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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] EAC 04 080 50963

Office: VERMONT SERVICE CENTER

Date: SEP 25 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as an Other Worker, Unskilled pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 Director, Vermont Service Center, initially approved the employment-based preference visa petition. In connection with a review of the beneficiary's alien registration file number, 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 The director's decision dated January 25, 2006 shall be withdrawn, and the matter remanded to the director for the full adjudication of the I-140 petition.

The petitioner is an apple orchard. It seeks to employ the beneficiary permanently in the United States as an orchard supervisor. 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, which the petitioner subsequently changed to unskilled worker, pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii). 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 January 5, 1998 and certified by DOL on February 24, 1998. The petitioner subsequently filed Form I-140 with CIS on March 13, 1998, which was approved on June 22, 2002. 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 August 18, 1997. 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 claimed wife's birth certificate and a copy of a Certificate of Marriage between the beneficiary and [REDACTED]

In connection with the Form I-130, the district director of the CIS office located in Palm Beach Gardens, Florida issued a decision dated February 23, 1999. The decision denied the Form I-130 because the petition had been terminated. A memorandum in the file indicates the petition was terminated because the beneficiary did not show up for an adjustment of status interview on August 25, 1998. The Form I-140 was filed on January 28, 2004 and subsequently approved on June 15, 2004, and the beneficiary filed Form I-485 with supporting forms and documentation on January 23, 2004.

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)¹ 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

¹ 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.

- 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 conspiracy must be contained in the alien's file.

On June 15, 2005, the director sent a Notice of Intent to Revoke (NOIR) to the petitioner stating the following:

A review of the beneficiary's alien registration file number [REDACTED] indicates that he conspired to procure an immigration benefit through an alleged marriage that was a fraud at its inception.

The director continued:

Based on a marriage certificate issued on September 26, 1996 in Palm Beach Gardens, Florida, the beneficiary married [REDACTED] on September 26, 1996 in West Palm Beach, Florida. On August 19, 1997, Ms. [REDACTED] filed a Petition for Alien Relative (Form I-130) for the beneficiary. On that same day, the beneficiary filed an Application to Register Permanent Residency or Adjust Status (Form I-485). The basis for the beneficiary's application was his marriage to Ms. [REDACTED] who claimed to be a U.S. citizen.

On April 22 and August 25, 1998, the beneficiary and Ms. [REDACTED] were scheduled to appear for interview in Palm Beach Gardens, Florida. They failed to appear and did not request that the interview be rescheduled. Therefore, on February 23, 1999, the Forms I-130 and I-485 filed on behalf of the beneficiary were denied. The Form I-485 was denied pursuant to Section 203(f) of the INA.

Evidence in the file from the West Palm Beach District Offices concludes that Ms. [REDACTED] birth certificate was probably fraudulent, and that the marriage certificate for [REDACTED] and the beneficiary was unquestionably fraudulent.

Further, according to the Form G-325A located with the beneficiary's current Form I-485 application, the beneficiary claims to have been married to [REDACTED] since June 14,

1986. He failed to disclose this information on the Form I-130 filed by [REDACTED]

It appears that the marriage between [REDACTED] and [REDACTED] was entered into solely for the purpose of procuring immigration benefits on behalf of the beneficiary.

In light of the aforementioned facts, it appears that the beneficiary and Ms. [REDACTED] conspired to enter into a marriage for the purpose of circumventing immigration laws. Based on the evidence of record, it appears that the marriage was a sham at its inception. For this reason, it appears that Form I-140 petition cannot be approved.

The NOIR provided no further description of discrepancies contained in the beneficiary's records, although the NOIR indicates that enclosures were sent to the petitioner. While the enclosures are not identified, the record also contains a memorandum to the file dated October 5, 1998 from the CIS West Palm Beach office. This redacted document stated the following: "The birth certificate of [REDACTED] appears to be bogus and the marriage certification of [REDACTED] to subject is definitely bogus. The application number of the marriage certificate [number redacted] had been used in other fraud cases." This memorandum and copies of the alleged wife's birth certificate and the marriage certificate appear to have been provided to the beneficiary and counsel either with the NOIR or when the approved petition was revoked.

