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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC-01-005-50015

Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The petition was filed for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act) as a skilled worker. As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on August 5, 2000 and certified by DOL on August 31, 2000. The petitioner subsequently filed Form I-140 with Citizenship and Immigration Services (CIS) on October 2, 2000, which was approved on May 8, 2001. The director never issued a request for evidence or notice of intent to deny the Form I-140. The merits of the Form I-140 have never been in question. An application for lawful permanent residence (Form I-485) in connection with the approved Form I-140 was pending at the time the director issued the NOIR.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on June 6, 1994. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, photographs, a copy of a Certificate of Marriage Registration between the beneficiary and [REDACTED] (Ms. [REDACTED]) and copies of documents showing that the beneficiary's and Ms. [REDACTED] names are on a lease agreement, utility bills, bank accounts, and the beneficiary's individual income tax returns for 1990, 1991, 1992, 1993, 1994, and 1995, all dated in 1995 and claiming Ms. [REDACTED] and sometimes her son as well, as a dependent¹.

An interview was conducted of the beneficiary and Ms. [REDACTED] on November 14, 1994, after which a Stokes interview² was requested because of inconsistencies in information provided by the pair, which was subsequently held on December 5, 1995. The December 5, 1995 Stokes interview was transcribed and is part of the record of proceeding. The district director denied the I-130 on July 22, 1996 for inconsistencies in information provided by the beneficiary and Ms. [REDACTED] during the Stokes interview.

The discrepancies in information from the Stokes interview noted by the district director in his decision include the following: (1) the district director noted that the beneficiary claimed that Ms. [REDACTED] his father in Trinidad but Ms. [REDACTED] said she never met him; (2) the beneficiary and Ms. [REDACTED] gave different versions of what they ate and drank to celebrate Ms. [REDACTED] birthday; (3) the beneficiary said they had three televisions

¹ It appears that many of these supporting documents were submitted after the Form I-130's initial denial by the district director.

² *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975) set forth procedures for governmental investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately.

in the house but Ms. [REDACTED] said there was one; (4) Ms. [REDACTED] said she did the laundry but the beneficiary said Ms. [REDACTED] and the beneficiary's sister did the laundry; (5) the beneficiary and Ms. [REDACTED] different versions about the various names represented on their mailbox; (6) the beneficiary and Ms. [REDACTED] gave different versions about whether or not Ms. [REDACTED] and her son receive welfare payments; and (7) the beneficiary and Ms. [REDACTED] reported different balances in their bank accounts.

Additionally, the district director noted in his decision that the beneficiary's individual income tax returns for 1991, 1992, 1993, 1994, and 1995 were all dated 1995, claiming Ms. [REDACTED] and her son as dependents, and filed after the interview was conducted. The district director also noted the misreporting of Ms. [REDACTED] social security number between a Form I-72 to report welfare history against the number reported on the Form I-130. The district director determined that the beneficiary failed to provide "evidence either documentary or by testimony given at the time of this interview that this, in fact, a bona fide marital relationship."

The beneficiary and Ms. [REDACTED] filed an appeal on August 9, 1996 with the Board of Immigration Appeals (BIA), who subsequently remanded the case on August 20, 1998. Counsel's brief to the BIA explained that the beneficiary and Ms. [REDACTED] answered many correct questions showing an "intimate knowledge of each other" and the mistakes made were reasonable and not dispositive that the marriage lacked bona fides. Counsel also stated that the transcription shows that the CIS examiner did not understand Ms. [REDACTED]. The BIA's decision stated the following, in pertinent part:

We find that while some of the discrepancies relied upon by the district director in his decision to deny the visa petition are not differences at all, or are minor discrepancies, there are some discrepancies that have not been adequately explained. For example, we do not find it important that [Ms. [REDACTED] stated that they had \$8,368 in the bank while the beneficiary stated that they had \$8,316 in the bank. Nor do we find it significant that [Ms. [REDACTED] did not include her sister-in-law with herself when she said that she did the shopping and the laundry. However, it does appear that the tax returns were all submitted and apparently prepared after the November 1994 interview, the beneficiary and [Ms. [REDACTED] did not agree on how many televisions were in the apartment, and [Ms. [REDACTED] forgot that she had met her father-in-law. The record contains little information regarding details of the couple's life together such as how they met, their living arrangements, weddings, and/or photos. The record will be remanded for further development of the record and the issuance of a new decision.

