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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC 03 100 51224

Office: VERMONT SERVICE CENTER

Date: JUN 11 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:



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 Director, Vermont 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). The matter is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (the 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 a delicatessen. It seeks to employ the beneficiary permanently in the United States as a manager. 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 June 6, 2005, the director revoked the petition's approval based upon the determination that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and revoked the petition's approval pursuant to section 204(c) of the Act, 8 U.S.C. § 1154(c).

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<sup>1</sup> The I-140 petition was filed on January 24, 2003; the director approved the petition on November 10, 2003; a NOIR was issued by the director to the petitioner on June 6, 2005; the petitioner responded to the NOIR; the director issued a NOR to the petitioner on November 22, 2005; and the petitioner appealed the revocation of the petition's approval on December 6, 2005. The record of proceeding is consolidated, *inter alia*, with two separate prior proceedings based upon marriage based petitions filed for the beneficiary by his spouse, [REDACTED] and a former spouse, [REDACTED]. In an affidavit made December 17, 1991, Ms. [REDACTED] evidenced her intent to withdraw the I-130 petition filed. According to testimony given at that time to Citizenship and Immigration Services (CIS) officers, [REDACTED] stated that her marriage to the beneficiary was fraudulent made to evade U.S. immigration laws. On March 5, 1992, CIS notified the beneficiary that the I-130 petition filed by [REDACTED] was withdrawn. A subsequent I-130 petition filed on February 3, 1997, by [REDACTED] naming the beneficiary was approved on February 10, 1997. On May 5, 2000, the director issued a NOIR concerning that approval. On November 25, 2002, a divorce decree was issued dissolving the marriage of [REDACTED] with the beneficiary.

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, counsel submits a legal brief and additional evidence.

Counsel submitted responses to the NOIR on July 19, 2005, and July 21, 2005. Therefore as of July 21, 2005, the following relevant documents were found in the consolidated record of proceeding: a letter from the petitioner dated November 4, 2002; letters from counsel dated July 19, 2005, and July 21, 2005; a document from the Supreme Court of New York evidencing the dissolution of the marriage between the beneficiary and [REDACTED] on July 24, 1996; a CIS memorandum to file dated February 2, 2001; a CIS "Decision on Application for Status as Permanent Resident" dated January 9, 2001 regarding the [REDACTED] family based petition;<sup>2</sup> a notice by CIS to [REDACTED] dated January 9, 2001, regarding the NOR of her CIS Form I-130 family based petition filed by her for the beneficiary; a cover letter from counsel dated May 31, 2000; a brief by counsel dated May 31, 2000, which is a response to the CIS NOIR of the [REDACTED]; a NOIR with certified mail receipts dated May 5, 2000, transmitted to [REDACTED] and her counsel by CIS; a notarized statement by [REDACTED] made December 17, 1991 that she was withdrawing the I-130 petition that she filed for the beneficiary; a letter from [REDACTED] dated May 9, 2000; a notarized statement made by [REDACTED] made July 12, 2000; notarized statements made by the beneficiary dated July 7, 2000; a notarized statement made by [REDACTED] dated May 24, 2000; a notarized statement made by [REDACTED] dated May 24, 2000; a statement made by an affiant (whose name is illegible on the document) made May 26, 2000; two separate marriage certificates between [REDACTED] and the beneficiary dated September 6, 1996 and April 14, 1998; a marriage certificate between [REDACTED] and the beneficiary dated August 15, 1991; one joint bank checking account statement for the period October 12, 1991 to November 14, 1991 naming the beneficiary and [REDACTED]; Wage and Tax Statements (W-2) dated 1995, 1996, 1997 and 1998 from [REDACTED] to the beneficiary in the amounts of \$5,100.00, \$7,800.00, \$10,950.00 and \$14,400.00 respectively; a W-2 Statement dated 1997 from [REDACTED] to the beneficiary in the amount of \$5,100.00; an illegible W-2 Statement dated 1996; U.S. federal personal joint tax returns for [REDACTED] and the beneficiary (Form 1040) for years 1997<sup>3</sup> and 1998 stating adjusted gross incomes (line 32) of \$20,418.00 and \$14,400.00 respectively; a deed dated July 22, 1998, from [REDACTED] and [REDACTED] to [REDACTED] and the beneficiary as recorded in Northampton County, Pennsylvania, at Deed Book Volume 1998-1, Page [REDACTED] for three tracts of land in that county (identified as [REDACTED] Easton, Pennsylvania) in the Township of Palmer for the recited consideration of \$107,500.00; a mortgage dated July 22, 1998, in the amount of \$96,750.00 between the American Federal Mortgage Corporation and [REDACTED] and the beneficiary dated July 22, 1998. for the

<sup>2</sup> 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), reference will be made to documents consolidated into the record of proceeding regarding a CIS Form I-130 family based petition filed by [REDACTED] for the beneficiary in 1991 and subsequently withdrawn by her. Since this communication took place in the context of the adjudication of the alien'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.

