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U.S. Citizenship  
and Immigration  
Services



BU

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 11 2006  
EAC 03 256 51691

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

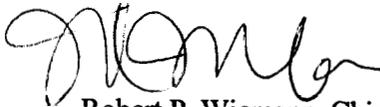
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[REDACTED]



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, Chief  
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 sustained. The petition will be approved.

The petitioner is a food mart. It seeks to employ the beneficiary permanently in the United States as a manager. 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).

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.

The petitioner's Form ETA 750 was filed with DOL on October 15, 2001 and certified by DOL on April 24, 2003. The petitioner subsequently filed Form I-140 with Citizenship and Immigration Services (CIS) on September 6, 2003, which was approved on May 13, 2004. The beneficiary's 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 previous immigrant visa petition. A Form I-130, Petition for Alien Relative, was filed on the beneficiary's behalf on October 18, 1999. 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, a copy of the petitioner's birth certificate and social security number, and a copy of a Certificate of Marriage between the beneficiary and [REDACTED]

In connection with the Form I-130, the record contains correspondence from the San Antonio CIS office to the beneficiary dated May 30, 2002 mailed to an Austin, Texas address with regard to fingerprints. A letter from former counsel, [REDACTED], notified the CIS on June 6, 2002, that the beneficiary had moved to Virginia. The district director of the CIS office located in Arlington, Virginia then issued letters to the beneficiary in Virginia for two adjustment of status interviews, on March 4, 2003 and December 5, 2002.

The director then issued an undated decision to the petitioner.<sup>1</sup> The director denied the Form I-130 based on abandonment because neither the petitioner nor the beneficiary had shown up for their I-130 interview either on

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<sup>1</sup> The record also reflects an envelope from the CIS Washington office addressed to former counsel and postmarked March 27, 2003, apparently along with the director's original decision. The envelope indicates the correspondence sent to former counsel was unclaimed mail and returned to the CIS Washington office. If this envelope did contain the director's decision, then the director issued her decision in late March 2003.

December 5, 2002 or March 4, 2003. The director stated that the petition was considered to have been abandoned and that no further action would be taken on it. Another document in the record was sent to the beneficiary that stated the beneficiary was scheduled for an interview with CIS on December 5, 2002 and March 4, 2003, that the beneficiary had not appeared for either of these scheduled interviews, and also did not provide explanation of why the beneficiary could not attend the interviews. The director denied the I-130 petition with accompanying I-485 application and revoked any previously authorized employment granted the beneficiary on the basis of the I-130 petition.

The beneficiary sent a letter to the CIS Virginia office with a receipt date of March 3, 2003, as well as a receipt date for the National Record Center of July 14, 2004.<sup>2</sup> In this letter, the beneficiary states that he was unable to attend the March 4, 2003 interview for adjustment of status due to unforeseen circumstances and his personal family problems. The beneficiary states that he is “not in a position to come for the interview on March 4, 2003.”

As stated previously, the Form I-140 was approved on May 13, 2004, and the beneficiary filed Form I-485 with supporting forms and documentation on July 1, 2004, which was denied on July 1, 2005.

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)<sup>3</sup> 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.

In addition, 8 C.F.R. § 204.2, (a)(1)(ii) states:

*Fraudulent marriage prohibition.* 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. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such 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

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<sup>2</sup> It is not clear from the record why this correspondence has receipt dates for both the Washington CIS District office and the National Record Center.

<sup>3</sup> 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.

conspiracy must be contained in the alien's file.

On April 7, 2005, the director sent a Notice of Intent to Revoke (NOIR) to the petitioner stating the following:

A Petition for Alien Relative, Form I-130, was filed on October 08, 1999, by [REDACTED] for [REDACTED]. This petition was abandoned on March 26, 2003, because you did not appear for the scheduled interviews on December 5, 2002 and on March 4, 2003. You did not establish that [REDACTED] and [REDACTED] married to begin a life together as husband and wife. It appears that the marriage was entered into with the sole intention of gaining immigration benefits for the beneficiary.

The director requested that the beneficiary provide evidence to establish that the marriage between him and [REDACTED] was not entered into for the purpose of evading immigration law. The director provided a list of documentation that could be provided, including documentation showing joint ownership of property, leases showing joint tenancy of a common residence, records showing commingling of financial resources, birth certificates of children born to the beneficiary and his wife, and affidavits of third parties having knowledge of the bona fides of the marriage relationship. The director stated that it was preferable that additional evidence submitted should be oldest available evidence rather than newly created.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record.

