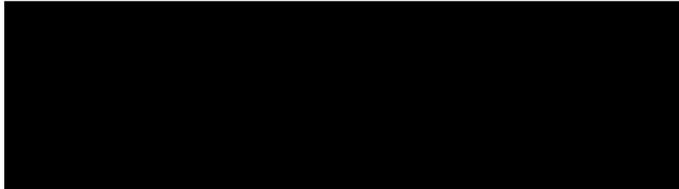


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Office: VERMONT SERVICE CENTER

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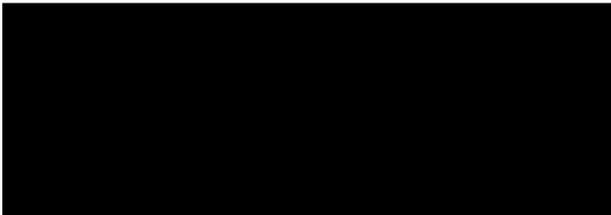
Petitioner:



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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, the 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). The subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn, but the approval of the petition will remain revoked.

Counsel filed an appeal with a Form G-28 signed by the beneficiary but without a Form G-28 properly executed by counsel and the representative of the petitioner. Therefore, the AAO rejected the appeal as improperly filed pursuant to the 8 C.F.R. § 103.3(a)(2)(v). With the instant motion filed timely, counsel submits a Form G-28 properly executed by both counsel and the authorized representative of the petitioner. The AAO concurs with counsel's assertion that the instant motion has overcome the ground of rejecting the appeal and will adjudicate the appeal as properly and timely filed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 January 13, 1998 and certified by DOL on January 26, 1998. The petitioner subsequently filed Form I-140 with Citizenship and Immigration Services (CIS) on November 5, 1999, which was approved on June 28, 2000. On March 15, 2002, the director issued a NOIR. The director revoked the approval of the petition on June 10, 2004 determining that a US citizen named Jaqueline Clarke filed a Form I-130, Petition for Alien Relative (Form I-130), on behalf of the beneficiary as a spouse of a US citizen on September 6, 1995 with a fraudulent birth certificate and marriage certificate.

On appeal, counsel asserts that section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), does not apply to the beneficiary because he did not fraudulently marry a US citizen for purposes of fraudulently obtaining an immigration benefit and he did not attempt or conspire to enter into a marriage for purposes of evading immigration laws.

Section 204(c) of the Act governs the procedures for granting immigrant status and states in pertinent part:

(c) Notwithstanding the provisions of subsection (b)<sup>1</sup> 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 [director] to have been entered into for the purpose of evading 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 immigration laws.

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<sup>1</sup> Subsection (b) of the Act refers to preference visa petitioners that are verified as true and forwarded to the State Department for issuance of a visa.

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 of 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 a United States citizen named [REDACTED] filed a Form I-130 on behalf of the beneficiary as a US citizen's spouse with INS (now CIS) New York office on September 5, 1996, and that the beneficiary concurrently filed his Form I-485 application for adjustment of status to obtain his permanent residence. The I-130 petition includes a Certificate of Marriage [REDACTED] (Year 1994) for the United States citizen and the beneficiary issued by Town Clerk, Town of North Hempstead, County of Nassau, State of New York on June 29<sup>th</sup>, 1994. On appeal counsel submits a "No Record Certification - Marriage-" issued on June 30, 2004 by [REDACTED] Registrar of Vital Statistics, Town of North Hempstead, County of Nassau, State of New York. This no record certification certifies that: "a search has been made in this office for the marriage record of [the beneficiary] and [REDACTED] June 29, 1994 at North Hempstead, NY, State of New York and that such record is not on file in this office." The petitioner did not provide any evidence that the Certificate of Marriage for the beneficiary and the citizen in the record is a fraudulent document. However, it is noted that the marriage certificate indicates at the bottom that: "[d]o not accept this copy unless the raised seal of the Town of North Hempstead is affixed thereon." The copy of the marriage certificate in the record does not contain such a raised seal of the Town of North Hempstead. The district director states in his decision of denial on September 5, 1996 that "[t]he documents submitted in support of your visa petition, to wit: Birth certification [REDACTED] issued 12/19/90 in Queens and Marriage certificate [REDACTED] issued 6/29/1994 in Hempstead have been verified, and found to be fraudulent." Therefore, 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 by reason of a fraud marriage for the purposes of obtaining immigrant benefits under the United States immigration laws and the marriage certificate submitted in connection with the beneficiary's marriage-based petition was fraudulent.

