U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: DEC 18 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the preference visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. In his Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140 petition. The petitioner filed an appeal which was rejected as untimely filed by the Administrative Appeals Office (AAO) and the director denied the motion to reopen or reconsider. The matter is now before the AAO on appeal.[1] The appeal will be dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a staff nurse under Section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). On April 27, 2006, 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). The merits of the underlying visa petition are not at issue in this appeal.

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)[2] 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.

On March 11, 2006, the director sent a NOIR to the petitioner stating that the record reflected that the beneficiary had entered into two marriages solely for immigration purposes and that the beneficiary had failed to comply with the National Security Entry-Exit Registration System (NSEERS).

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[1] The Form I-140 petition was filed on September 2, 2003; the director approved the petition on September 1, 2005; a NOIR was issued by the director to the petitioner on March 11, 2006; the petitioner responded to the NOIR on April 3, 2006; the director issued a NOR to the petitioner on April 27, 2006; and the petitioner appealed the revocation of the petition's approval on May 26, 2006. The AAO rejected the appeal as untimely filed on July 2, 2008 and remanded to the director as a motion to reopen or reconsider. On November 13, 2009, the director denied the petitioner's motion to reopen or reconsider and the petitioner appealed on November 30, 2009.

[2] 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 AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out sworn statements from both of the beneficiary's former spouses that the beneficiary had entered into each marriage for immigration purposes, that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

In response to the NOIR, the petitioner failed to provide any additional evidence and requested a copy of documentation in the record.

On appeal, the petitioner provided a letter from his second spouse, tax returns with his second spouse, joint bank statements with his second spouse, credit cards statements with his second spouse, automobile policies with his second spouse and evidence of compliance with NSEERS.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, 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. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary attempted to enter into a marriage for the purpose of evading the immigration laws.

As set forth in the director's NOR and denial of the motion to reopen or reconsider, the issue in this case is whether or not the marriage bar under Section 204(c) of the Act applies to this case. The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petitions. A Form I-130 petition was filed on the beneficiary's behalf by [redacted][3] on May 20, 1994. Concurrent with the filing of the Form I-130 petition, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a United States citizen. The file contains the completed forms, signed by the beneficiary and a copy of a marriage certificate between the beneficiary and [redacted].

In connection with the Form I-130 petition, [redacted] made a sworn statement indicating that the marriage between her and the beneficiary was not *bona fide* and S-M- withdrew the Form I-130 petition.

The record of proceeding contains the following relevant evidence: affidavit from the beneficiary attesting to his residence during the period in question; the beneficiary and [redacted] marriage certificate from 1993; the beneficiary and [redacted] United States Internal Revenue Service (IRS) Joint Individual Income Tax Forms 1040 for 1993 and 1994; the beneficiary and [redacted] Illinois Individual Income Tax Return Form IL-1040 for 1993; copies of photos of the beneficiary and [redacted]; sworn statements, dated July 27, 1994, by [redacted] attesting to the facts surrounding the entry into a sham marriage with the beneficiary and a request to withdraw the Form I-130 filed on behalf of the beneficiary; a legacy Immigration and Naturalization Service (legacy INS) letter to [redacted] dated July 27, 1994 stating that her Form I-130 petition that she filed for her husband has been withdrawn; and a Judgment for Joint Simplified Dissolution of Marriage evidencing the dissolution of the marriage between the beneficiary and [redacted] on August 31, 1994.

On April 27, 2006, the director revoked the Form I-140 petition's approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c). The director stated that on two occasions, the beneficiary had committed marriage fraud to obtain an immigration benefit. Specifically, however, the director found that the beneficiary had entered into a marriage with [redacted] for the purpose of evading immigration laws. The director relied solely upon the beneficiary's marriage to [redacted] as a basis for revocation under section 204(c) of the Act in his November 13, 2009 decision on the motion to reopen.[4]

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

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[3] Name withheld to protect the identity of the individual.

[4] The director's decision on the motion to reopen withdrew his finding that the beneficiary had failed to comply with NSEERS and did not discuss whether there was sufficient evidence to also establish that the beneficiary had engaged in a second sham marriage.

> 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 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.