In the NOIR, 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 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 added that any affidavits should be supported by one or more types of documentary listed above, and should contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to Ms. [REDACTED] or the beneficiary, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. The director added that such persons may be required to testify before an immigration officers as to the information contained in the affidavit.

The director also requested evidence to establish that Ms. [REDACTED] intent in marriage was to establish a life together. The director indicated that evidence of such an intent might include but was not limited proof that the beneficiary had been listed as Ms. [REDACTED] spouse on insurance policies, property leases, mortgages, income tax forms or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experience.

The director also requested evidence of the legal termination of the marriage of [REDACTED] and the beneficiary, such as a divorce decree, death certificate, or annulment document. The director added that in order for the legal termination of a marriage to be considered valid for immigration purposes, it must have been registered with a civil authority.

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 detailed the evidence of the record, primarily questionable documentation including the birth certificate of Ms. [REDACTED] and the marriage certificate between the beneficiary and Ms. [REDACTED], and also the fact that the beneficiary did not reveal the prior marriage on his I-485 Form. In addition, a redacted version of the memo that addressed the questions of fraudulent documents appears to have been provided to the beneficiary and his attorney of record.

In response to the NOIR, counsel submits a letter dated July 14, 2005. In her letter, counsel stated that the beneficiary entered the United States more than fifteen years ago and that he entered legally as a farm worker. Counsel stated that the beneficiary applied for the SAW program² but was denied under a court decision that determined sugar was not a crop. Counsel then stated that beneficiary did not intend to enter into a fraudulent marriage or to evade immigration laws. Counsel stated that the beneficiary’s friend had an appointment with a woman who had obtained permission to work for another friend and that the beneficiary’s friend encouraged the beneficiary to come to the appointment with him and apply for permission to work in the United States. Counsel stated that when the two persons met the woman, she gave them very little information and they were asked to sign one or two papers that were not explained to the beneficiary or his friend, nor were they given a chance to read what they were signing. Counsel states that all the beneficiary was told was that he would receive an appointment to go to the immigration office. According to counsel, the beneficiary could not contact this person again, as she changed her telephone number and disappeared. Counsel stated that the beneficiary never received permission to work and never saw the woman again. Counsel concluded that the beneficiary was cheated by an individual who took advantage of a poorly educated farm worker. Counsel also stated that since the beneficiary was unaware that the documentation submitted showed a marriage, he was unable to submit the requested information.

On January 25, 2006, the director revoked the approval of the I-140 petition. The director stated that in response to the NOIR, the beneficiary submitted a letter from his attorney and that no additional evidence or documentation was submitted with the letter. The director referenced counsel’s comments with regard to the beneficiary not knowingly intending to commit fraud but rather being misled by the individual who submitted forms in the beneficiary’s behalf. The director stated that the statement made by counsel without documentation to verify the statement cannot be considered sufficient evidence to overcome the grounds for the revocation of the instant petition.

On appeal, counsel states again that the beneficiary did not enter into a fraudulent marriage and did not intend to evade immigration laws. Counsel states the beneficiary was defrauded by someone who stated she could get him permission to work, but did not give him information to understand what she intended to do on the beneficiary’s behalf.

² Special Agricultural Worker program is a legacy INS program in which certain agricultural workers were determined eligible to apply for legal residency. Following litigation over the crops to be included in the program, sugar cane was not found to be a perishable commodity, and thus, sugar cane workers were not eligible for the program.

Counsel submits a notarized affidavit from the beneficiary. In this affidavit, the beneficiary states the he lives in Modena, New York and has worked as a supervisor for the petitioner, an apple orchard, for almost ten years. The beneficiary also stated that he has lived in the United States since 1990 and described his involvement in the House of God Church in Newburgh, New York and further states that he has never been arrested, either in the United States or in Jamaica.

The beneficiary then states that he truly regrets following his friend's advice and getting involved with the woman in Florida. The beneficiary states that he never had any intention of entering into a marriage or evading the immigration law. The beneficiary stated that he entered the United States legally as a farm worker and applied for the SAW program and was issued permission to work and travel.