Pursuant to the BIA remand, a second Stokes interview was conducted of the beneficiary and Ms. [REDACTED] on April 25, 2000, which is also transcribed and part of the record of proceeding. The district director denied the Form I-130 again on July 18, 2000 based on discrepancies in information provided by the beneficiary and Ms. [REDACTED] during the second Stokes interview.

The district director noted the following discrepancies during the second Stokes interview: (1) Ms. [REDACTED] did not know the beneficiary's middle name although the beneficiary believed she did; (2) Ms. [REDACTED] claimed to use the beneficiary's last name while the beneficiary claimed she did not; (3) Ms. [REDACTED] did not know when the beneficiary arrived in the United States; (4) Ms. [REDACTED] and the beneficiary gave different versions about

Ms. [REDACTED] son's whereabouts both for the morning of the second Stokes interview and the night before; (5) the beneficiary gave the address represented as the residence he shared with Ms. [REDACTED] when they first met, the same address provided at the first Stokes interview, but Ms. [REDACTED] said she did not recall where they lived and then changed her mind and gave a different street name; (6) the beneficiary claimed to have changed Ms. [REDACTED] wedding ring but Ms. [REDACTED] said it was the same one from the date of their wedding; (7) the beneficiary and Ms. [REDACTED] gave different versions of where their two telephones were located in their residence; (8) the beneficiary claimed to have a voice mail service but Ms. [REDACTED] said there was neither voice mail nor an answering machine; (9) the beneficiary said there were three chairs at their kitchen table but Ms. [REDACTED] said there were four; (10) the beneficiary claimed there was a black sponge couch in the living room but Ms. [REDACTED] said they sit on the carpeted floor and there is no furniture in that room; (11) the beneficiary said he and Ms. [REDACTED] smoke cigarettes on occasion but Ms. [REDACTED] they never do; (12) the beneficiary and Ms. [REDACTED] gave different versions about how they spent their evening the night before the second Stokes interview; (13) the beneficiary and Ms. [REDACTED] gave different versions about whether or not they showered the evening before the second Stokes interview; and (14) the beneficiary and Ms. [REDACTED] gave different versions about which train they used to travel to the second Stokes interview.

The district director concluded the following, in pertinent part:

The answers the couple gave regarding their lives together made it doubtful that this is a bona fide marriage. [Ms. [REDACTED] and the beneficiary were given the opportunity to rebut the many discrepancies discovered during their sworn testimonies, but neither [Ms. [REDACTED] nor [the] beneficiary opted to address any of the discrepancies by giving logical or clear explanations to the many discrepancies discovered during the [second] Stokes interview.

[Ms. [REDACTED] has not provided evidence, by testimony given at the time of the interview, that there is a bona fide marital relationship. The conduct of the parties of marriage is relevant to their intent at the time of marriage . . . Further, where there is reason to doubt the validity of the marital relationship [Ms. [REDACTED] must show evidence that the marriage was not entered into for the purpose of evading the immigration laws . . .

You have not provided evidence, by testimony given at the time of this interview, that there is, in fact, a bona fide marital relationship.

The beneficiary and Ms. [REDACTED] filed another appeal to the BIA on August 18, 2000. The instant Form I-140 was approved on May 8, 2001, after which the beneficiary's counsel corresponded with the assistant district counsel and stated the beneficiary would withdraw the BIA appeal and pursue the employment-based immigrant visa with his consent. Subsequent correspondence from the assistant district counsel grants the withdrawal request and directed counsel to file the adjustment of status paperwork. The beneficiary filed Form I-485 with supporting forms and documentation on August 9, 2001 and the appeal to the BIA was withdrawn.

