U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 186 50816 Office: TEXAS SERVICE CENTER Date: FEB 27 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Texas Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting and tax consulting services. He seeks to employ the beneficiary[1] permanently in the United States as an accountant. 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 determined that the petitioner had not established that the beneficiary is eligible for the classification sought, and, that the petitioner and the beneficiary could not provide the required standard of evidence to convince the director that the beneficiary's marriage to a United States citizen was not a fraudulent marriage, and, therefore revoked the petition's approval accordingly.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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:

> *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.

---

[1] According to the petition, the beneficiary arrived in the United States on October 6, 1999, in temporary worker status, that is H-1B, valid until November 29, 2003 but according to the records of the U.S. Citizenship and Immigration Services (CIS) and the beneficiary's CIS Form I-94 card in the record of proceeding, the beneficiary arrived in the United States as a temporary visitor, that is B-1, on October 16, 1999, valid until January 5, 2000. In a supplemental brief, counsel stated that that the beneficiary entered the United States in B-1 status and then the petitioner requested and received H-1B status for the beneficiary. This statement is not supported by the record of proceeding, or the records of CIS. 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).

Section 212(a)(6)(C)(i) 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.

The subject U.S. Citizenship and Immigration Services (CIS) Form I-140 employment based petition is dated May 22, 2003. The petition was accepted for filing on June 24, 2003. The Director issued a notice of its intent to deny the petition on December 2, 2003. The petitioner responded to the notice on February 23, 2004. The petition was approved on March 9, 2004. The Director issued a notice of its intent to revoke the approval of the petition on March 23, 2005. Counsel submitted a response to the notice of the intent to revoke on April 20, 2005. The Director issued a decision revoking the petition's approval on June 23, 2005. On July 11, 2005, the petitioner appealed the revocation. Counsel submitted a brief on August 11, 2005.

On appeal of the employment based petition (the subject petition), counsel asserts in a statement to the I-290B CIS appeal form that the director did not provide proof that the beneficiary entered into a marriage for immigration benefit or allow the beneficiary the opportunity "to provide a rebuttal of their [sic] presumption at his adjustment interview."

As a preface to the following discussion, counsel forthrightly has set forth the marital history of the beneficiary. The beneficiary married [redacted] now [redacted], in Pakistan on July 15, 1973. While the beneficiary was married to [redacted], the beneficiary married his reputed U.S. citizen wife, [redacted] on April 19, 1997 in Karachi, Pakistan without an intervening divorce. This recitation is supported by the record of proceeding as will be discussed further.

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), we note that testimony was given by the beneficiary at his adjustment interview on February 9, 2005. 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.

Part 4 of the I-140 petition requests information if anyone had ever filed an immigrant petition for the beneficiary. The response to that question was "no" when in fact as is set forth here, there was a prior immigrant petition filed by [redacted] for the beneficiary.

According to the CIS Form I-485 dated May 22, 2003, and the CIS Form G-325A dated May 22, 2003, found in the record of proceeding, the beneficiary stated that his wife's name is _____ and their daughter's name, by that marriage, is [redacted] The beneficiary failed to state that he had a second wife, [redacted] on the form.

According to the record of proceeding in which there is consolidated in the present record information concerning a prior marriage based petition involving the beneficiary. A CIS Form I-130 marriage based petition was filed on June 27, 1997 by [redacted] for the beneficiary. This petition was later withdrawn by [redacted] at her request on or about March 1, 1999.

According to counsel, the director arbitrarily denied the I-140 petition filed by the petitioner by not providing a transcript of statements made to support the conclusion and affording both the petitioner and the beneficiary an opportunity to respond and to submit rebuttal evidence. Counsel asserts that in the beneficiary's adjustment interview, the beneficiary was not allowed to explain his marital history, but that according to counsel:

> In fact, he [the beneficiary] was only able to confirm that he participated in polygamous marriage while in Pakistan when he was briefly married to two people at the same time [redacted] also known as [redacted], and [redacted] It is true that the Beneficiary participated in polygamy for a brief period while in Pakistan (However, he is no longer married to two people, and he will not be practicing polygamy in the future). It is also true that his second marriage [to [redacted]] is unrecognizable and void according to U.S. immigration laws. However, a polygamous marriage is not the same as a fraudulent marriage, and the restrictions of INA §204(c) must not apply here.

Counsel in response to the director's notice of intent to revoke issued to the petitioner on March 23, 2005 submitted the following documents: an affidavit from the beneficiary made April 15, 2005; a marriage certificate and its translation concerning the marriage between the beneficiary and [redacted] occurring on April 19, 1997; an untranslated marriage certificate that documents according to counsel's cover letter a marriage that occurred between the beneficiary and [redacted], now known as [redacted] the beneficiary's medical history and related documents; the beneficiary's passport, visa, Florida driver's license, social security card, and CIS issued employment authorization card as well as other documents. There were no exhibits submitted with the Form I-290B.

The director found that the beneficiary (and the petitioner) could not provide the required standard of evidence to convince the director that the beneficiary's marriage to a United States citizen was not a fraudulent marriage.