On appeal, counsel contends that the petitioner has submitted extensive evidence to demonstrate that the beneficiary's marriage to his second spouse, [redacted][5], was in good faith; however, as stated above, the director's decision on the motion to reopen relied upon the fraud found in the beneficiary's marriage to [redacted]. The AAO finds that the record contains inconsistent evidence about the beneficiary's second marriage to [redacted]. As the appeal will be dismissed based on the AAO's finding that the beneficiary's first marriage was entered into for the purpose of evading immigration laws, the AAO will not in this decision further discuss whether the beneficiary's second marriage was also entered into for the purpose of evading immigration laws.

On appeal, counsel urges USCIS to consider that there is very little evidence available with regard to the *bona fide's* of the beneficiary's marriage to [redacted] due primarily to the passage of time.[6] The AAO finds substantial and probative evidence of marriage fraud in the record that remains unrebutted. The passage of time does not relieve the petitioner from its burden of proof.

On July 27, 1994, [redacted] gave sworn statements in which she stated that she had never consummated her marriage with the beneficiary or lived with him. She stated that she lived with her boyfriend and a roommate at an address in Ohio that differs from the one provided on the Form I-130 and Form I-485. She stated that she went to a prearranged meeting with the beneficiary in September 1993 and that the meeting was prearranged with the beneficiary's friend, [redacted][7], who told her he would pay her $2,000.00 for her to marry the beneficiary. She stated that she only met the beneficiary on four occasions and was given $500.00 the day of the marriage. She stated that the beneficiary also gave her a necklace. She stated that [redacted] resided at the address which she and the beneficiary had

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[5] Name withheld to protect the identity of the individual.

[6] The AAO notes that the petitioner was able to provide some contemporaneous supporting documentation in regard to the beneficiary's marriage to [redacted] despite the same general time period for both marriages.

[7] Name withheld to protect the identity of the individual.

provided on the Form I-130 and Form I-485. She stated that the beneficiary wanted her to file joint taxes with her; however she did not want to.

In an affidavit from the beneficiary, dated March 23, 1995, he stated that he had been employed with [redacted] in Chicago, Illinois since November 1992. He stated that he had resided in Chicago, Illinois the entire time that he was married to [redacted]

The copies of the beneficiary and [redacted] United States IRS Joint Individual Income Tax Forms 1040 for 1993 and 1994 and the beneficiary and [redacted] Illinois Individual Income Tax Return Form IL-1040 for 1993 are not signed and there are no tax return transcripts to confirm that these taxes were ever filed. These documents directly conflict with [redacted] statement that she did not wish to file joint taxes with the beneficiary.

The copies of photographs of the beneficiary and [redacted] together are all dated on October 5, 1993, the date on which they were married.

The judgment of dissolution of the marriage between the beneficiary and [redacted] indicates that the date of separation is the same date on which the marriage took place, lending further support to the conclusion that the marriage was not *bona fide*.

Finally, there is no evidence that the beneficiary and [redacted] comingled their assets or affidavits from third parties and other contemporaneous documentation sufficient in the record to overcome the evidence that supports a reasonable inference that the petitioner's prior marriage with [redacted] was entered into for the purpose of evading immigration laws.

On appeal, counsel states that the termination of immigration proceedings against the beneficiary by the immigration court in 1995 and the facts set forth in a personally obtained transcript of the proceedings before the court shows that legacy INS expressed its intention to have the beneficiary removed from the United States based on marriage fraud and then joined in a motion to terminate proceedings. Counsel contends that the termination of immigration proceedings should serve as an indicator that the director did not have sufficient evidence of fraud in the marriage between the beneficiary and [redacted]; however, the record does not establish the basis for legacy INS' decision to join in the motion to terminate proceedings and the AAO has examined the record as a whole and reached an independent conclusion that the beneficiary engaged in marriage fraud. *See Matter of Tawfik*, Supra.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that there was an attempt to enter into a sham or fraudulent marriage. We find that [redacted] and the alien beneficiary, by fraud or by willfully misrepresenting a material fact, are in violation of Section 212(a)(6)(c)(i) of the Act first mentioned above.

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 by conspiring with others to submit fraudulent documents that on their face presented evidence of a valid marriage where none existed as a basis of that petition, committed fraud.

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.

Therefore, an independent review of the documentation reflects ample evidence that the beneficiary attempted to evade the immigration laws by marrying [redacted] and that attempt is documented in the alien's file. Thus, the director's determination that the beneficiary 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 USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

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.