Counsel argues on appeal that the alleged marriage has never taken place and was a fiction to which the beneficiary was not a party, and that the beneficiary did not attempt or conspire to enter into a marriage for purposes of evading immigration laws. The AAO agrees with counsel that the submitted "no record certificate" shows that there is no legal and real marriage entered between the beneficiary and the alleged U.S. citizen and that the marriage was a fiction. However, the AAO cannot concur with counsel that the beneficiary was not a party to the marriage fraud. The fraudulent marriage certificate identifies the beneficiary, the I-130 petition was filed on behalf of the beneficiary as a spouse of a U.S. citizen based on that fraudulent marriage certificate, the beneficiary filed his adjustment of status application based on the marriage-based immigrant petition to obtain his permanent residence based on the marriage fraud, and the beneficiary actually obtained his employment authorization document as a part of his immigrant benefits with the fraudulent marriage. 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 were based on a fraudulent marriage, and 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 October 4, 2000 and June 17, 2004 respectively. Per the beneficiary's affidavit, in 1995 he met and retained an attorney named [REDACTED] for his "greencard" referred by his coworker [REDACTED]. His June 17, 2004 affidavit indicated that: "[s]ince I was interested in obtaining a 'green card,' in 1995 I went to an 'attorney' named [REDACTED] who was recommended to me by my fellow worker [REDACTED]". On September 26, 1995 he appeared at the CIS New York Office and obtained an employment authorization document. Several months later he was alerted by his accountant and tried to contact Bianca but she was disappeared. At that point, another attorney, [REDACTED] found that his application with CIS was based on marriage and Bianca fraudulently filed similar applications for many people. Therefore, he did not appear for an adjustment interview based on that the petition and never sought to extend the employment authorization card issued in conjunction with that petition. The beneficiary stated that he had never known a person by the name [REDACTED] that he never applied for a marriage license anywhere in the U.S., and that he was never married to [REDACTED] nor attempted or conspired to enter into a marriage with [REDACTED] or any other woman for purposes of evading the immigration laws.

The record shows that the beneficiary entered the United States in February 1992 without inspection.<sup>2</sup> In 1995, after staying in the United States for three years, he should have been aware of how to obtain an employment authorization document and lawful permanent resident status through legal procedures. Although the record does not contain sufficient evidence to show that he retained [REDACTED] as his attorney and instructed her to obtain his permanent residence through a fraudulent marriage, it is clear that his purpose was to evade the U.S. immigration laws to obtain immigrant benefits because from his coworker he knew that [REDACTED] had "fixed immigration papers" for illegal immigrants<sup>3</sup> and he should have known that [REDACTED] could not "fix any illegal immigrant paper" with legal procedures. The beneficiary's affidavit itself indicated that he did not ask [REDACTED] to file a political asylum application for him, instead that he wanted to obtain his lawful permanent resident status and asked the attorney how she could obtain that for him. It may be that the beneficiary did not know that [REDACTED] would use a fraudulent marriage to help him to obtain a work permit at that time instead of a political asylum application, but he might have known that she would obtain a work permit and other immigration benefits through some illegal method.

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 [REDACTED]. In his October 4, 2000 affidavit the beneficiary stated that: "[t]he next step was that I had to give to her all the documents [REDACTED] requested, passport, photos, she took my prints, she had me sign various documents bearing only my personal data, and she told me that the rest would be filled out with more time." The beneficiary's June 17, 2004 affidavit stated that: "[A]t the time of this appointment, I signed several blank forms only filled with my personal data. 'Bianca' explained to me that the rest of the information would be filled later." The beneficiary did not verify what forms he signed. The record shows that on the same day the U.S. citizen filed the Form I-130 with the

<sup>2</sup> See the concurrently filed Form I-485 adjustment of status application.

<sup>3</sup> The beneficiary's affidavit dated October 4, 2000 states in pertinent part that: "[I]n the year 1995, when I was working at the [REDACTED] in Armonk, NY, I met a Brazilian named [REDACTED]. He worked there as a waiter. [REDACTED] asked me if I had wanted to fix my papers with Immigration. I asked him how? He too was illegal. He told me that he was fixing his papers through an attorney who worked with Immigration. ... [REDACTED] showed me his employment authorization and social security card. ... The attorney processed the application, he later received his appointment with Immigration and got it then."

