

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE:



Office: VERMONT SERVICE CENTER

Date: **MAY 24 2006**

EAC-03-214-52959

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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty 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 April 30, 2001 and certified by DOL on January 10, 2003. The petitioner subsequently filed Form I-140 with Citizenship and Immigration Services (CIS) on May 30, 2003. On May 11, 2004, the director issued a notice of intent to deny (NOID) the Form I-140 because the beneficiary previously filed a Form I-130 Petition for Alien Relative as the spouse of a United States citizen and a Form I-485 Application to Register Permanent Residence or Adjust Status on January 3, 1995. The Forms I-130 and I-485 were terminated on April 22, 1996 because the beneficiary failed to attend a scheduled interview. The director gave the petitioner 30 days to submit evidence that would overcome the reasons for denial. In response to the NOID, counsel submitted a letter asserting that there was no fraud committed nor did this alien ever enter into a marriage. The director denied the petition on July 28, 2004 determining that the record included evidence to establish that the beneficiary sought to obtain benefits through marriage to a United States citizen that was not bona fide and entered into to evade immigration law.

On appeal, counsel asserts that the beneficiary was never married to a United States citizen, that he never signed a marriage license nor did he have specific intent to enter into a marriage, and that he was the victim of a sham.

Section 204(c) of the immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), states in pertinent part:

No immigrant petition shall be approved if (1) the beneficiary has been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a United States citizen 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 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 immigration laws.

The regulation at 8 C.F.R. § 204.2(c)(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 an immigrant visa classification filed on behalf of an alien for whom there is substantial and probative evidence of such an 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 denial of the instant I-140 petition is in connection with the Form I-130 and concurrent Form I-485 filed on behalf of the beneficiary. The record shows that a United States citizen through her counsel filed a Form I-130 on behalf of the beneficiary as a citizen's spouse with INS (now CIS) New York office on January 3, 1995. The I-130 petition includes a Certificate of Marriage for the United States citizen and the beneficiary issued by Town Clerk, Town of North Hempstead, County of Nassau, State of New York on December 20th, 1994. On appeal counsel submits a "No Record Certification –Marriage-" from Michelle Schimel, Registrar of Vital Statistics, Town of North Hempstead, County of Nassau, State of New York. This no record certification certifies that: "a search has been made in this office for the marriage record of [the beneficiary] and [the citizen] December 20, 1994 at Garden City, NY, State of New York and that such record is not on file in this office". The petitioner did not provide any evidence that the Certificate of Marriage for the beneficiary and the citizen in the record is a fraudulent document. However, it is noted that the marriage certificate indicates at the bottom that: "[d]o not accept this copy unless the raised seal of the Town of North Hempstead is affixed thereon". The copy of the marriage certificate in the record does not contain such a raised seal of the Town of North Hempstead. The AAO finds the no record certification more reliable and persuasive. It is most likely that the marriage certificate submitted in connection with the beneficiary's marriage-based petition was fraudulent.

Counsel argues on appeal that the beneficiary never signed any documentation alleging he was married, or had a woman's name as his wife, did not have intent to commit marriage fraud, did not attempt to give fraudulent documents or statements, and did not attempt to conspire against CIS for a benefit. However, counsel did not submit any documents or evidence to support her assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO agrees with counsel that the name of the beneficiary is written in different script on his medical examination form. It appears that the signature on the medical examination was not from the beneficiary himself. However, the AAO also finds counsel's argument inconsistent with the facts, for which a reasonable explanation would be difficult to set forth.

The record shows that on the same day the US citizen filed the Form I-130 with the CIS New York office the beneficiary also concurrently filed his Form I-485 adjustment of status application with the same CIS office. The application filed by the beneficiary included Form I-485 and Form G-325. Form I-485 is titled "Application to Register Permanent Residence or Adjust Status." It is doubtful that a signatory to this form would believe it to be a work permit application instead of an application for lawful permanent residence (i.e., in lay person's terms, the "greencard"). In Part 2 on the first page of Form I-485, box b says "My spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category which allows derivative status for spouses and children". When the form was given to the beneficiary for signature as alleged by counsel, that box should have reminded the beneficiary the application somehow related to marriage or a spouse. Additionally, despite listing a US citizen as his wife on Page 2 of the Form I-485, the beneficiary signed his name to the form.

Additionally on the one-page Form G-325 the US citizen's name as wife, date of marriage and place of marriage etc. clearly show on the same page above where the beneficiary needed to sign his name. The beneficiary could not have missed that before he signed the form. If the beneficiary as counsel alleged signed these forms as if they were a work permit application, then at least later when he was actually given an

application for employment authorization and instructed to go to a CIS office, the beneficiary should have tried to find what the other forms he signed before were for and what they were based on. However, the beneficiary did not. Instead he went to the CIS office, got his work permit and became a recipient of immigration benefits from a fraudulent marriage.

The record shows that on January 3, 1995 the CIS New York office issued an interview notice to the beneficiary for his adjustment of status; on February 7, 1995 the beneficiary went to CIS in person and was granted his work permit based on his marriage petition and related applications. Five months later, the beneficiary did not appear at his adjustment of status interview on July 24, 1995. Neither counsel nor the beneficiary explained why he did not attend his adjustment interview. Subsequently, on April 22, 1996 the beneficiary's Form I-130 and Form I-485 were terminated by CIS based on the beneficiary's failure to attend the interview and the beneficiary was granted voluntary departure until May 22, 1996.

Counsel contends that the beneficiary never planned, anticipated, attempted or conspired to enter into any agreement in any way, shape or form, and therefore he withdrew the marriage-based petition and related applications once he discovered there was wrong doing on one hand, but on the other hand, she asserts that the first time the beneficiary knew there was a problem when he went to CIS to inquire about his EAD renewal on February 7, 1997. Counsel does not explain the reason for the lapse of time between the beneficiary learning on February 7, 1997 that immigration petitions and applications providing him with immigration benefits were fraudulently submitted to CIS on his behalf and withdrawing the application on June 16, 2003, six years later, which is also more than two years after the instant petitioner filed the labor certification application, five months after the labor certification application was approved and even two weeks after his I-140 petition and a new adjustment of status application were filed with CIS. That delay does not support the proposition that the beneficiary did not attempt or conspire to obtain immigration benefits through marriage fraud.

Counsel also claims that the beneficiary was swindled, relied upon the advice of someone who said he was an attorney and prepared paperwork and had him sign the paperwork. Counsel appears to claim ineffective assistance of counsel on appeal. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

In the instant case, counsel's claim does not meet the requirements stated above.

An independent review of the documentation in the record of proceeding presents substantial and probative

evidence to support a reasonable inference that the prior marriage was a marriage fraud. The Form I-130 and concurrently filed Form I-485 were supported with a fraudulent marriage certificate. The beneficiary had obtained and continued to receive immigration benefits from the fraudulent marriage-based petition and related applications until an employment-based sponsor filed a petition on his behalf before he withdrew the prior application. There is ample evidence that the beneficiary conspired to evade the immigration laws by marrying US citizen and that fraud 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.