

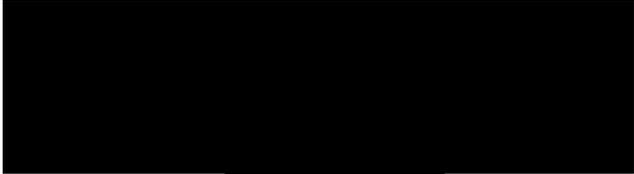
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
SRC 00 254 52590

Office: TEXAS SERVICE CENTER

Date: JUL 24 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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

cc:



DISCUSSION: The Director, Texas Service Center, initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on September 10, 2004. The beneficiary's new employer responded to this notice. The matter is now before the Administrative Appeals Office (AAO) on certification. The matter will be remanded to the director for the automatic revocation of the petition based on the initial petitioner's lack of business operations, the initial petitioner's lack of response to the director's NOIR, and if deemed appropriate by the director, on the additional basis that the beneficiary fraudulently entered into a marriage for the purpose of evading the immigration laws of the United States.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). That section 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.

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director in his new decision determined that, due to the beneficiary's change in employers with subsequent changes in job duties subsequent to the approval of the instant I-140, issues involving the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313 (AC21) arose in the matter. The director identified one issue as the new petitioner's ability to pay the proffered wage, and another issue with regard to the dissimilarity of job duties between the original job offer and the new job with the second employer. The director determined that these were novel issues and thus, certified his decision for review by the AAO.

The procedural history in this case is documented by the record; however, it is not incorporated into the decision. The AAO will review the procedural history in these proceedings.

The petitioner submitted a I-140 petition to the Texas Service Center on August 17, 2000. The Form ETA 750 submitted with the petition was for a Landscape Gardener. The priority date for the Form ETA 750 was January 14, 1998. The duties of the position as outlined on Part A, Section 13 of the ETA Form 750 are as follows:

Maintain grounds and landscape of private and business residences using power-operated equipment, like chain saw and hand mower. Install plants, flowers, and trees according to clients' requests. Apply chemical products to reduce pesticides and control growth. Clean grounds and make repairs to concrete walks and driveways.

On March 16, 2001, the director approved the I-140 petition.

On July 7, 2003, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner, identified as The Grass Master, Inc., [REDACTED], Boynton Beach, Florida, stating that Mr. [REDACTED], the petitioner's

counsel at the time of the approval of the instant I-140 petition, had been convicted of several federal offenses relating to the filing of fraudulent immigrant worker visa petitions. The director further noted that since the petitioner's law firm was found guilty of committing immigration fraud, it might be concluded that the petitioner's petition might contain fraudulent documents, and that the available evidence no longer supported the petition's approval. The director sent a detailed list of items she sought clarification about or additional evidence and information for. Since that notice is contained in the record of proceeding, which is a public access document, it will not be recited in this decision. The record does not contain any response from the petitioner to this correspondence.

On September 10, 2004, the director issued a second NOIR to the petitioner, attn: T [REDACTED] [REDACTED] Boca Raton, Florida and also sent a copy of the notice to T [REDACTED] Grassmasters Landscaping, Inc., 10778 Grant Way, Boynton Beach, Florida. In this NOIR, the director stated that state of Florida corporation records indicated that the Grass Master, Inc. was no longer active as a business enterprise and thus may no longer be extending a job offer to the beneficiary. The director also noted that Grassmaster Landscaping Inc. is active in Boynton Beach, Florida; however, in the instant petition, the petitioner's ETA Form 750 specified a worksite in Boca Raton, Florida. The director noted that a labor certification is valid only within the Standard Metropolitan Statistical Area (SMSA) of the specific worksite. The director asserted that if the petitioner (The Grass Master, Inc.) had organized under a new name and was active as a business under the new name and ownership, the I-140 petition's approval could only be valid if the beneficiary worked in Boca Raton, Florida. The director then stated that if the petitioner intended to employ the beneficiary as a landscape gardener, it would need to submit a new permanent labor certification specifying a worksite in or near Boynton Beach, or provide evidence that the beneficiary will be working in the Boca Raton area. The director also noted that petitioner needed to provide evidence that it, under either name, currently had the ability to pay the hourly proffered wage of \$7.16 to the beneficiary.

In a section entitled "Notes," at the bottom of the NOIR, the director stated that if the beneficiary had a job offer by another employer as a landscape gardener or in a similar occupation, a letter from the new employer on company letterhead verifying the employment offer, should be provided to the record. The director stated that if such evidence was submitted, the I-140 petition's approval might still be valid. The director also noted that it was possible that Mr. [REDACTED] filed the I-140 petition without the knowledge or consent of the petitioner. The director stated that in numerous cases, Mr. [REDACTED] used the names of actual business enterprises on visa petitions without the firm's knowledge to create the appearance of a job offer where none existed. The director stated that if the petitioner never knew the beneficiary; or had any intention of hiring him, the petitioner should state this in its response to the NOIR.