On January 2, 2003, the beneficiary's pending Form I-485 was relocated to Vermont Service Center's Business Branch for consideration of revoking the underlying I-140 petition pursuant to section 204(c) of the Act. The officer recommending revocation disagreed with the assistant district counsel's assessment of the case contained

in internal correspondence that the case did not appear to contain “rampant fraud.”

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)³ 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 April 25, 2003, the director sent a NOIR to the petitioner stating the following:

It has now come to the attention of [CIS] that there appears to be fraud involved with the filing of the instant Form I-140. It appears a prior Form I-130, Petition for Alien Relative, filed on behalf of the beneficiary was denied after discrepancies involving the beneficiary’s marriage and purported children were noted in two Stokes interviews, making the beneficiary permanently subject to Section 204(c) because of a sham marriage. The attorney of record at the time of the filing of the Form I-130 allegedly attempted to nullify the record of that form and its attendant Form I-485, Application to Register Permanent Resident or Adjust Status, by obtaining an “agreement” to “allow” the beneficiary to pursue adjustment based on the instant Form I-140 in return for withdrawing a second appeal of the decision on that Form I-130 denial to the [BIA]. There are also address discrepancies noted in the G-325A’s submitted with both the form I-130 and the Form I-140.

The NOIR provided a copy of the district director’s July 18, 2000 decision.

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 un rebutted, 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 explained its reliance upon the detailed investigation by the district director and the record or proceeding that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

In response to the NOIR, counsel cited to the fact that assistant district counsel chose not to invoke Section 204(c)

³ 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.

of the Act but two years later CIS is making a finding of fraud. Noting that the district director determined that the beneficiary and Ms. [REDACTED] 'did not have a bona fide marital relationship at the time of the interview and that the parties had failed to prove that despite the finding, [Form I-130] should be approved based on their intent at time of marriage,' she asserts that there was no finding of an intent to enter into a sham marriage and no evidence in the record of proceeding that the beneficiary's "previous marriage" was entered into for the purpose of evading the immigration laws. Counsel cites to *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990) as precedent requiring a finding that a marriage is a sham in order to invoke Section 204(c) of the Act, and that "even a 'reasonable inference does not rise to the level of substantial and probative evidence request to the preclusion of approval of a visa petition in according with Section 204(c) of the Act.'"

On December 29, 2003, the acting director revoked the approval of the I-140 visa petition because she found counsel's response ineffective since, in her interpretation, the district director did deny the Form I-130 based on findings that the beneficiary and Ms. [REDACTED] entered into a sham marriage⁴. Additionally, the district director noted that no additional evidence was provided to rebut the invocation of Section 204(c). On the same date, the acting director denied the adjustment application the beneficiary filed in connection with the previously approved Form I-140.

On appeal, counsel states the following: "error of law – there was no finding that marriage entered into to defraud government but rather failure to provide sufficient documentation to overcome burden, see attached. Finding is necessary under law." Counsel resubmits the various decisions issued in this matter, her correspondence with the assistant district counsel, and her response to the director's notice of intent to revoke the petition.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. 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).

Counsel's assertion in response to the NOIR that there was no bona fide marriage but there was also a failure to prove that the Form I-130 should be approved based on their intent at the time of marriage is not persuasive. Her reliance upon *Tawfik* does not support her client's case as she asserts. *Tawfik* does not stand for a distinction between a determination that a marriage lacks bona fides and a determination that a marriage is a sham, fraudulent, or entered into to evade the immigration laws. The facts of *Tawfik* are different from the case at hand. In *Tawfik*, the district director did not make a finding that the marriage was entered into to evade immigration laws, but specifically used language that he has made a reasonable inference, which the BIA found insufficient to revoke an approved immigrant visa.

Tawfik at 167 states the following, in pertinent part:

⁴ The acting director also issued a decision on October 1, 2003 stating that no response was received to the notice of intent to revoke and revoking the petition, to which counsel filed an appellate form proving she had submitted a response.

