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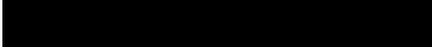


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FILE: 
EAC 01 263 54066

Office: VERMONT SERVICE CENTER

Date: DEC 14 2005

IN RE: Petitioner: 
 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:



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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Director.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook, foreign food. 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 had violated Title 8 C.F. R. of Federal Regulation, Part 204.2(a)(1)(ii), and, denied the petition pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

The 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.

The 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 I-140 employment based petition is dated September 23, 2001. The petition was filed on December 7, 2001. It was approved on July 2, 2002. The Director issued a Notice of its Intent to Revoke the approval on October 1, 2003. Since counsel submitted no response to the Notice of its Intent to Revoke, on April 20, 2004, the Director issued a notice that the petition was revoked. On April 29, 2004, the petitioner appealed the revocation and submitted new evidence.

Prior to the filing of the above employment-based petition, there was another immigrant petition filed for the beneficiary alien by his United States citizen (USC) wife¹. The Form I-130 marriage based petition was filed on November 22, 1994. The signed petition was denied since the alien and his spouse did not appear for the necessary interview.

On appeal, counsel asserts in a supplement to the I-290B that "The Service's act in revoking the approved I-140 petition is based upon mistaken conclusions, and a fraud perpetrated against both the Service and the beneficiary." The exhibits to the Form I-290B are copies of the following: the Director's decision dated April 20, 2004; a Motion to Reopen requesting that the denial of the I-485 to adjust in the United States be withdrawn; and, the attached statement above noted, among other documents.

The signed Form G-325A submitted by the beneficiary identified his spouse as a United States citizen. The marriage based immigrant petition is in the record of proceeding of this case. It contains a marriage certificate stating that the beneficiary was married to a [REDACTED] a United States citizen who is a resident of Brooklyn, New York, on January 14, 1994.

On September 19, 2005, counsel submitted a brief in the matter and additional evidence mentioned below.

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).

Counsel asserts that because the Director made factual errors, which are the date of the beneficiary's marriage to [REDACTED] and by confusing her with a Brazilian citizen [REDACTED] that therefore, the Director's determination of marriage fraud based upon a prior marriage to [REDACTED] is incorrect. This contention is correct. At the time the Director made the decision, on April 20, 2004, the record of proceeding evidenced that the Beneficiary was married to a United States citizen [REDACTED] of Brooklyn, New York on January 14, 1994. (The alien later married [REDACTED] on September 30, 1995 without evidence of an intervening divorce of [REDACTED]).

However, the fact that the director made erroneous findings of fact does not require the AAO to approve applications or petitions where eligibility has not been demonstrated. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The Administrative Appeals Office is never bound by a decision of a service center or district Director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

¹ The beneficiary in the petitioner's employment based petition now denies the occurrence of this marriage.

According to the record of proceeding, at the time of the Director's decision in this matter, there was evidence of a marriage to a United States citizen [REDACTED] and, a prior (to the subsequent and current employment based petition) marriage based immigrant petition submitted on behalf of the alien by his spouse, [REDACTED]. The alien failed to disclose this prior petition in the present employment based petition and adjustment application. On the present Form I-485 prepared by counsel and submitted by the beneficiary, Part 3 on that form, states "Have you [the beneficiary] ever applied for permanent resident status in the U.S.?" This question is unanswered on the employment based adjustment application.²

As mentioned above, it is undisputed that on the date of the Director's decision to revoke the present petition, the record of proceeding contained documentary evidence to show that the beneficiary has been married since October 19, 1994 to a United States citizen. A marriage certificate was submitted with the marriage based petition stating that the beneficiary was married to United States citizen [REDACTED] of Brooklyn, New York, on January 14, 1994.³

In support of the appeal the beneficiary prepared an affidavit. In this statement, the beneficiary contends that, although he paid for the preparation of the marriage based petition, and, he received employment authorization through it, he later discovered he was misled by the individual who prepared the petition. This individual was known to the beneficiary only as [REDACTED]. We find this explanation to be not credible.

The contents of the marriage based petition and adjustment application (G-235A) contain beneficiary's personal data that is the same or similar information also contained in the employment based petition and adjustment application. The alien's birth certificate is attached to both. All the documents submitted to CIS bear his signature. We find the statements that the alien beneficiary was a non-participant in the preparation and submission of all the documents mentioned above not credible. *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."

The alien and his U.S. citizen spouse claimed that a visa was immediately available under a marriage-based petition. A marriage certificate was introduced and the petition was certified to be true and correct by the alien's spouse. There was no documents introduced in that petition process to withdraw the petition, or correct information as submitted. Now counsel, in this employment-based petition, has introduced statements and a document to refute certified statements in the marriage based proceeding. The AAO may rely on the record of proceeding in both proceedings, as they now exist.

Notwithstanding the above finding, the AAO makes the following additional finding. Counsel contends

² On the Form I-485 prepared and submitted by the beneficiary, Part 3 on that form, asks the question "Have you ever applied for permanent resident status in the U.S.?" This question is unanswered on the employment based adjustment application prepared and signed by the alien beneficiary on January 22, 2002.

³ According to counsel on appeal, this marriage certificate is "not authentic" and the marriage never occurred. Counsel has submitted a certificate from the County of Nassau, State of New York that certifies on May 21, 2004, that there is no record of a marriage between the beneficiary and [REDACTED] that occurred on January 14, 1991.

because the marriage was never entered into, the case of *Matter of Anselmo*⁴ holds that section 204 (c) of the Act cannot apply to the facts of this case. However, because the record of proceeding is not conclusive as to whether or not an actual marriage was entered into, the matter is remanded to the director for a determination. If the petitioner can demonstrate that a marriage was not entered into, then in that case, the director must adjudicate the preference visa petition on its merits.

We find that the alien knowingly withheld information from CIS in preparation of his present Form I-485 adjustment application, and, that act in and of itself constitutes fraud or a willful misrepresentation of a material fact to obtain a visa. This is a violation on the part of the beneficiary of section 212(a)(6)(c)(i) of the Act first above mentioned.

There is no evidence of innocent misrepresentations of the beneficiary in these regards in the record of proceeding. Other than characterizing the beneficiary as an innocent in this affair, counsel offers no explanation for the beneficiary's conduct throughout the submission of two immigrant petitions other than to say that, as counsel contends, by concluding that the beneficiary acted intentionally in this series of acts "strains credibility beyond acceptance." We disagree. The beneficiary failed to alert immigration authorities of the fraudulent marriage scheme, identify the participants in it in such detail to cause their apprehension, or withdraw from the fraudulent scheme to receive permanent residency status by marriage.

Counsel cites the case of *Firstland International, Inc., et. al. v. United States Immigration and Naturalization Service*, 377 F.3d 127 (2nd Cir, 2004) for the proposition that revocation of an approved visa petition can only be made through the Secretary of State to a beneficiary of an approved petition, "... before such beneficiary commences his journey to the United States." In that case, the beneficiary was already in the United States legally on a nonimmigrant visa. According to the Form G-28 submitted on appeal, the petitioner lives in Connecticut; thus, this case did arise in the Second Circuit. Although this case did arise in the Second Circuit, *Firstland* is no longer a binding precedent.

In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, CIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The 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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under

⁴ 16 I&N Dec. 152 (BIA 1977).

section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director 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. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.