In response to the NOIR, counsel submitted six notarized affidavits. Three original affidavits are from the beneficiary; from [REDACTED] the beneficiary's former wife, and from [REDACTED] the beneficiary's former mother-in-law. The other copies of affidavits are from [REDACTED] the beneficiary's former father-in-law; [REDACTED] a friend of the beneficiary's former wife; and [REDACTED], the beneficiary's friend in Virginia.

In his affidavit, the beneficiary stated that he went to Texas to visit a friend, and he met "[REDACTED]" at a party. The beneficiary stated that during his stay in Texas, he was constantly in touch with [REDACTED] and they started to like each other and started dating. They finally got married. The beneficiary stated that he knew [REDACTED] had problems so he wanted to get her away from Texas. The beneficiary then stated the following, in pertinent part:

I had friends in Virginia, so I decided to look for a job there, and [REDACTED] was supposed to follow me. . . . I was shocked to find out that [REDACTED] went to prison. She concealed many things from me and lied about not having kids, her criminal record, drugs, etc. . . . After [REDACTED] was convicted again, I learned even more about [REDACTED] past criminal record, drug addiction, and the fact that she had kids.

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<sup>4</sup> The record contains a marriage certificate that states the beneficiary and [REDACTED] were married in Richmond, Texas in Fort Bend County, on January 20, 1999.

[REDACTED] were married in

The beneficiary then stated:

I finally decided to divorce [REDACTED]. It was a very difficult and emotionally challenging decision for both of us as it is for every couple seeking a divorce as a last resort, I, nevertheless, was left with no other choice, unfortunately. Although we have been divorced for quite some time, we do stay in touch and have healthy, friendly relations. Please consider my appeal as an attempt to establish my marriage with [REDACTED] as a sincere, genuine bond. We both married with the best of intentions. In the beginning, I believed that our marriage would last forever.

In her affidavit, the beneficiary's former wife stated the following, in pertinent part:

I met [REDACTED] through a friend. We dated several times before we got married. After we got married, I failed to tell him that I had been J.D.C.,<sup>5</sup> I also failed to tell him I had a son. We were happy and loved each other. After finding out the truth, he was upset, so we decided to get a divorce. [REDACTED] was a good friend, husband and father to myself and my kids.

The beneficiary's former mother-in-law [REDACTED] in her affidavit, stated the following, in pertinent part:

[REDACTED] my daughter was married to [REDACTED] Jan 1999. They got along [sic] very well, he was very nice to her kids and also to my husband [REDACTED] [and] myself. [T]hen after a few years in their marriage, he found out that she had not been honest to him about herself, that she had a record, she had been to jail and then spent some time in prison. [A]fter this, they could not get along [sic]. So they decided to get a divorce, but he is a very nice guy, and my family all love him still.

In his affidavit, [REDACTED] the beneficiary's former father-in-law, stated the following, in pertinent part:

I met [REDACTED] through a friend [and] we introduced [sic] him to [REDACTED]. [REDACTED] [and] [REDACTED] dated for a short time, then they got married. After a few months, they found out about her criminal background and other personal [sic] things. So [illegible] could not trust her, so they got a divorce and he went his way [&] and she went hers. [REDACTED] is my daughter.

The affidavit allegedly from [REDACTED], states the following, in pertinent part:

My name is [no name is inserted in the text] and I am writing [sic] this letter to inform you that I have known [REDACTED] for many years. [REDACTED] and [REDACTED] were married for about two. The marriage didn't last very long because [REDACTED] found out about [REDACTED]'s past. [REDACTED] was un-true and failed to tell [REDACTED] about her criminal past and history of being in prison several times throughout her life. That is why [REDACTED] [and] [REDACTED] divorced. In spite of all this, they still remain friends

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<sup>5</sup> The record does not indicate what the J.D.C. is.

until this day.

Counsel also submitted the beneficiary's former wife's criminal records report from the Fort Bend County Sheriff's Office, Fort Bend, Texas. This document lists arrests for various infractions of the law from February 1995 to October 21, 2004. Counsel also submits the beneficiary's divorce decree from [REDACTED], dated August 27, 2004, from the District Court of Fort Bend County, Texas, as well as the beneficiary's IRS Form 1040, for tax year 2000 with accompanying W-2 form. These documents indicated that the beneficiary had submitted the tax form, filing as head of household, with [REDACTED], identified as "Other."