The beneficiary also states that after his friend and he met a woman in Florida, all he was told was that he would receive permission to work. The beneficiary stated that the woman never gave his friend and him much information and that eventually they could not contact her at all. The beneficiary states that the woman deceived him and his friend and cheated them and took advantage of the fact that he did not understand the immigration laws.

The beneficiary concludes by stating that he is not able to submit any documentation with regard to the marriage fraud. The beneficiary states that he cannot find the woman who defrauded him and that he is sure that she would not assist him if he could find her. The beneficiary adds that if he is not permitted to adjust status to permanent residence, it would be a great hardship for him, his wife, and his employer. The beneficiary states that he has supervised his crew of apple workers for so many years that it would be difficult to replace him.

Counsel also submits notarized letters from [REDACTED] the beneficiary's wife; [REDACTED] son of the petitioner and partner in the petitioner's business operations; and [REDACTED] Pastor, House of God, Hebrew Pentecostal Church, Newburgh, New York.

In her affidavit, the beneficiary's wife states that she has visited her husband several times previously and that it was very difficult living apart from her husband and that she had expected him to become a permanent resident when he was issued permission to work and travel under the SAW program. The beneficiary's wife asserts that her husband has worked very hard in the United States and has been at the same job for almost ten years. The beneficiary's wife states that she knows that her husband and his friend were fooled and cheated by a woman in Florida and that her husband had no intention of disobeying the immigration law. The beneficiary's wife states that all the beneficiary was told was that he would receive permission to work.

[REDACTED], in his affidavit, states that the beneficiary has been employed by the petitioner since November 1996 as a supervisor, and is an excellent and reliable worker. Mr. [REDACTED] states that the business relies on the beneficiary and the business would suffer greatly if he were not permitted to stay in the United States. Mr. [REDACTED] states that the beneficiary is familiar with every inch of the petitioner's apple orchard and knows how to keep the trees in the best possible condition for a good harvest. Mrs. [REDACTED] also states that the beneficiary is especially good at supervising work crews and having them pick the apples and keep them from being damaged. Mr. [REDACTED] concludes by stating that he knows the beneficiary to be a man of honesty and integrity, and that he did not think the beneficiary would knowingly disobey the immigration law. Mr. [REDACTED] adds that the beneficiary is not an educated man and could be taken in by unscrupulous people.

Mr. [REDACTED] the pastor of the beneficiary's church, states that the beneficiary and his wife have been a part of the church family for some time and they are very valuable to the success of the church. Mr. [REDACTED] describes the work done by both the beneficiary and his wife for the church. Mr. [REDACTED] states that he feels CIS should not take any action against the beneficiary and his that would adversely affect them. Mr. [REDACTED] states that he has known them for some time, has been to their home, and spent time with their friends and that he has only seen and heard good things concerning them.

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).

There is not sufficient probative evidence in the record of proceeding to support a reasonable inference that the beneficiary entered into a previous marriage for the purpose of evading immigration laws. Rather, the record shows that the beneficiary did not enter into a marriage. Instead, the USC sponsor misrepresented to CIS that they had. The record, based on the beneficiary's affidavit, supports the beneficiary's signing documents that were used in conjunction with a fraudulent I-130 filing. The record indicates that CIS officials in West Palm Beach considered the documents submitted to the record to be similar to those submitted with other petitions found to be fraudulent in that the marriage certificate and its number has been used in other relative-based immigrant petitions. Action on the I-130 petition was terminated for this reason and also because of the non-appearance of the alleged couple at a CIS interview. The record appears to support the fraudulent nature of the marriage document submitted with the I-130 immediate relative petition. However, the record does not reflect any marriage entered into by the beneficiary and [REDACTED]. Based on the fraudulent marriage certificate, no marriage took place in connection with the filing of the previous immediate relative. Therefore section 204(c) is not applicable in the instant petition. See *Matter of Anselmo* 16 I&N 152 (BIA 1977). However, it is noted that the beneficiary is inadmissible for fraud pursuant section 212(a)(6)(c) of the Act. The director's decision dated January 25, 2006 shall be withdrawn, and the matter remanded to the director for the full adjudication of the I-140 petition.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for consideration of the I-140 petition.