On December 30, 2004, the director received a letter from Mr. [REDACTED] President, Colonial Decorators, [REDACTED] Delray Beach, Florida. In his letter, Mr. [REDACTED] stated that the beneficiary was employed by his company and earned \$15 an hour. Mr. [REDACTED] also submitted a document entitled "2004 for Profit Corporation Annual Report" filed February 19, 2004 by Colonial Decorators, Inc., with the Florida Secretary of State. The document identified Colonial Decorators, Inc.'s principal place of business as 10099 182 Court, South, Boca Raton, Florida. On January 6, 2005, the director sent a Request for Further Evidence to the beneficiary with reference to his I-485 Application to Adjust Status and requested a more detailed letter from the beneficiary's new employer describing the beneficiary's job duties. The director stated that

the information was needed in order to conclude process of the petitioner's I-140 petition and the beneficiary's I-485 adjustment of status application.

On February 2, 2005, Mr. [REDACTED] submitted a second letter to the director. In his letter, Mr. [REDACTED] stated that the beneficiary worked for his company as a faux finisher, and that some of the beneficiary's duties included various wall finishes as well as custom matching various marbles, wood graining and other custom effects. Mr. [REDACTED] noted that the company worked on ceilings as well as woodwork.

On February 14, 2005, the director issued a Notice of Certification to the petitioner, identified as The Grass Master, Inc. Attn: [REDACTED], Boca Raton, Florida.¹ In his decision, the director referred to AC21. The director cited section 106 (c) of AC21 with reference to petitions for individuals whose applications for adjustment of status pursuant to section 245 of the Act were filed and remained unadjudicated for 180 days or more, that remained valid if the individual changed jobs or employers and if the new job was in the same or a similar occupational classification as the job for which the initial petition was filed. The director noted that with regard to the instant petition, the beneficiary's adjustment application had been pending for 180 days or longer. The director further noted that the beneficiary, based on the letters from Colonial Decorators, did have a new job. The director then contrasted the job duties of a landscape gardener with those of a faux finisher and determined that the beneficiary's new employment offer was not in the same or similar occupational classification.

The director also noted that Section 106 (c) of AC21 is silent as to whether the beneficiary must be paid the proffered wage by the new employer. The director then determined that the I-140 petition's approval could not be preserved under section 106 (c) of AC21 because the beneficiary's proposed new employment was not in the same or a similar occupational classification as that described in the labor certification.

The director also referred to the petitioner's initial representation in the submission of the I-140 petition by [REDACTED]. The director stated that although the instant I-140 petition was filed during the period of time in which [REDACTED] was operating his fraud scheme, the evidence in the instant petition is inconclusive of fraud. The director stated that according to the record, the initial petitioner, The Grass Master, Inc., was active at the time the labor certification was filed in 1998, and that as of September 7, 2004, it was listed as active under its original management, but under a new name (Grassmasters Landscaping, Inc.) and in a new location. The director also noted that the instant petition lacked the usual hallmarks of [REDACTED]'s *mala fide* failings in that the beneficiary's W-2 Statements submitted to the record with the initial petition appear authentic, and not counterfeited. The director stated that reasonable individuals could reach conflicting conclusions as to the existence of fraud in the instant petition, but that CIS concluded the revocation of the instant petition was based on ineligibility not stemming from fraud.

The director concluded by stating the ability to pay issue relating to the beneficiary's job portability and the dissimilarity of the job duties between the initial proffered position and the new employer's proffered

¹ The record reflects that the copy of the certified decision sent to the petitioner was returned to the file, marked "return to sender, undeliverable as addressed."

position were the sole relevant issues in the instant petition. The director noted that since there has not been time to develop a body of case law with regard to AC21 issues, he certified his decision to the AAO.

Section 205 of the Act, 8 U.S.C. 1155, states 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).

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)).

In sum, the director appears to have good and sufficient cause to revoke the instant petition, pursuant to section 205 of the Act, 8 U.S.C. 1155 and as discussed in *Matter of Estime*, 19 I&N 450 (BIA 1987)). The realization by the director that the petition was approved on the basis of a possible fraudulent I-140 petition error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Furthermore, the fact that the initial petitioner has never responded to the director's initial NOIR dated July 7, 2003, the second NOIR dated September 10, 2004, or the director's certified decision dated February 14, 2005, which all contain questions of the petitioner's possible involvement in fraud, is sufficient cause to revoke the instant I-140 petition.