In a cover letter, counsel stated that under section 237(a)(1)(G)(ii) of the Act, CIS cannot make a finding of a fraudulent or sham marriage unless the District Adjudication Officer (DAO) "makes a determination on the evidence that there was fraud at the inception. The test for fraud at the inception is whether the bride and groom intended to establish a life together." Counsel cited *Lutwak v. U.S.* 344 U.S. 604(1954); and *Bark v. INS*, 511 F.2d 1200 (9<sup>th</sup> Cir. 1975). Counsel stated that CIS must look at the subjective state of mind of the parties, and that in the instant petition, there was never a determination on the evidence by the District Adjudication Officer. Counsel stated that the DAO never met with the beneficiary and his wife, and that the I-130 petition was denied on the basis of being abandoned since the beneficiary and the petitioner failed to attend the adjustment of status interview. Counsel stated that the beneficiary's wife was incarcerated and could not attend the interview and that the beneficiary's marriage had already begun to fall apart. Counsel again stated that there was no evidence in the record to support a finding of a sham marriage, and that, ultimately, there was no finding of a sham marriage.

Counsel stated that any evidence to support a finding of a sham marriage must be substantial and probative, and cited *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). Counsel asserted that in the instant petition, there was no evidence at all to support a finding of a sham marriage, much less any substantial and probative evidence. Counsel stated that the conduct of the parties before and after the marriage is relevant and cited *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Counsel also stated that subsequent conduct after the marriage, no matter how unconventional, does not prove lack of marital intent, and cites *Bark V. INS* again. Finally counsel stated that the BIS would not uphold a denial of a marriage petition where the specific basis for denial and evidence underlying the denial are absent, and cited to *Matter of Pradiou*, 19 I&N Dec. 419 (BIA 1986). Counsel stated that in the instant petition, the specific basis for the denial and evidence underlying the denial are absent. Counsel then stated that there is ample evidence in the record to support the beneficiary's and his former wife's intent to establish a life together. Counsel states that both the beneficiary and his former wife testified as to their intent at the onset of the marriage to establish a life together. Counsel stated that the beneficiary moved to Virginia shortly after he was married, and that he knew his wife had some problems but didn't know the nature or the extent of them. Counsel stated that the beneficiary's wife testified that she kept her criminal past from the beneficiary, and also the fact that she had children from him. Counsel stated that the beneficiary's mother-in-law also testified to the effect that the information about the beneficiary's wife's prison records and children had on the marriage. Counsel stated that the beneficiary's wife was again incarcerated shortly after their marriage and that she never joined the beneficiary in Virginia. Counsel stated that both the beneficiary and his former wife testified that they decided to terminate their marriage as a result of the beneficiary's wife's unwillingness to be truthful to the beneficiary about her past. Counsel finally stated that while the sequence of events after the beneficiary's marriage is not the norm, it does not disprove their bona fide marital intent.

On August 8, 2005, the director revoked the petition. In his decision the director reviewed the evidence submitted to the record in response to the NOIR, including the beneficiary's tax return of 2000 that included [REDACTED] as a dependent, with address of residence listed as Virginia. The director stated that the beneficiary indicated in his affidavit that he left Texas for employment in Virginia and that his wife was supposed to join him in Virginia but was arrested, convicted and taken to prison before his wife could join the beneficiary. The director then noted that the beneficiary's wife's arrest record indicates that she had time served on August 9, 1999, and that the beneficiary's marriage took place in January 1999. The director stated that the evidence indicated that the beneficiary had from January 20, 1999 to August 9, 1999 to establish the bona fide nature of the beneficiary's marriage. The director stated that no evidence was submitted to the record to establish a bona fide marital relationship.

The director stated that the petitioner had not submitted any documentary evidence to support the affidavits and to establish a bona fide marriage relationship between the beneficiary and [REDACTED]. The director reiterated the types of relevant evidence that the beneficiary could have submitted, including joint ownership of property, property leases and commingling of financial resources. The director then stated that the record did not establish a bona fide marital relationship between the beneficiary and [REDACTED] and revoked the petition, citing to *Matter of Esteime*, Int. Dec. 3029 (BIA 1987). The director also cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) in discussing the revocation of the approved petition, and the need for the petitioner to resolve any inconsistencies in the record.

On appeal, counsel draws attention to the affidavits filed by the former relatives of the beneficiary, including his mother-in-law, father-in-law, and his former wife. Counsel states that the former family members had nothing to lose by giving negative information about the beneficiary and nothing to benefit by testifying in his behalf. Counsel states that notwithstanding these facts, the former relatives came forward and testified on the beneficiary's behalf. Counsel notes that the CIS noted that the beneficiary's 2000 tax return listed the beneficiary's address in Virginia to where the beneficiary went when he left Texas, and also noted that the beneficiary had filed the return listing his wife as his dependent. Counsel states that neither the beneficiary nor the beneficiary's wife realized that there was an error in the return filed by a Virginia financial service company. Counsel submits an amended 2000 tax return to correct the beneficiary's 2000 filing status as married filing joint return.

