

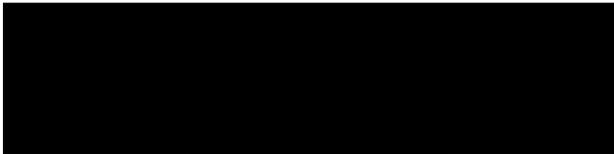


U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy

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FILE:

WAC 99 227 51853

Office: CALIFORNIA SERVICE CENTER

Date: JAN 14 2008

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, California Service Center, initially approved the preference visa petition. Subsequently, the director issued a 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).<sup>1</sup> The matter is now before the Administrative Appeals Office (AAO) on appeal.<sup>2</sup> The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act, 8 U.S.C. § 1155, states: “The Attorney General 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 (BIA) 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.*

The nature of the petitioner’s business is installation, repair, service and maintenance of heating, ventilation and air conditioning equipment (HVAC). It seeks to employ the beneficiary permanently in the United States as a HVAC 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 July 24, 2006, the director revoked the approval of the petition based upon the determination that the beneficiary is ineligible for

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<sup>1</sup>There is no evidence in the form of copies of annual reports, federal tax returns, or audited financial statements of the petitioner’s ability to pay the proffered wage according to the regulation found at 8 C.F.R. § 204.5(g)(2). According to the record the beneficiary was self-employed for a time. The California State contractor’s number (# [REDACTED]) provided by the owner of the petitioner (the petitioner’s corporate status is listed as “suspended” according to the California Secretary of State on December 19, 2007) to the California Employment Development Department in a letter dated November 26, 1997, is registered to Jay’s Services a company owned by the beneficiary. See <http://www2.cslb.ca.gov/General-Information/interactive-tools/check-a-license/Personnel>. (accessed December 19, 2007).

<sup>2</sup> The I-140 petition was filed on August 19, 1999; the director approved the petition on August 22, 2000; a NOIR was issued by the director to the petitioner on May 12, 2006; the petitioner responded to the NOIR on June 15, 2006; the director issued a NOR to the petitioner on July 24, 2006; and the petitioner appealed the revocation of the petition’s approval on August 7, 2006. The record of proceeding is consolidated with a separate prior proceeding based upon a marriage based petition filed for the beneficiary by his putative spouse, [REDACTED]. In that prior proceeding, in 1993 the beneficiary’s conditional permanent residence was revoked based upon the director’s finding that the beneficiary’s perpetrated a fraudulent marriage to a United States citizen to evade U.S. immigration laws.

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).

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 [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)(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 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, substitute counsel submits a legal brief and no additional evidence.

The I-140 employment based petition was filed on August 19, 1999. Accompanying the petition was the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor and documents relating to the beneficiary's technical training, education and work experience. Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the

beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause."

The director issued a NOIR on May 12, 2006. As already stated, a NOIR 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. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). In the NOIR, the director referred to a sworn, signed statement made on April 16, 1993 by the putative spouse, [REDACTED]. In summary, [REDACTED] in response to CIS immigration investigative officers questions declared that she entered the United States on May 27, 1982, and after adjusting her status legally became a United States citizen on July 1989. She then affirmed that she was introduced to the beneficiary (then living in the Republic of the Philippines) by the beneficiary's sister, [REDACTED].

According to the director's findings in the prior family based preference petition proceedings, at the behest of [REDACTED] subsequently entered into a sham marriage with the beneficiary (on August 4, 1989) with the purpose of evading United States immigration laws with a premeditated plan to confer an immigration benefit upon the beneficiary to which he was not entitled that is conditional leading to permanent legal residence.

She also disclosed to the immigration officers that she never lived as husband and wife with the beneficiary. Further, she reported that on the date of the interview she was living with another man,<sup>3</sup> with their child (not the beneficiary's child) and she had been residing this way for the past two years (i.e. approximately April 1991 to April 1993 to present).

According to [REDACTED] the beneficiary sent her money for the costs of a divorce between the couple but requested that she forestall her divorce action until the immigration proceedings leading to the receipt by the beneficiary of legal permanent residency status were completed. The beneficiary's sworn, signed and witnessed written statement is found in the consolidated record of proceeding with the prior CIS I-130 petition family based immigrant petition proceeding.