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 whether the beneficiary signed blank or completed forms on August 24, 1995. 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." If the beneficiary had signed the completed forms, when the form was given to the beneficiary for signature, that box would have reminded the beneficiary the application somehow related to marriage or a spouse. Additionally, despite listing a U.S. citizen as his wife on Page 2 of the Form I-485, the beneficiary had 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 directly related to lawful permanent resident status processing instead of a political asylum application. It is doubtful that a signatory to this form would believe it to be a political asylum application.

Additionally on the one-page Form G-325 the U.S. 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.

In addition, all the immigration forms come with a 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 the content 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.

Counsel also claims that the beneficiary relied upon the advice of someone who said she was an attorney and prepared paperwork and had him sign the paperwork. Counsel appears to claim ineffective assistance of counsel on appeal. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

In the instant case, counsel's claim does not meet the requirements stated above.

An independent review of the documentation in the record of proceeding presents persuasive evidence to support a reasonable inference that the marriage between the beneficiary and [REDACTED] was a fraudulent marriage. The Form I-130 and concurrently filed Form I-485 were supported with a fraudulent marriage certificate. The beneficiary had obtained immigration benefits from the fraudulent marriage-based petition and related applications. There is ample evidence that the beneficiary conspired to evade the immigration laws by marrying U.S. citizen and that fraud is documented in the alien's file. Thus, the director's decision of revocation dated June 10, 2004 determining that the beneficiary has been accorded or sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by CIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Counsel also argues that in 2002 the Vermont Service Center I-601 unit reviewed the facts of the beneficiary's case and found no ground for exclusion. Counsel's reliance on the result of Form I-601, Application for Waiver of Grounds of Excludability, to support his argument that section 204(c) does not apply to the instant I-140 petition is misplaced. Form I-601 is to waive grounds of excludability when declared inadmissible to the United States. Section 204(c) governs whether the director should approve an I-140 immigrant petition when the beneficiary of the petition has participated in a fraudulent marriage for the purpose of evading immigration laws so that the beneficiary can obtain immigrant benefits. Filing Form I-601 or its result from the director that there are no grounds of excludability for the beneficiary is irrelevant to a determination of whether or not the instant I-140 immigrant petition is approvable under Section 204(c).<sup>4</sup>

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 AAO finds that the director had good and sufficient cause to revoke the approval of this petition. 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 assertions on appeal, the AAO has identified an additional ground of revocation and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite experience prior to the priority date with the 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).

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.

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<sup>4</sup> Additionally, the marriage fraud determination was made after the adjudication of the Form I-601.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 13, 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	2 years
	Related Occupation	Blank

The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on December 16, 1997 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had been working as a full time "Italian Specialty Cook" for a restaurant named Brezza, Inc. in Armonk, New York since December 1994. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The petitioner submitted an experience letter from [redacted] Incorporated located at [redacted] [redacted] verifying that the beneficiary worked for the restaurant as an Italian specialty cook from December 1994 to the present (when the letter dated December 23, 1997). As quoted above, the regulation at 8 C.F.R. § 204.5(g)(1) requires such evidence must be in the form of letter from current or former employer or trainer and must include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. The experience letter in the record is on letterhead of Brezza Incorporated, was dated December 23, 1997 and signed by [redacted] [redacted] It is not clear whether the writer indicates his title in the company as the general manager using the abbreviation of G.M. before his name, but this letter does not include the writer's full name and full title. In addition, this office cannot verify the writer's position with the company and his signature. The petitioner did not submit any evidence to demonstrate that [redacted] was the person who had the authority to issue and

sign a letter on behalf of Brezza, Inc., or that the company was in good standing or active when [REDACTED] wrote and signed the letter in December 1997. The record does not contain any documentary evidence to show the relationship between the petitioning entity and Brezza, Inc. or relationship between the beneficiary and [REDACTED] since he appears to be the owner for both companies. The letter does not verify the beneficiary's full-time employment. If he worked as a part-time cook, the three years from December 1994 to December 1997 when the letter was written of part-time experience as an Italian specialty cook do not meet the two years of experience requirement set forth on the Form ETA 750 in the instant case. Therefore, the AAO cannot accept this letter as an experience letter from the beneficiary's current or former employer as required by the regulation at 8 C.F.R. § 204.5(g)(1). The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The petition will be denied 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 motion to reopen is granted. The director's decision dated June 10, 2004 is affirmed and the petition remains revoked.