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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JAN 0 3 2014 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

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 Director, Vermont Service Center (director), approved the preference visa petition, but later revoked its approval. After initially rejecting the petitioner's appeal as improperly filed, the Administrative Appeals Office (AAO) granted the petitioner's motion to reopen and dismissed its appeal. The matter is now before the AAO on its own motion to reopen. The decisions of the director and the AAO will be withdrawn, and the petition will be remanded to the Director, Texas Service Center, for further action, consideration, and the entry of a new decision pursuant to below.[1]

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Secretary 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 [of the Act]." A director's realization that he approved a petition in error may constitute good and sufficient cause to revoke a petition's approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner owns and operates a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook specializing in Italian cuisine. The petition requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).[2]

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The priority date of the petition is January 13, 1998, which is the date that an office in the DOL's employment services system accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The director's Notice of Revocation (NOR) concludes that the marriage fraud bar of section 204(c) of the Act, 8 U.S.C. § 1154(c), prohibits the petition's approval. Accordingly, the director revoked the petition's approval on June 10, 2004.

The AAO affirmed the director's decision and found that the petitioner failed to establish the beneficiary's qualifying experience for the offered position. The AAO dismissed the petitioner's appeal on September 14, 2007.

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[1] As part of USCIS's "bi-specialization" initiative, the Vermont Service Center has not accepted employment-based immigrant visa petitions for adjudication since April 1, 2006. *See* "News Release: USCIS Notifies Employers of Filing Changes," USCIS, p. 1 (Mar. 24. 2006), *available at* http://www.ilssys.com/USCISFilingChanges.pdf (accessed Dec. 20, 2013). The AAO therefore remands this matter to the Texas Service Center, which now adjudicates employment-based immigrant visa petitions for areas of intended employment in the eastern part of the United States.

[2] Section 203(b)(3)(A)(i) of the Act allows the granting of preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act affords the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

While adjudicating the petitioner's appeal of the denial of its later petition for the beneficiary in the same offered position, the AAO reviewed the record and determined that it erred in its decision in this matter. On October 10, 2013, the AAO reopened the case on its own motion.[3]

The record documents the procedural history in this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[4]

In revocation proceedings, the burden of proof to establish eligibility for the benefit remains on the petitioner. *Matter of Cheung*, 12 I&N Dec. 715, 719 (BIA 1968).

The revocation of the instant petition's approval stems from an earlier immigrant visa petition for the beneficiary. The U.S. Immigration & Naturalization Service (the Service), the predecessor of U.S. Citizenship and Immigration Services (USCIS), received a Form I-130, Petition for Alien Relative, on September 6, 1995, seeking immediate relative classification of the beneficiary as the spouse of a U.S. citizen. The file contains the I-130 petition and the beneficiary's application for adjustment of status, which was filed with the petition.

The District Director, New York Field Office, denied the I-130 petition on September 5, 1996. The decision concludes that "fraudulent" U.S. marriage and birth certificates accompanied the petition.

Section 204(c) provides that "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 [Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws; or

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[3] Pursuant to 8 C.F.R. § 103.5(a)(5)(ii), the AAO notified the petitioner of the reopening of this matter and the petitioner's right to submit a brief within 30 days of service of the motion to reopen. As of the date of this decision, the AAO has not received: a brief from the petitioner; notification that it has waived its right to submit a brief; or a demonstration of good cause to extend the time period in which it may submit a brief. *See* 8 C.F.R. § 103.5(a)(5)(ii).

[4] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any new evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

(2) the [Secretary of Homeland Security] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Sections 204(c)(1), (2) of the Act.[5]

On March 15, 2002, the director issued a Notice of Intent to Revoke (NOIR) the instant I-140 petition's approval, stating that the beneficiary's attempt to obtain lawful permanent residence as the spouse of a U.S. citizen by submitting fraudulent documents with the I-130 petition rendered the instant I-140 petition unapprovable under section 204(c).

"Good and sufficient cause" exists to issue a notice of intent to revoke when the record at that time, if unexplained and unrebutted, would warrant denial of the visa petition based on the petitioner's failure to meet its burden of proof. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

USCIS properly revokes a petition where "the evidence of record at the time the decision was issued (including any explanation, rebuttal, or evidence submitted by the petitioner ...) warranted such a denial." *Estime,* 19 I&N Dec. at 452.

The plain language of section 204(c) of the Act requires an actual "marriage" to invoke the marriage fraud bar. *See Matter of Anselmo*, 16 I&N Dec. 152, 153 (BIA 1977); *Matter of Concepcion*, 16 I&N Dec. 10, 11 (BIA 1976) (where the beneficiaries admitted that their previous "marriages" were fictions supported by false documents, section 204(c) did not apply because actual marriages never occurred).