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 Agdinaoy*, 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)). Tawfik states that the revocation decision may be made at any time and is properly determined by the district director in the course of his adjudication of the subsequent visa petition. *Id.* at 168 (citing *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)).

Tawfik states that "in order to find that an alien has attempted to enter into a marriage for the purpose of evading the immigration laws, the evidence of such an attempt must be documented in the alien's file." In the instant case, the AAO concurs with the acting director that there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary's prior marriage was entered into for the purpose of evading immigration laws. The AAO finds that there is ample evidence that the beneficiary attempted to evade the immigration laws by marrying Ms. [REDACTED] and that attempt is documented in the alien's file. Contrary to counsel's assertion, just because the director did not specifically state that the beneficiary's prior marriage was a sham marriage does not indicate that it was not a sham marriage.

The district director interviewed the beneficiary and Ms. [REDACTED] three times, two through an extensive and thorough Stokes procedure, which were both carefully transcribed and incorporated into the record of proceeding. The noted inconsistencies in sworn testimony are detailed and extensive, not only within the interviews themselves, but also in the types of misinformation represented from one interview to the next⁵. In the second Stokes interview, the beneficiary and Ms. [REDACTED] failed to respond to the examiner who carefully reviewed with them in person the inconsistent and discrepant information provided by them individually and jointly.

The AAO concurs with the district director that there were substantial inconsistencies in the information pertaining to Ms. [REDACTED] child, Terrence. Ms. [REDACTED] stated that she alone took the train and dropped off Terrence with her sister-in-law the night before the second Stokes interview while the beneficiary stated that they drove together in the car the morning of the second Stokes interview. It is reasonable to presume that a couple could remember the details of their son/stepson's child care provisions within the past 24 hours and the major inconsistency in that fact alone was quite damaging to the claim that they share a life and have a bona fide marriage⁶. The filing of the tax returns all at once in 1995 seems to reveal an effort to prove a dependent

⁵ For example, in the first interview, Ms. [REDACTED] apparently forgot she met the beneficiary's father; but in subsequent interviews, they both concede she never met him at all.

⁶ The AAO also notes that there are two other birth certificates and welfare documentation relating to Tanysha

relationship. The inconsistent factual representations made concerning Ms. [REDACTED] wedding ring, the details of their dinner the night before the second Stokes interview, the details about the furniture and utility services in the home and showering habits, all undermine a finding that the couple are intimate and share a life as husband and wife. The testimony was carefully analyzed by the district director and his findings detailed in his decision, which was incorporated into the record of proceeding.

Counsel, in response to the director's NOIR, acknowledged that the marriage has been terminated since she used the phrase "prior marriage," and offered no further evidence of its viability in the past⁷. The BIA, in its decision, noted that the record of proceeding did not contain such evidence as "details of the couple's life together such as how they met, their living arrangements, weddings, and/or photos." Even after remand, the record of proceeding still does not contain such evidence. The district director clearly stated in his decision that the marriage was not bona fide and "the conduct of the parties of marriage is relevant to their intent at the time of marriage . . . Further, where there is reason to doubt the validity of the marital relationship the petitioner must show evidence that the marriage was not entered into for the purpose of evading the immigration laws," in his final conclusion that the petition should be denied based on it lacking bona fides.

Therefore, the AAO find, after an independent review of the documentation in the record of proceeding, there is substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The director correctly analyzed and noted the discrepancies in factual representations throughout the multiple testimonials provided by the beneficiary and Ms. [REDACTED] and failure to provide corroborating evidence. There is ample evidence that the beneficiary attempted to evade the immigration laws by marrying Ms. [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 CIS 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.

and [REDACTED], whose mother is listed as Ms. [REDACTED]. In the transcribed Stokes interviews, Ms. [REDACTED] and the beneficiary stated that she only has one child.

⁷ The AAO notes that the termination of the marriage must have occurred after counsel withdrew the BIA appeal and pursued the beneficiary's lawful permanent residence based on the employment-based immigrant visa.