U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 2 1 2014 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly. The director also concluded that the labor certification was not completed accurately based on discrepancies in the information listed in Sections J and K of the ETA Form 9089 and the record.

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.

As set forth in the director's denial, at issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case.

Section 204(c) of the Act provides:

> Notwithstanding the provisions of subsection (b) of this section 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.

(Emphasis added.) Subsection (2) of this provision incorporates the Immigration Marriage Fraud Amendments of 1986 (IMFA), by which Congress revised the bar to include cases where "the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Pub. L. No. 99-603, § 4, 100 Stat. 3537, 3543 (Nov. 10, 1986).

Construing section 204(c) of the Act as it existed prior to IMFA, the Board of Immigration Appeals (BIA) held that the bar in section 204(c) did not apply to cases where an alien does not actually enter

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[1] 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.

into a marriage, but rather falsifies documents to represent the marriage's existence. *See Matter of Concepcion*, 16 I&N Dec. 10, 11 (BIA 1976) (concluding that section 204(c) did not apply to alien who never married but falsified marriage documents, because "it cannot be determined that she obtained immediate relative status on the basis of a marriage entered into for the purpose of evading the immigration laws"); *Matter of Anselmo*, 16 I&N Dec. 152, 153 (BIA 1977) ("In the absence of an actual marriage, section 204(c) does not apply.").

Of course, with the amendment adding subsection (2), it can no longer be said that section 204(c) requires an "actual marriage." By the express language of section 204(c)(2), an attempt or conspiracy to enter into a marriage will also suffice, if the purpose was to evade the immigration laws. But absent even an attempt or conspiracy to enter into a marriage, the IMFA amendments to section 204(c) of the Act do not negate the continued applicability of *Concepcion* and *Anselmo*. By its plain language, section 204(c) of the Act applies only to an alien who "entered into," or "attempted or conspired" to enter into, a marriage. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.").

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 so that the director could reasonably infer the attempt or conspiracy. *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)).

The record of proceeding reveals that the beneficiary was married to [redacted]l on December 16, 1997. On January 27, 1998, the beneficiary's wife filed a Form I-130, Petition for Alien

Relative, on his behalf. That petition was denied by the District Director, New York, New York, (district director) on October 18, 2001, after determining that "a *bona fide* marital relationship" did not exist. The district director detailed the results of interviews conducted with the beneficiary and his wife on October 16, 2001. The district director listed multiple discrepancies between their responses to questions about their household, their religious practices, and other areas of their lives. The beneficiary's wife appealed the district director's decision to the BIA, which affirmed the district director's decision on December 4, 2003.

On appeal, counsel asserts that the beneficiary had not engaged in marriage fraud because he was not legally married to his former wife. Counsel submitted evidence suggesting that the beneficiary's wife was still legally married to another man at the time of their wedding and, therefore, the marriage was invalid. However, even if the beneficiary was not legally married to [redacted], it remains that the beneficiary "attempted to enter into a marriage for the purpose of evading the immigration laws." Counsel submits no authority for his assertion that an illegal or invalid marriage cannot be determined to be fraudulent. Although counsel points to an unnamed decision of the BIA, this case is not a precedent decision that the AAO is required to follow. Further, the referenced BIA decision makes no determination whether Section 204(c) applies where the beneficiary's former spouse may not have been legally free to marry. Rather, the BIA notes that this issue should be addressed by the director.

Regarding the beneficiary's marriage, the petitioner provided the following documentation:

a) Affidavit of the beneficiary, dated April 3, 2009 and copy of November 1, 2001, affidavit stating that he married [redacted] in good faith without knowledge of her prior marriage, that they separated approximately October 1, 2004,[2] and explaining discrepancies in testimony given at the [redacted] interview.
b) Copies of two affidavits from [redacted] The first is dated September 4, 2007, stating that she met the beneficiary on June 17, 1997; that their first date was June 29, 1997; and that they ended the relationship due to incompatibility. The second is dated November 1, 2001 and is a summary of her explanation for the discrepancies between her testimony and the testimony of the beneficiary at the [redacted] interview held on October 16, 2001.
c) Copy of the 1999 life insurance policy taken out by the beneficiary as the insured naming [redacted] as the beneficiary.
d) Copies of selected bank statements from [redacted], Account number [redacted]
e) Copies of 2000 and 2001 installment payment agreements with the IRS addressed to both the beneficiary and [redacted]
f) Copies of jointly filed individual federal tax returns for 1999, 2000, 2001, and 2002. The 1999 return shows only business income claimed in addition to $135 in taxable

