



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**



B36

FILE:



Office: VERMONT SERVICE CENTER

Date: **OCT 10 2007**

EAC 01 056 54349

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the employment based preference visa petition on July 11, 2001. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR) on September 2, 2004. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) on January 6, 2006. The matter is now before the Administrative Appeals Office (AAO) on an appeal filed January 24, 2006. The previous decision of the director will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a wholesale importer of garments. It seeks to employ the beneficiary permanently in the United States as an administrative officer. 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 January 6, 2006, the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) based upon the determination that the beneficiary is ineligible for the classification sought because of the beneficiary's fraudulent marriage to a United States citizen and denied the petition approval pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).<sup>1</sup> The director specifically found that the denial of a prior I-130 petition must be overcome before the immigrant petition for alien worker (Form I-140) can be reconsidered.

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

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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Secretary 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."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

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

---

<sup>1</sup> See 8 C.F. R. § 204.2(a)(1)(ii).

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 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 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)(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 nature, for which qualified workers are not available in the United States.

The acting director stated in her decision that while acknowledging receipt of evidence from the petitioner submitted in rebuttal to the NOID, "... the intent to revoke is based on a different petition (Form I-130) and that therefore the denial of that petition must be overcome before the Immigrant petition for Alien Worker (form I-140) can be reconsidered."

According to *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990),

In making a determination that a beneficiary's prior marriage comes within the purview of section 204(c) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c) (1988), as a marriage entered into for the purpose of evading the immigration laws, the district director should not give conclusive effect to determinations made in prior proceedings, but, rather, should reach an independent conclusion based on the evidence of record, although any relevant evidence may be relied upon, including evidence having its origin in prior ... [Citizenship and Immigration Services (CIS)] proceedings involving the beneficiary or in court proceedings involving the prior marriage.

The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

There is no statement in the record of proceeding that the acting director reviewed the evidence submitted by the petitioner in rebuttal to the NOIR issued. This is gross error. The director should analyze all the evidence submitted according to whether or not 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. As the rebuttal evidence was not reviewed by the acting director, the acting director's decision must be withdrawn.

**ORDER:** The acting director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.