Although the director indicates that the original petitioner may have changed business operations, and that there does not appear to be any fraud in the instant petition, it is the petitioner's burden to establish its actual business operations, and its non-involvement in any fraudulent immigration practices. The burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

With regard to the two businesses identified in the director's second NOIR, namely, The Grass Master, Inc., and Grassmasters Landscaping, Inc., these two businesses appear to be two separate businesses. As stated on the petitioner's federal income tax return for 1998, the petitioner has an employer identification number of [REDACTED] 7. The current business named The Grass Master, Inc. on the state of Florida corporation database

has an employer identification number of [REDACTED] and it is located in Tallahassee, Florida. Grassmasters Landscaping, Inc., as indicated on the state of Florida corporation database, has an employer identification number of [REDACTED]. The information provided about these various Florida corporations is available at <http://www.sunbiz.org/scripts/cornamelis.exe> (Accessed July 23, 2008.) The petitioner's ongoing business operation could not be confirmed through the state of Florida corporate database. The initial petitioner is not still in business, which warrants an automatic revocation of the instant petition without appeal. The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(D) states, in pertinent part, that the approval of a petition is revoked as of the date of approval upon termination of the employer's business in an employment-based preference case under section ... 203(b)(3) of the Act.

While the director raises questions with regard to the applicability of AC21 to either the beneficiary porting to another employer, performing a job with different job duties, and the question of whether the new employer has to provide additional documentation as to its ability to pay the proffered wage, these issues are moot. Based on the non-response of the initial petitioner as of August 10, 2003,² the instant petition's approval should have been revoked.

Beyond the decision of the director, the record indicates that the beneficiary filed an earlier I-485 Application to Register Permanent Residence or Adjust Status with CIS on November 16, 1994. Based on this document, the beneficiary married a U.S. citizen, [REDACTED] on January 6, 1994 in Garden City, New York. Based on CIS records, the application was denied for lack of prosecution when the beneficiary and his wife failed to present themselves for an adjustment of status interview.³ The record also contains an order for voluntary departure of the beneficiary from the United States by May 5, 1996, issued by the District Director of the legacy INS New York District on April 5, 1996. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a Certificate of Marriage between the beneficiary and [REDACTED]. No notice or correspondence was received from the beneficiary or a representative of the beneficiary to update or correct representations made on the Form I-130 or supporting documents.

In support of the Form I-485 application he filed on October 2, 2001, the beneficiary submitted a marriage certificate showing that he married [REDACTED] on March 11, 1989 in Tarunirim, Brazil, five years prior to the claimed marriage to [REDACTED] in the United States on January 6, 1994. *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." *Matter of Ho* also 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.

² 33 days after the date of the NOIR, dated July 7, 2003.

³ The supporting documents for the beneficiary's current I-485 and the earlier I-485 indicate identical names for the beneficiary's mother and father, as well as identical birth dates, and both contain the beneficiary's signature.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)⁴ 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.

In addition, 8 C.F.R. § 204.2, (a)(1)(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 immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such 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.

In summary, the record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary. We have no evidence that the marriage certificate is a fraudulent document. Thus, on the face of the document, a marriage occurred between the beneficiary and

The director requested no further evidence or explanation from the beneficiary or the petitioner as to the previous marriage documentation. The documentation appears to present substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. The fact that the record contains evidence to this effect does raise questions as to the fraudulent nature of the beneficiary's prior contacts with the U.S. immigration process, and does provide some additional weight to the possibility that the I-140 employment-based petition was entered into fraudulently.

The AAO notes that the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As the record of proceedings indicate, the director has assumed some of this burden by providing alternative theories with regard to why the petitioner did not respond to the director's NOIR dated June 2003, and whether there were intimations of the petitioner's fraudulent submission of a petition to

⁴ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

the record. However, it is the petitioner who needs to provide further explanation or documentation as to its actual ongoing existence, and any further documentation as to the nature of the initial I-140 petition filed while Mr. [REDACTED] represented the petitioner, and any further documentation as to when the beneficiary changed jobs following the initial petition's approval in 2001. Based on the record of proceedings, the petitioner has not met that burden.

The director's certified decision to the AAO is withdrawn. The matter is remanded to the director for revocation of the instant petition based on the non-response of the initial petitioner to the director's NOIR dated July 7, 2003. The director should also address the issue of whether the beneficiary entered into a fraudulent marriage for purposes of immigration into the United States.

ORDER: In view of the foregoing issues, the director's certified decision will be withdrawn. The petition is remanded to the director for further consideration of the initial petitioner's business status, and whether the beneficiary entered into a fraudulent marriage for immigration purposes. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.