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[2] The record indicates that the beneficiary obtained a divorce from [redacted] on July 31, 2007, from the [redacted]

interest with $2,497 owed in taxes. The 2000 return shows only business income claimed with $145 in taxable interest and $2,714 in taxes owed. The 2001 return shows only business income claimed with $155 in taxable income and $351 in taxes owed. The 2002 return shows only business income claimed with $145 in taxable interest and $338 in taxes owed.[3]

g) Copies of affidavits from family members including together with copies of undated photos stated to depict the beneficiary/Rowell wedding and life together.

h) Copies of federal tax returns and evidence of payment of wages relevant to the petitioner's continuing financial ability to pay the proffered wage.

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. We note that there is virtually no evidence that the beneficiary and have ever commingled financial resources. It is noted that the record contains a letter from Savings dated July 7, 1999, in which the balances in two accounts were itemized. One was the account held by both the beneficiary and in which the balance is stated to be $2061.00. The other account number listed is account number This account was held by the beneficiary as sole owner. The balance was $4,078.00 as of the date of the letter, July 7, 1999. It is additionally noted that the selected bank statements, submitted in response to the NOID, exclusively showed the jointly held account with a minimal balance for several years ranging from $11.87 to $69.71. The one exception to these balances was the statement from July 24, 1999, showing both additions of $2,050 and subtractions of $2,051 and also in August 2001, just prior to the October 2001 Stokes interview. It is noted that the taxable interest amounts shown on page 1 of all of the jointly filed income tax returns could not have been earned from the balances shown on the one jointly held bank account. Additionally, we do not believe that the testimony given to the district director in the Stokes interview is outweighed by the documentation of joint tax returns showing taxes owed for four years, affidavits from family members, or a $50,000 life insurance policy.

Additionally, having reviewed the transcript from the interview relating to household amenities, we find that the district director's observations and the Nebraska Service Center director's findings to have merit. We note the following included among household arrangements described in the interview: s testimony that she cooked on an electric stove (p. 13, and the beneficiary's testimony that fire comes out (p.23, to be inconsistent, as well as the different responses related to whether the microwave is black or white. states black, p.12 of transcript) (The beneficiary states that it is white, p.23). Additionally, they could not agree when they moved in together after the wedding. Further, it is noted that the discrepancy between the beneficiary's testimony and testimony regarding the mode of

[3] Prior to the official 2007 divorce degree, the beneficiary filed his taxes in 2004, 2005 and 2006 as "single."

transportation to Atlanta was inconsistent and unconvincing. (For a couple who never traveled together since their marriage in 1997, as testified by [redacted] the fact that the beneficiary did not know that his wife was traveling by automobile and not by airplane to Atlanta, Georgia, shows a lack of awareness that partners in a *bona fide* marriage would be expected to have). As noted above, the beneficiary claimed she went by air. (p. 20, [redacted]). Later, the transcript indicates that he attempted to retract this statement by claiming that he did not know how [redacted] traveled because he is busy at his job. (p.27, [redacted] Further, the transcript does not indicate that he was interrupted in adding to his statement about going to the airport to meet her, as claimed in the beneficiary's subsequent affidavit, dated November 1, 2001, attempting to reconcile some of his statements. Rather, the interviewer gave him a chance to explain what he meant by "but," so that he could have explained at the interview what he later claimed in his affidavit, but he did not continue. (p.20, [redacted]. Further, it is noted that [redacted] was asked if her husband ever goes to a mosque and she replied, "Not really, but I've seen him pray." She adds that she has seen him pray twice in answer to a question as to how many times a day that the beneficiary prayed and additionally states that the beneficiary folds the prayer rug and puts it away. (p. 14, [redacted] transcript). The beneficiary describes his Muslim prayer practice as not being a regular event but occurring sometimes on Friday. He stated that he used to go to the mosque, but not regularly. When asked about the specifics of his praying in the home facing the [redacted] the beneficiary states that he "perform my prayer in mosque not at home, I go to mosque I don't pray at home." (pp. 24-25). The parties tried to rehabilitate this discrepant testimony, as to where the beneficiary prayed, in subsequent statements, in that the beneficiary was only referring to Friday prayers that he does not perform at home, but their initial statements remain inconsistent.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary attempted to enter into a prior marriage for the purpose of evading immigration laws. There is ample evidence that the beneficiary attempted to evade the immigration laws by attempting to marry [redacted] and these attempts are 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 U.S. Citizenship and Immigration Services (USCIS) to have been entered into for the purpose of evading the immigration laws is affirmed.