To invoke the bar, a beneficiary's file must contain "substantial and probative" evidence of a fraudulent marriage. *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990); 8 C.F.R. § 204.2(a)(1). "Probative" means "tending to prove, or actually proving" an alleged fact. Black's Law Dictionary 1367 (4th ed. 1968). "Substantial evidence" is "more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 217 (1938).

The record in the instant case at the time of the NOIR's issuance contained the I-130 petition, the beneficiary's adjustment application, and the Service's decisions denying the petition and the application. The I-130 decision found that the U.S. marriage and birth certificates accompanying the petition were "fraudulent." The beneficiary's adjustment application was denied because he lacked an approved immigrant visa petition.

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[5] The current version of the marriage fraud bar, which applies whether or not a beneficiary received an immigration benefit from a fraudulent marriage, affects petitions filed on or after November 10, 1986. Pub.Law No. 99-639, §4, 100 Stat. 3537 (Nov. 10, 1986).

The finding that fraudulent documents accompanied the I-130 petition might indicate that the beneficiary willfully misrepresented material facts in an attempt to obtain lawful permanent residence as the spouse of a U.S. citizen. But the finding does not indicate that the beneficiary entered into a marriage with the I-130 petitioner. On the contrary, the finding of fraudulent U.S. marriage and birth certificates tends to prove that the beneficiary did *not* enter into a marriage with the I-130 petitioner. The finding of fraudulent marriage and birth certificates suggested that the purported "marriage" did not occur, and that the petitioner was not born in the United States or was not the person indicated on the marriage and birth certificates.

Because the record at the time of the NOIR's issuance did not establish that the beneficiary entered into an actual marriage with the I-130 petitioner, the record did not establish that section 204(c) barred approval of the I-140 petition. Therefore, the record did not warrant denial of the I-140 petition based on section 204(c), and the director did not properly issue the NOIR.

Even if the record warranted denial of the I-140 petition when the director issued both the NOIR and the NOR, the AAO's decision of September 14, 2007 erred in finding that section 204(c) applied to the instant petition. On appeal, the petitioner submitted a certificate from the town that allegedly issued the marriage certificate that accompanied the I-130 petition. The town's certificate states that it had no record of issuing a marriage certificate to the I-130 petitioner and the beneficiary.

The AAO found that the town's certificate "shows that there is no legal and real marriage entered between the beneficiary and the alleged U.S. citizen and that the marriage was a fiction." Because the record did not establish that the beneficiary entered into an actual marriage with the I-130 petitioner, the AAO erred in finding that the marriage fraud bar of section 204(c) of the Act prohibited the instant I-140 petition's approval.

For the foregoing reasons, the AAO finds that the marriage fraud bar of section 204(c) does not preclude approval of this petition and withdraws that portion of its previous decision. The AAO also withdraws the portion of its previous decision that finds that the beneficiary more likely than not knew the falsity of the 1995 immigration filings on his behalf. That determination is not relevant to the adjudication of the instant petition and affects the beneficiary's admissibility to the U.S. *See Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959) (holding that immigrant visa petition proceedings are not the appropriate forum for determining an alien's admissibility).

In view of the foregoing, the previous decisions of the director and the AAO will be withdrawn in this matter. However, the petition is not immediately approvable for the reasons discussed below

The Beneficiary's Qualifying Experience

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications

for the offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of Italian specialty cook requires four years of high school and two years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience in the job offered at [redacted] in [redacted] from December 1994 to at least December 16, 1997, the date the beneficiary signed the labor certification.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers giving the names, addresses, and titles of the employers, and descriptions of the beneficiary's experience with them. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter on [redacted] stationery, dated December 23, 1997, stating that the restaurant employed the beneficiary since December 1994 in the offered position. The letter also provides a description of the beneficiary's job duties and states that he received $700 per week in wages.

The experience letter from Brezza fails to state whether the beneficiary worked full- or part-time for the restaurant. If the beneficiary worked on a part-time basis from December 1994 to December 1997, he may not have possessed the equivalent of two years of full-time experience in the offered position as the labor certification requires by the petition's priority date. The amount of wages that Brezza paid the beneficiary during that time does not demonstrate how many hours he worked.