<sup>3</sup> The 1997 Form 1040 personal joint tax return for [REDACTED] and the beneficiary stated wages in the amounts of \$5,100.00 from [REDACTED], \$10,950.00 from [REDACTED] [sic] Trade in the amount of \$10,950, and \$4,368.00 from [REDACTED]

realty identified as [REDACTED], Easton, Pennsylvania providing for monthly payments of \$966.97; an automobile insurance policy binder for the policy period March 1, 1999 to September 1, 1999 for two vehicles owned by [REDACTED] and the beneficiary; and two utility bills for service charges to [REDACTED], Easton, Pennsylvania.

As already stated there was a prior marriage based petition filed for the beneficiary by his then spouse, [REDACTED]. In an affidavit made December 17, 1991, [REDACTED] evidenced her intent to withdraw the I-130 petition filed. According to testimony given at that time to CIS officers, Ms. [REDACTED] stated that her marriage to the beneficiary was fraudulent made to evade U.S. immigration laws. On March 5, 1992, CIS notified the beneficiary that the I-130 petition filed by [REDACTED] was withdrawn.

On November 22, 2005, the Director revoked the Form I-140 petition's approval pursuant to section 204(c) of the Act, 8 U.S.C. § 1154(c). Specifically the director found that the evidence submitted by the petitioner including documentation showing joint ownership of property, commingling of financial resources and affidavits of third parties having knowledge of the bona fides of the marriage relationship was insufficient to overcome evidence in the record of proceeding that supported a reasonable inference that the petitioner's prior marriage with [REDACTED] was entered into for the purpose of evading immigration laws.

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 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 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

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 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 203(b)(3)(A)(i) of 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.

As additional evidence to support the instant appeal, counsel submits a notarized statement of [REDACTED] dated December 12, 2002; a letter dated June 21, 2002, a report and several statements by petitioner's private investigator; and affidavits of [REDACTED] and the beneficiary.

On appeal counsel contends that two statements submitted upon appeal secured by the petitioner's private investigator from [REDACTED] formerly [REDACTED] refute an earlier statement given to CIS on December 17, 1991.

On December 17, 1991, [REDACTED] gave the following written statements before CIS officers on the occasion of the beneficiary's adjustment interview:

I, [REDACTED] under oath, swear that I was paid \$500 to marry ... [the beneficiary] and promised \$300 after the interview.

We never consummated the marriage.

I live at [REDACTED] with my son. I receive Welfare.

I make the above statements willing.

[REDACTED]

The second statement is as follows:

To Whom It May Concern

I hereby withdraw visa petition I filed of ... [the beneficiary].

I do not wish this person to derive any benefits for immigration purposes based on our relationship.

[REDACTED]

On appeal, counsel has submitted a letter from Barbary Coast Investigations dated June 21, 2001. According to the petitioner's private investigator, [REDACTED] was living in Oakland, California, in 2001 with her son. Referenced in that letter, two signed but un-notarized statements were made by [REDACTED] on June 21, 2001, and July 4, 2001 that concerned the above recited statements.

In summary in the statement on Barbary Coast Investigations letterhead dated June 21, 2001, [REDACTED] stated that she "saw" the statement dated December 17, 1991, she did not write the letter, she did not know who wrote the letter which according to her is not in her writing, but she did sign it.

The statement dated July 4, 2001, is in two parts. The first part on Barbary Coast Investigations letterhead has the appearance of being prepared by the investigator. It begins "The following is a follow up statement I gave to [REDACTED] a private investigator. The initial statement was taken on June 21, 2001 [etc] ...."

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<sup>4</sup> Counsel also contends that the director erred by making no further investigation of the bona fides of the marriage between [REDACTED] and the beneficiary. 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.

In summary, this first portion of the statement is a list of declarative sentences. Ms. [REDACTED] declares by her signature that she has no recollection of signing the December 17, 1991 statements and that the contents of the December 17, 1991 statement are false.<sup>5</sup> Specifically in the statement dated July 4, 2001, [REDACTED] declares the opposite of what she stated in her December 17, 1991 statements (i.e. that the contents of the December 17, 1991 statement “are false,” that [REDACTED] was not paid to marry the beneficiary, that she never told the CIS officer that she was paid to marry the beneficiary, and although she wanted to obtain permanent residency for the beneficiary, she withdrew the application because she was collecting welfare benefits at another address which she believed is “an issue of welfare fraud” that CIS knew about at that time.

There is no other statement or document in the record concerning welfare fraud.

The second portion of the statement is typewritten and signed (but not notarized) by [REDACTED] on July 4, 2001. In this statement, [REDACTED] describes the conditions of her marriage to the beneficiary. [REDACTED] stated, “When we went to the [CIS] interview I was asked ...if I collected welfare [sic]. She [a CIS officer] told me to get a letter saying I was not collecting.”

According to [REDACTED] it was CIS, not [REDACTED], that wished her to withdraw the immigration petition. [REDACTED] stated that CIS threatened her with prosecution for welfare benefit fraud, which she states she was undertaking at that time. However this bare statement without more is not determinative of CIS’ reputed affirmative misconduct. There has been no demonstration of affirmative misconduct in the record of proceeding on the part of CIS in performance of its empowered duties under statute and regulation.