No new evidence is submitted on appeal to support the beneficiary's claim that the marriage was *bona fide*. Counsel asserts on appeal that "USCIS did not have the authority to invalidate the underlying labor certification." However, it is noted that the director did not invalidate the labor certification. Rather, the director denied the petition and noted that the labor certification "was not completed accurately." Moreover, contrary to counsel's assertion, the regulation at 20 C.F.R. § 656.30(d) provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of

> the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The director stated in his decision that "USCIS was not persuaded" by the beneficiary's claimed work history. However, the director's decision was not based on this ground.

Beyond the decision of the director,[4] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the offered job of manager. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a manager at [redacted] Pakistan, from January 1, 1989, through March 1, 1991.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a copy of an employment letter from [redacted] dated December 5, 2011, and signed by managing director [redacted]

The director noted discrepancies in the record concerning the beneficiary's employment history. Specifically, the director stated that the labor certification lists only the beneficiary's employment with [redacted] from 1989 to 1991 and no other employment, while the record reflects that the beneficiary was employed in other positions since 1991. On appeal, counsel asserts that the

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[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

beneficiary's employment history since 1991 is immaterial to the instant petition, as the beneficiary's employment since that time has been in positions other than the offered job of manager.

The AAO does not agree with counsel's assertion. The instructions to Section K on the ETA Form 9089 state, "List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification."[5] No additional evidence of the beneficiary's experience was submitted on appeal. As the petitioner has failed to overcome the inconsistencies with independent, objective evidence, the petitioner has not established that the beneficiary is qualified for the offered position.

The AAO notes an additional discrepancy not raised by the director that must be resolved in any further filings. The petitioner indicated on Part 5, Line 2.a of the petition that the business was a restaurant. However, the petitioner's Internal Revenue Service (IRS) Form 1120S federal income tax returns indicate that the business is a convenience store.[6] This discrepancy must be addressed in any further proceedings.

It is also noted that the file contains numerous affidavits of residence from seven different individuals who identify themselves as the beneficiary's relatives. These individuals all have the same surname ( ) as the company representative who signed the petition and identified himself as the petitioning company's manager. This same surname is also shared by the individual who signed the employment letter confirming the beneficiary's claimed qualifying employment experience in Pakistan. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc). Since the relationship between the petitioner and the beneficiary is unclear at this time, this issue will not serve as an additional ground of ineligibility. However, the petitioner should submit an explanation and evidence of any relationship it (or its officers or shareholders) has with the beneficiary with any further filings.[7]

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[5] Counsel states that the DOL audited the labor certification and found the beneficiary to be qualified for the offered job; however, the DOL's audit does not request any information regarding the beneficiary's experience. DOL's certification of the ETA Form 9089 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

[6] On its tax returns (as well as on Part 5, Line 2, of the Form I-140 petition) the petitioner listed its North American Industry Classification System (NAICS) code as "445120." This NAICS code is assigned to "Convenience Stores." www.naics.com (accessed January 30, 2014.)

[7] *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner identified that it was an entity with two employees, and checked "yes" to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

> (l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:
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> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
>
> (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
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> (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the

The petition will be denied 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.

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business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.