law, he indicated that he had last seen her three months previously at the Fairfax Hospital. However, when asked the same question on the same date, the beneficiary's USC spouse told the immigration officer that the beneficiary had last seen her mother the previous weekend. The NOID also states that the beneficiary indicated during the same interview that on October 21, 1995, five days prior to the interview, he left for work at 6:30 a.m. His spouse indicated that the beneficiary began work at 4:00 p.m. on October 21, 1995. In addition, the NOID states that at the October 26, 1995 interview, the beneficiary claimed to have made breakfast for himself and his spouse on October 22, 1995. His USC spouse stated that she made breakfast on October 22, 1995.

In response to the NOID, the beneficiary and his USC spouse did not provide sufficient evidence to overcome the discrepancies in the record which call into question the credibility of the claim that the two of them lived together as husband and wife in a *bona fide* marriage at the time of the October 26, 1995 interview. For

example, the beneficiary's spouse explained that the reason that she told the immigration officer that her husband had last seen her mother the weekend prior to their interviews with the Service, rather than three months earlier than that as her husband had claimed, is because she thought the immigration officer was asking her when *she* had last seen her mother. This is not a reasonable explanation, especially given that evidence in the record indicates that the beneficiary's USC wife is U.S. born and has spoken English since childhood. The response to the NOID also indicates that the reason that the beneficiary stated at the interview with the immigration officer that he left for work at 6:30 a.m. on October 21, 1995, rather than late in the afternoon as his USC wife had said, is because the beneficiary thought that October 21, 1995 was a weekday and that the immigration officer was asking at what time he leaves for his weekday job, not his weekend job. This is not a reasonable explanation, especially given that the response to the NOID also states that the reason the beneficiary stated that he met his USC spouse at 6:30 p.m. for dinner on October 21, 1995, whereas his USC spouse stated that he was at work at this time, is because the beneficiary believed that October 21, 1995 was a Sunday, and the two of them did meet for dinner at 6:30 p.m. on Sunday, the day that followed October 21, 1995. As the record did not support the claim that the beneficiary and his USC spouse were living together as husband and wife, the Form I-130 was denied.

In the June 17, 2005 NOIR related to the instant petition, the director also referred to the October 26, 1995 interviews of the beneficiary and his USC spouse, and pointed out that on that date the two of them gave contradictory answers to questions that should have yielded consistent responses from a husband and wife. The director also referred to other inconsistent information in the record surrounding the claim that the beneficiary and [REDACTED] had a *bona fide* marriage such as the fact that the beneficiary listed [REDACTED] as his *current* spouse on his Form I-485, Application to Register Permanent Residence or Adjust Status, received by CIS on March 6, 2004, and that he listed [REDACTED] as his *former* spouse on the Form G-325A, Biographic Information, also received by CIS on March 6, 2004.

The inconsistencies in the record surrounding the petitioner's claim that the beneficiary and his USC spouse did not enter into marriage for the purpose of evading the immigration laws cast doubt on this claim. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon 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. *See Id.*

In response to the NOIR, regarding the discrepancies between the beneficiary's testimony and his spouse's testimony at their October 26, 1995 interviews, the petitioner through counsel resubmitted the November 27, 1995 response to the notice of intent to deny the Form I-130, which offers explanations for the discrepancies in this testimony such as those discussed above. It does not provide independent, objective evidence to resolve the inconsistencies in the testimony of the beneficiary as compared to that of his USC spouse. Also provided was the beneficiary's notarized affidavit dated July 13, 2005 which attests that the beneficiary and [REDACTED] had a *bona fide* marriage from June 1994 through June 1996, and that in June 1996 they separated. In addition, the beneficiary indicates at item 7 of this affidavit that he is submitting affidavits from others as evidence that he and his USC spouse had a *bona fide* marriage. There are however no such affidavits in the record. With the response to the NOIR counsel also submitted the following as supporting documents: a copy of the beneficiary's marriage certificate to his USC spouse; a copy of his USC spouse's birth certificate; the copy of the beneficiary's apartment lease dated July 2, 1994 which contradicts the copy

of the same lease submitted at the Form I-130 interview in that it lists one less name on the list of individuals who would reside in the beneficiary's apartment; the 1994 tax return for the beneficiary described above; a copy of a telephone bill for the beneficiary and his USC spouse dated October 10, 1994; a copy of a joint checking account statement for the beneficiary and his USC spouse for the period of November 4, 1994 through December 5, 1994; and the snapshot photographs. In addition, counsel suggests in his brief that the reason that documents in the record list the beneficiary as being simultaneously married and divorced from [REDACTED] is because the beneficiary is not certain whether [REDACTED] ever did or did not file divorce papers after the two separated.