In response to the director's notice counsel submitted copies of the following documents: explanatory letters from counsel dated June 9, 2006, and June 28, 2004; a passport amendment validation application and related documents for [REDACTED]; a partially legible affidavit from the United States Consulate, the Republic of the Philippines; a marriage contract between the beneficiary and his putative spouse, [REDACTED], evidencing a marriage on August 4, 1989;<sup>5</sup> personal letters signed by [REDACTED] with the return address [REDACTED], California 90062 U.S.A to the beneficiary at his address in the Republic of the Philippines; the notice of approval of the CIS I-30 family based immigrant petition as of October 29, 1989; an employment verification for [REDACTED]; a form provided by [REDACTED] for her daughter [REDACTED] in 1990; an affidavit of support given by [REDACTED] for her daughter [REDACTED] made in 1989; a

<sup>3</sup> [REDACTED] Their child is named [REDACTED]

<sup>4</sup> According to information found in the record, [REDACTED] is the daughter of the beneficiary and [REDACTED]

<sup>5</sup> This marriage was dissolved on January 5, 1994, according to the record.

<sup>6</sup> Although it is nowhere stated in the record except as a comment by the director, it does not appear that the beneficiary is the putative father of [REDACTED]

document (CIS Form I-791) signed by the beneficiary and [REDACTED] under penalty of perjury entitled "Joint Petition to remove the Conditional Basis of Alien's Permanent Resident Status," a "Witness Statement" dated February 1992, submitted by two individuals, one the brother-in-law of the beneficiary, attesting to the cohabitation of the beneficiary and [REDACTED] at [REDACTED] Alhambra, California from March 25, 1990;<sup>7</sup> four checks issued by the state of California and the U.S. Department of Treasury to the beneficiary and [REDACTED] at [REDACTED] Alhambra, California;<sup>8</sup> a marriage certificate between the beneficiary and Yuly [REDACTED] evidencing their marriage on March 5, 1994; [REDACTED]'s personal federal tax return, Form 1040, for 1988; three birth certificates for two boys and a girl, all issue of the beneficiary and [REDACTED] an invoice addressed to [REDACTED] and [REDACTED] with two financial statements; a school tax assessment addressed to [REDACTED] and [REDACTED]; a letter written by the beneficiary's sister, [REDACTED] directed to CIS dated June 7, 2006; approximately 13 pages of photo copies and notes; and a "Declaration of [REDACTED]" dated June 8, 2006;

In order to reflect the record of proceeding (and, for what evidence the following may provide to the issues of this case relating only to the I-140 petition, its approval and subsequent revocation), evidence elicited during two adjustments interviews<sup>9</sup> of the beneficiary and his putative spouse conducted by CIS immigration officers is included below. Since these communications took place in the context of the adjudication of the beneficiary's application for adjustment of status, the proper venue for consideration of the evidence presented is with the CIS official with jurisdiction over the application for adjustment. The AAO has no jurisdictional authority to determine or review adjustment of status matters.

The director issued a NOR to the petitioner on July 24, 2006. 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 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>10</sup> However, substitute counsel did not submit additional evidence on appeal.

As a preface to the following discussion, the AAO does not have jurisdiction to review the substantive merits

<sup>7</sup> This affidavit is contradicted by the beneficiary's sworn statement and counsel's assertion that the spouses met only monthly for the five years of their marriage from 1989 to 1994.

<sup>8</sup> There is a note included with the check copies that states "Sign it, and return back to me by mail. With your photo copy of your driver license and S.S.S. #. Thank you, [REDACTED]" It is not explained why it would be necessary for [REDACTED] to correspond with the beneficiary to obtain the tax refund checks cashed if they lived together.

<sup>9</sup> The putative spouse, [REDACTED] provided a sworn, signed statement on April 16, 1993, and the beneficiary provided a sworn, signed statement on April 20, 1993.

<sup>10</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

of an immediate relative marriage petition. This office can only review the record of proceeding, which in this case consolidates both the prior relative based and employment based immigrant petition proceedings, to ascertain that there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the marriage was entered into for the purpose of evading immigration laws. *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In the subject case, the director made a finding of fraud.