Counsel also notes that CIS was not satisfied that the beneficiary was unable to provide evidence such as a mortgage agreement, lease agreement or other document evidencing the commingling of financial resources. Counsel submits an additional affidavit from the beneficiary to further explain the financial situation that existed when the beneficiary got married. This affidavit states the following, in pertinent part:

Since we lived with [REDACTED] parents after our marriage, we did not have a lease in our name. We also did not have utility bills in our name- all of the bills were in [REDACTED]'s name. I had no money, and [REDACTED] also had no money. We barely had two dimes to rub together. We certainly did not have money to open a bank account. Any money we had went to daily living expenses.

Counsel then states that while the beneficiary's wife was incarcerated in Texas, she and the beneficiary sent many letters back and forth to one another. Counsel submits five letters with envelopes date stamped that were written

to the beneficiary by his wife while incarcerated in Texas. The dates of the letters range from September 7, 1999 to December 25, 1999.

Counsel states that although the beneficiary does not have the letters that he sent to his wife, he does have the certified mail return receipts as evidence of his correspondence. These copies of certified mail return receipts are for correspondence from 1999 to 2000 from the beneficiary to [REDACTED] either in prison or in Richmond, Texas. Counsel also submits telephone bills from March 1999 to October 1999 that she states were previously unavailable. The telephone bills are in the name of [REDACTED] the person with whom the beneficiary lived with in Virginia at the time. The bills cover calls to Texas both in March 1999 and September 1999. Counsel states that the telephone bills show calls that the beneficiary made to the beneficiary's wife and her family in Texas as well as collect calls from the beneficiary's wife to the beneficiary while she was incarcerated. Finally, counsel submits photos of the beneficiary's wedding.

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).

While the marriage between the beneficiary and Erica Giles may be viewed as problematic, there is not sufficient 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. It is further noted that the record contains correspondence from the beneficiary with regard to his inability to appear for the Washington District Office interview scheduled for March 4, 2003. It should also be noted that the copies of affidavits submitted by the beneficiary's father and her friend are not originals and either lack the name of the affiant in the affidavit contents or have names of signators that were written in either before or after the documents were notarized. Thus, these two affidavits are given limited evidentiary weight. Further the affiants, the beneficiary's father and the beneficiary's friend, suggest that the beneficiary and his wife were divorced shortly after their marriage. However, the record indicates that the beneficiary and his wife were divorced in August 2004, five and a half years after the beneficiary's marriage, which is significantly more than the two years of marriage claimed by Izella McGee or the several months of married life claimed by [REDACTED] the beneficiary's father. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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."

Nevertheless, the sworn affidavits from the beneficiary's former wife and her mother are given significant weight, especially in view of the more recent letters that counsel submitted to the record. In addition, the letters and envelopes, certified mail receipts and telephone bills submitted on appeal appear genuine and support an ongoing marriage and relationship between the beneficiary and his wife. It should be also noted that the notarized affidavits from both the beneficiary's former wife and her mother do not support any allegations of a marriage entered into for purposes of subverting the U.S. immigration laws. The fact that the beneficiary maintained contact with his wife and her family in 1999 and 2000 after his departure from Texas is significant in establishing

that at some level, a bona fide marriage relationship existed. Furthermore the record reflects that the beneficiary did not omit mention of his marriage to [REDACTED] on the current I-485 petition, submitted in July 2004.<sup>6</sup>

In evaluating the evidentiary weight to be given the affidavits submitted by the beneficiary, versus the fact that the beneficiary and his wife did not appear for their I-130 adjustment of status interview, the AAO views the evidence submitted on appeal as more probative that a marriage relationship existed at the time the original I-130 petition was filed on October 18, 1999.

In summary, the record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary, and then viewed as abandoned based on the beneficiary's and the petitioner's failure to appear for the I-130 adjustment of status interview. We have no evidence that the marriage certificate or divorce decree are fraudulent documents. Thus, on the face of the document, a marriage occurred between the beneficiary and [REDACTED] and then a subsequent divorce.

In addition, an independent review of the documentation in the record of proceeding does not present substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. 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 withdrawn.

**ORDER:** The appeal is sustained. The director's decision to revoke the employment-based immigrant visa petition is withdrawn. The petition's approval is reinstated.

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<sup>6</sup> The beneficiary's divorce decree is dated August 27, 2004. Therefore at the time of filing the I-485 received by the service center on July 1, 2004, the beneficiary was still married to [REDACTED]