At the time the Director made the decision, on June 23, 2005, the record of proceeding evidenced that the beneficiary was married to a United States citizen [redacted] that occurred on April 19, 1997 while already married to [redacted] now known as [redacted] a Pakistani national, in Dacca, Pakistan on July 15, 1973. These facts are not in controversy.

According to the beneficiary's affidavit made April 15, 2005, the beneficiary "consented to a divorce" from [redacted] "sometime "in early Fall of 1997" but cannot prove that a divorce was granted.[2]

Counsel has stipulated that the second marriage to [redacted] is "unrecognizable and void" according to U.S. immigration laws.

The beneficiary's reputed U.S. citizen wife, [redacted] filed the marriage-based petition on June 27, 1997, based upon a reputed valid marriage with the beneficiary. In the record of proceeding, consolidated

---

[2] No official state or court document was submitted in this matter substantiating the divorce. The official documentation of the reputed divorce substantiating the statements made in this case that a divorce occurred is absent. The record of proceeding nor statements submitted concerning the issue does not state that the evidence is unavailable. 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)).

with the present case is a CIS Form G-325A prepared by the beneficiary dated June 20, 1997 he stated his marriage to [redacted] but not to Ishrat Bano, now known as [redacted] Likewise , on the CIS Form G-325A dated May 22, 2003, the beneficiary stated his marriage to [redacted] but not to [redacted]

However, in the beneficiary affidavit dated April 15, 2005, the beneficiary admitted that he was married to two different spouses at the time the above referenced marriage based petition was filed in 1997. We accept the beneficiary's statement as an admission against interest in this matter. We find that the beneficiary has knowingly and willfully falsified or concealed a material fact , which is the fact that he had two spouses on June 20, 1997 when he prepared the CIS Form G-325A.

On this issue counsel attempts to distance the beneficiary from culpability by citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988). Counsel contends on appeal that this case provides where evidence in the record proves that the beneficiary was an active participant in a fraudulent marriage the burden of proof shifts to the subsequent petitioner, which is in this instance [redacted] to demonstrate that the beneficiary did not seek status based on a prior fraudulent marriage. We distinguish *Matter of Kahy* here because in that case the petitioner, who was the putative United States citizen spouse, by sworn affidavit admitted to the fraud and she was the source of the adverse evidence, whereas in this case, the beneficiary has provided the evidence of a fraudulent marriage with [redacted] Notwithstanding CIS' burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). Based upon the record of proceeding in this matter, the petitioner and the beneficiary have not submitted independent and objective evidence that the divorce record exists, or that it in fact occurred before the marriage based petition was filed on June 27, 1997.

Counsel cites the case *Matter of Pradieu*, 19 I&N 419 (BIA 1986) and the case precedent of *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990) in support of his contentions.

The case precedent of *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990) involved a case in which a determination was made by CIS that the beneficiary's prior marriage came within the purview of Section 204(c) of the Act. According to *Tawfik* the director must reach an independent conclusion of marriage fraud and that relevant evidence may be relied upon which can be prior CIS proceedings that involve the beneficiary and the prior marriage. The beneficiary in a separate proceeding involving a marriage based petition had prepared an attested immigration document, the CIS Form G-325A document that stated that [redacted] was his wife, with no mention of his first wife, now known as [redacted] That information is contained within the record of proceeding in this matter and it was available to the director in making his present determination.

The case of *Matter of Pradieu*, 19 I&N 419 (BIA 1986) relates to spousal petitions filed in the New York District Office of CIS and the necessity of, in the adjustment process, of documenting the interview and evidence. Since the subject petition or its adjudication does not originate in the New York District Office of CIS, nor does it involve an adjustment matter, the *Matter of Pradieu* does not apply. Further, the AAO has no jurisdictional authority to determine or review adjustment of status matters.

We find that there is substantial and probative evidence of marriage fraud. There is evidence of a series of willful misrepresentations and fraudulent acts made by the beneficiary who misrepresented his marital status, and, misrepresented a divorce that he asserted occurred in Pakistan but he has not proven by independent, objective evidence.

We concur in the director's finding the beneficiary's marriage to a United States citizen was a fraudulent marriage according to substantial and probative evidence found in the record of proceeding including the prior I-130 marriage based petition proceeding.

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*, 19 I&N Dec. at 591-592 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."

We find that the petitioner had not established that the beneficiary is eligible for the classification sought on the priority date of the visa petition.

We find that the director did explain the factual and legal basis why the petition's approval was revoked by providing factual information found in the record of proceeding, that the director communicated to the petitioner his findings, and the prior case precedent citation as found in the director's decision dated June 23, 2005.

We find that the director demonstrated good and sufficient cause in revoking the approval of the petition. The beneficiary's reputed marriage to a United States citizen was a fraudulent marriage according to substantial and probative evidence found in the record of proceeding including the beneficiary's own admission made in the affidavit dated April 15, 2005, and, in the prior I-130 marriage based petition proceeding. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.