[REDACTED]’s statements of December 17, 1991, and her later contrasting statements given ten years later on June 21, 2001 and July 4, 2001 are inconsistent. Further, according to the record of proceeding, the written statements given by [REDACTED] in the adjustment interview that she desired to withdraw her petition for the beneficiary because she was paid and would be paid compensation, that the marriage was never consummated but a marriage in name only, and that she did not live with the beneficiary but with her son, were not specifically refuted by [REDACTED] in the later statements. Ms. [REDACTED]’s statement of December 17, 1991, stated that she was paid to marry the beneficiary and promised cash to attend the adjustment interview.

*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.” *Id.* at 591-592.

The petitioner’s statements reflected in the statements made on June 21, 2001 and July 4, 2001 (which are not affidavits) submitted ten years after the statements given by [REDACTED] in 1991, are inconsistent to her initial written statements discussed above made in 1991. The petitioner’s attempts to rebut [REDACTED]’s prior statements, by in effect impeaching [REDACTED]’s sworn statement given to CIS, are not credible in the totality of the evidence mentioned above in this case. Counsel’s contentions regarding [REDACTED]’s later statements are inconsistent and contradictory on their face. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of*

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<sup>5</sup> Assuming this is true, the beneficiary is admitting to misrepresentation of facts before a CIS officer in an effort to secure immigration benefits.

*Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Ms. [REDACTED]'s statements made on June 21, 2001 and July 4, 2001 are inconsistent with earlier sworn statements and unsubstantiated as discussed above. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel submitted an affidavit made May 27, 2000, by [REDACTED] (no address, telephone number or contact information provided in the affidavit) that stated he had known the beneficiary since 1990 and he witnessed the marriage of the beneficiary and [REDACTED] on August 15, 1991. He stated that after the marriage he saw the couple together at a wedding reception and at a New Year 's Eve party in New Jersey.

Counsel submitted an affidavit made July 12, 2000, by [REDACTED] (no address, telephone number or contact information provided in the affidavit) that stated he had known the beneficiary when the beneficiary worked for [REDACTED] and he witnessed the marriage of the beneficiary and [REDACTED] in 1991. He stated that after the marriage he saw the couple together "at their apartment one time after their wedding" and inferentially when the beneficiary's wife came to pick the beneficiary up from work.

Although the above two affidavits were notarized, they did not include a biographic document<sup>6</sup> that identifies the affiants, proof that the affiants were in the United States during the period they said they observed the beneficiary, and a current working telephone numbers or addresses at which the affiants may have been contacted to verify the affidavit information. The affidavits submitted were not amenable to verification. The above affidavits do not provide detail regarding how and when the beneficiary and the affiants met; or their frequency of contact. Based upon the above affidavits the affiants had almost no contact with the beneficiary and [REDACTED] after their marriage. Further, the affidavits provide no significant witness or testament to the beneficiary and [REDACTED]'s alleged marital relationship.

Counsel cites a federal court case<sup>7</sup> for the contention that CIS "bears the burden of establishing by substantial and probative evidence" that the [REDACTED] marriage was entered into for purposes of obtaining immigration benefits by fraud. This is incorrect. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

There is substantial and probative evidence in the record of proceeding of the [REDACTED] marriage based petition to support a reasonable inference that there was an attempt to enter into a sham or fraudulent marriage.

We find that there is substantial and probative evidence of an attempt or conspiracy by the alien and other individuals who have attempted or conspired to enter into a marriage in violation of the regulation 8 C.F.R. § 204.2(a)(1)(ii) for the purpose of evading the immigration laws. The beneficiary by submitting fraudulent documents or conspiring with others to submit fraudulent documents that on their face, in the marriage supported petition, presented evidence of a valid marriage where none existed as a basis of that petition, committed fraud.

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<sup>6</sup> Photo identification for example.

<sup>7</sup> We note that the AAO is not bound to follow the published decision of a United States district court, even in matters, which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The federal court case cited by counsel, *Lattig v. Pilliod*, 289 F. 2d 478, 479 (7<sup>th</sup> Cir 1961) is not case precedent that the AAO follows.

Counsel cites the case of precedent of *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), for the proposition that the director should examine the record as a whole. The director issued a NOIR on June 6, 2005, and in that notice provided the factual allegations arising from the report of the CIS officer of [REDACTED]'s December 17, 1991 statement, counsel submitted evidence in response to that NOIR, and counsel submitted evidence as mentioned above to the director's NOR.

The standard for revocation is found in statutory authority at section 205 of the Act as stated above and it is that standard that is applicable in this case. 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 substantial and probative evidence in the record of proceeding of the [REDACTED] marriage based petition to support a reasonable inference that [REDACTED] and the beneficiary entered into a sham or fraudulent marriage.

The AAO affirms the director's decision to revoke the approval of the petition.

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 will be dismissed.