Also, the letter from Brezza fails to state the title of its author as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires. The letter identifies the author as "G.M.M. Viccani." It is unclear whether "G.M." are initials in the author's name, or whether they stand for "General Manager," the author's possible title at the restaurant. Because the letter does not establish the employer's title, it fails to meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

In addition, the beneficiary's 1995 Form G-325A, Biographic Information, which accompanied the I-130 petition for him, does not state his purported employment with Brezza. The inconsistency on the Form G-325A casts doubt on the beneficiary's claimed qualifying experience for the offered position.

Further, online records of the New York State Secretary of State's Office identify the petitioner's proprietor as the chief executive officer of [redacted] which dissolved as a corporate entity in 2002. *See* http://www.appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=1806140&p_corpid=1735098&p_entity_name=%62%72%65%7A%7A%61&p_name_type=%25&p_srch_type=%42%45%47%49%4E%53&p_srch_results_page=0 (accessed Nov. 21, 2013). The beneficiary's previous, purported employment relationship with the petitioner's owner casts doubt on the *bona fides* of the instant job offer to him.

The AAO noted these issues in previous decisions in this matter and in the petitioner's later petition for the beneficiary. The petitioner, however, has not resolved these issues. In any future filings, the petitioner must overcome the doubts raised with independent, objective evidence of the beneficiary's full-time, qualifying employment experience before the petition's priority date. *See Matter of Ho*, 19 I&N Dec. at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

For the foregoing reasons, the AAO finds that the record fails to demonstrate that the beneficiary possessed the required two years of experience in the offered position as stated on the labor certification by the petition's priority date.

The Beneficiary's Qualifying Education

The record also does not establish the beneficiary's educational qualifications for the offered position.

As discussed above, a petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *see also Wing's Tea House,* 16 I&N Dec. at 160; *Katigbak,* 14 I&N Dec. at 49.

In the instant case, the labor certification states that the offered position requires four years of high school in addition to two years of experience in the job offered. On the labor certification, the beneficiary claims to have attended high school at [redacted] in [redacted] from February 1972 to November 1977.

The record, however, does not contain any evidence to support the beneficiary's claimed high school attendance. Going on record without supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)). Therefore, the record fails to establish that the beneficiary possessed the minimum educational qualifications for the offered position stated on the labor certification by the petition's priority date.

The AAO may deny an application or petition that fails to comply with technical requirements of the law, even if the director did not identify all of the grounds for revocation in the initial decision. *See Spencer Enters., 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*, 381 F.3d at 145 (noting that the AAO conducts review on a *de novo* basis).

The Petitioner's Ability to Pay the Proffered Wage

A petitioner must also demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The labor certification states the proffered wage of the offered position as $700 per week, or $36,400 per year based on a 40-hour work week.

USCIS records show that the petitioner has filed at least nine I-140 petitions for other beneficiaries since 2001. The petitioner filed eight of the petitions under the name and one, for the beneficiary's purported actual wife, under the name " ' Accordingly, the petitioner must establish its continuing ability to pay the combined proffered wages of all the beneficiaries whose petitions were pending between the January 13, 1998 priority date of the instant petition and the date the instant beneficiary obtains lawful permanent residence status. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977).

The record does not establish the priority dates, proffered wages, or wages the petitioner paid to the other beneficiaries. Nor does the evidence show whether any of the other petitions have been withdrawn, revoked, or denied without appeal, or whether any of the other beneficiaries have obtained lawful permanent residence. Without this information, the AAO cannot determine the petitioner's ability to pay the combined proffered wages of the relevant petitions. Therefore, the AAO concludes that the petitioner has not established its continuing ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries of its other petitions for all relevant years.[6]

The petitioner was informed of its failure to establish its ability to pay in its later petition for the beneficiary. The petitioner, however, has not resolved this issue. In any future filings, the petitioner must provide independent, objective evidence of its continuing ability to pay the proffered wage from the petition's priority date onward.

Conclusion

The previous decisions of the director and the AAO will be withdrawn. The petition is remanded to the Director, Texas Service Center, for consideration of the issues stated above. The Director, Texas Service Center, 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, Texas Service Center. Upon receipt of all the evidence, the Director, Texas Service Center, will review the entire record and enter a new decision.

ORDER: The decisions of the director and the AAO are withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Therefore, the AAO may not approve the petition. Because the petition is not immediately approvable, the petition is remanded to the Director, Texas Service Center, for issuance of a new, detailed decision.

[6] The record includes copies of Forms W-2 issued to the beneficiary for the years 1998 through 2005. The Forms W-2 demonstrate that the petitioner employed and paid the beneficiary less than the proffered wage in 2001, 2004, and 2005, and at least the proffered wage in 2002 and 2003. The Forms W-2 for 1998 through 2001 were issued by an entity other than the petitioner with a different Federal Employer Identification Number (FEIN).