Substitute 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 NOR “only [stated] a conclusion of law” without giving a “findings of fact that answer our rebuttal.”

Counsel submitted a brief in the matter.

In the brief, counsel provides various statements in an anecdotal manner of the couple’s motivations as he perceives them, and the courses of conduct of the beneficiary and his putative spouse, [REDACTED] from 1989 and afterward. Counsel asserts that a valid and not a sham marriage existed between the couple. Since no timeline was provided by counsel in the ten separate statements made by counsel, this office is unable to correlate counsel’s assertions to the evidence provided in the record of proceeding. Further, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel asserted that “during the five-year period [of the marriage] the [beneficiary] would meet monthly with the wife.” There was no continuous cohabitation between the beneficiary and his putative spouse, [REDACTED] from 1989 until their divorce in 1994. Counsel’s statement supports in part [REDACTED]’s statement made to the CIS investigating officers that the couple never lived together.

Counsel provides in his brief three additional numbered contentions, this time with dates, to contend the director “completely ignores” the evidence submitted that there was an “intent” to have a valid marriage.

Counsel contends that the documents for the CIS Form I-130 family based petition as well as documentation prepared by [REDACTED] to bring her daughter into the United States filed in 1989 as all evidence of a valid marriage. Counsel does not explain the relevance of these assertions to the issue at hand, which is the director’s finding that the subject marriage was entered into for the purpose of evading immigration laws.

Counsel then contends that the beneficiary “actually immigrated” on March 25, 1990 in Hawaii where he then flew to the United States to meet his wife’s daughter (i.e. [REDACTED] who was then according to her birth date<sup>11</sup> only ten months old) “to establish a relationship with this infant less than one year old for two to three weeks before she [sic] left.”

Finally counsel acknowledges [REDACTED]’s statement to the CIS investigating officers that she was cohabitating with another man while married to the beneficiary from approximately April 1991 to April 1993. Counsel then speculates as to the birth date of [REDACTED] and concludes that the

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<sup>11</sup> [REDACTED] County of Los Angeles, California, Certified Abstract of Birth, # [REDACTED], date of birth May 25, 1989.

conception of [REDACTED] was after the beneficiary had “entered the United States as a permanent resident” but during her cohabitation with a man not her putative husband.

Counsel then asserts in a narrative fashion that “we do not know who paid for [REDACTED] trip to the Philippines to marry the beneficiary in 1989,” “we assume” that the beneficiary and his family in the Philippines paid for [REDACTED]’s daughter’s up-keep for seven months, and that substitute counsel does not know what statements the beneficiary made to the CIS investigating officers in the matter.<sup>12</sup> However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel cites the case of *Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980) for the proposition if a marriage “was valid on inception, then it is valid if the partners are separated and no longer viable.” Counsel is omitting facts that are inconvenient to his own argument. In *Matter of Boromand*, the BIA held that where there is no evidence of a fraudulent marriage or legal dissolution of the marriage, the denial of an adjustment of status application or the subsequent rescission of an adjustment grant cannot be based *solely* on the nonviability of the marriage at the time of the adjustment application.

That is not the case here. In the subject case, [REDACTED]’s sworn statement was that she never lived as husband and wife with the beneficiary. Further, she reported that on the date of the interview she was living with another man, with their child conceived during the pendency of her putative marriage with the beneficiary and she had been residing this way for two years (i.e. approximately April 1991 to April 1993). This and other adverse evidence was in the record of proceeding, and mentioned by the director in his decision as evidence reviewed that lead to the revocation of the approval of the petition.

Counsel also states in his brief that Exhibit A identified as excerpts from a immigration “sourcebook,” further supports counsel’s contentions. However, despite the AAO’s request that counsel submit a brief and/or additional evidence, only the brief was submitted in this case without Exhibit A. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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 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 agree that the director had good and sufficient cause to revoke the petition’s approval and that the beneficiary is ineligible for the classification sought based on the beneficiary’s fraudulent marriage to a United States citizen.

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<sup>12</sup> This statement was made by the beneficiary on April 20, 1993, and it is in the record of proceeding.

The petition's approval will remain revoked 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 appeal is dismissed.