The petitioner failed to provide competent, objective evidence sufficient to overcome the evidence in the record which indicates that the beneficiary conspired to enter into a marriage for the purpose of evading immigration laws. Thus, the director appropriately revoked the approval of the petition.

In his appeal brief, counsel asserts that the Service failed to properly mail a copy of the July 8, 1998 Form I-130 denial to the beneficiary's most current address of record, and as a consequence the beneficiary never received the denial. According to counsel, the Service erred when it sent the beneficiary's copy of the denial to the address which the beneficiary used on the Form I-130. Counsel suggests that instead, the INS should have mailed the denial to the address which the beneficiary listed on his Form I-821, Application for Temporary Protective Status, because that form was filed with the Service after the Form I-130 and before the Service issued its final denial of the Form I-130. Moreover, counsel indicates that if the Service had mailed the July 8, 1998 denial letter to the beneficiary's address on the Form I-821, the beneficiary would have thoroughly rebutted, in a timely appeal, the evidence in the record that he had entered into a marriage for the purpose of evading immigration laws of the United States. Counsel further asserts that at the present time, it is much more difficult for the beneficiary to rebut this evidence by producing documentation to substantiate that his marriage to [REDACTED] was a *bona fide* marriage and by producing affidavits from those who might attest to the legitimacy of the marriage because so many years have elapsed since the beneficiary and [REDACTED] separated.

First, this office would again note that "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" and that CIS must "deny a petition for an immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy..." See 8 C.F.R. § 204.2(a)(1)(ii); see also section 204(c) of the Act. This office finds that the record contains substantial and probative evidence that the beneficiary conspired to enter into a marriage for the purpose of evading the immigration laws. Thus, CIS is obliged to revoke the approval of the Form I-140 in this matter.

This office notes as well that relative to the Form I-130 filed by the beneficiary's USC spouse, the beneficiary is not an affected party or person with legal standing to file an appeal. See 8 C.F.R. § 103.3(a)(1)(iii)(B) and 8 C.F.R. §§ 103.3(a)(2)(i) and (v). As such, even if the beneficiary was not aware of the July 8, 1998 denial in time to appeal that decision as counsel has claimed, at no point was the beneficiary entitled to file an appeal.<sup>1</sup> Also, it is not clear to this office why the beneficiary and his USC spouse did not submit

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<sup>1</sup> This office notes incidentally that the cover sheet to the beneficiary's copy of the Form I-130 denial in the record includes a section used by the Service to inform those with the right to appeal to which office that

independent, objective evidence to rebut the evidence in the record which indicates that the beneficiary conspired to enter into marriage for the purpose of evading the immigration laws when responding to the October 30, 1995 notice of intent to deny the Form I-130, if such evidence was available at that time as is suggested by counsel.

Counsel also suggests on appeal that because the evidence of record related to the Form I-130 was incorporated into the beneficiary's A-file prior to the approval of the instant petition, CIS may not now use findings and evidence which are an integral part of the processing of the Form I-130 to revoke approval of the petition. Counsel's assertions are not persuasive. CIS must deny any visa petition filed on behalf of an alien for whom there is substantial and probative evidence of his having conspired to enter into a marriage for the purpose of evading the immigration laws. *See* 8 C.F.R. § 204.2(a)(1)(ii); *see also* section 204(c) of the Act.

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

**ORDER:** The appeal is dismissed.

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appeal is made and the deadline for filing. This is not an indication that it was the Service's intent to instruct the beneficiary that he had the right to appeal. Rather, the Service did not complete this section because Mr. [REDACTED], as the beneficiary on the petition, was not entitled to file an appeal.