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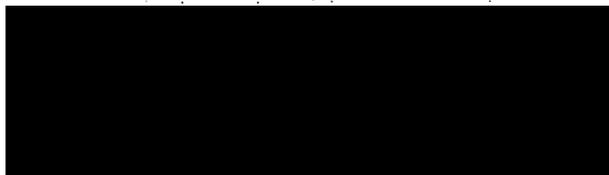
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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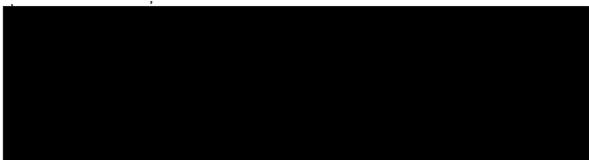


FILE: W20 200 549 [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAY 01 2007
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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 petition was denied by the District Director, Portland, Oregon local office. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the district director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a doughnut and coffee shop. It seeks to employ the beneficiary permanently in the United States as a doughnut baker (or doughnut maker). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The ETA 750 was filed with the DOL on April 18, 2001, establishing the priority date of this petition. The Immigrant Petition for Alien Worker (I-140) was filed with the Citizenship and Immigration Services (CIS) on March 7, 2003.

The district director denied the petition because of inaccuracies in the represented information relating to the beneficiary's employment history stated on the ETA 750B, as established by information which emerged from interviews with the beneficiary. The petition was also denied because of the beneficiary's admission in 1974 that he paid a U.S. citizen to marry him to "get residency in the United States" that resulted in the application of the marriage fraud bar under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

On appeal, counsel contended that because the beneficiary's fraudulent marriage occurred in 1974, before the enactment of the fraudulent marriage bar provisions of the Act in 1986, then he is not barred from seeking an employment-based visa. In support of establishing the beneficiary's qualifying work experience, counsel also submitted another employment verification letter on appeal.

The AAO dismissed the appeal on August 15, 2006. It determined that the beneficiary's fraudulent conduct in 1974 fell within the parameters of the marriage fraud bar of section 204(c) of the Act because the determinative fact is when the petition was filed, not when the fraud occurred. Following a review of the record, the AAO also determined that the new employment letter submitted on appeal lacked credibility and concluded that the petitioner had failed to establish that the beneficiary possessed the requisite qualifying six months experience as a baker as set forth in the ETA 750A. The AAO further determined that additional alternative and independent grounds for denying the I-140 existed in that the record failed to demonstrate that the petitioner had a continuing ability to pay the proffered wage of \$27,726.40 per year as of the priority date of April 18, 2001.

The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

Counsel raises two issues on motion. Relevant to the applicability of section 204(c) of the Act, he reiterates the assertions made on appeal. On motion, counsel again relies on *Amarante v. Rosenberg*, 326 F.2d (9th Cir. 1964), and contends that because section 204(c) of the Act was not the applicable law when the beneficiary's fraudulent conduct occurred in 1974, long before the 1986 enactment of the marriage fraud bar in section 204(c), then the beneficiary is not barred from receiving an employment-based visa. Counsel urges that the

reasoning set forth in *Amarante* should be adopted in this case because it is the controlling Ninth Circuit opinion on this issue.

Counsel's reliance on *Amarante* is misplaced. The decision that the *Amarante* court rendered in 1964 is not relevant to whether the provisions of section 204(c) of the Act should be applied to the instant case. The *Amarante* court interpreted then existent provisions of 8 U.S.C. § 1101(a)(27)(A), which provided that nonquota immigrant petitions would not be approved if the alien previously had been accorded a nonquota status by reason of marriage fraud. The facts in that case related to an approval of a visa petition by an alien's first wife, which was subsequently revoked based on a finding of marriage fraud. The alien's application for permanent residency was denied. The marriage to the first wife was annulled and the court found that the alien's second wife's petition to classify his status was not barred because the approved visa petition and its subsequent revocation without approval of the application for permanent residency did not accord any status that would have prohibited the approval of the second spouse's petition.

Section 204(c) of the INA provides in pertinent part:

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.

As noted in the earlier AAO decision, the application of section 204(c) is based upon petitions filed on or after the date (November 10, 1986) of enactment rather than the date when the fraudulent conduct occurred. *Ramilo v. Dept. of Justice*, 13 F.Supp.2d 1055 (D. Hawaii 1998) *aff'd* 178 F.3d 1300, 1999 WL 311380 (9th Cir. 1999)(unpublished). That case involved a naturalized U.S. citizen, [REDACTED] who filed two immigrant visas on behalf of her alien spouse. The first was denied, but the second was approved in 1995. It was subsequently revoked based upon a prior fraudulent marriage entered into between the alien and an earlier spouse, [REDACTED] had unsuccessfully attempted to sponsor the alien on an immigrant visa but the petition was denied in 1984 based upon the district director's determination that the marriage was fraudulent. The court found that the revocation was proper and that the 1984 fraudulent marriage with [REDACTED] violated section 204(c) of the Act.

As noted above, the *Ramilo v. Dept. of Justice* decision was affirmed by the Ninth Circuit. For this additional reason, counsel's assertion that the earlier *Amarante* decision should be considered controlling is mistaken. In affirming the district court's decision, the Ninth Circuit stated:

The procedural application of § 204(c) was also proper. The enacting legislation clearly states that the relevant amendments to § 204(c) 'shall apply to petitions filed on or after the date of the enactment of this Act.' Immigration Marriage Fraud Amendments of 1986, § 4(b), Pub.L. No. 99-639, 100 Stat. 3537. Other courts have applied § 204(c) in situations

where the marriage fraud occurred prior to November 10, 1986, and the petition was filed after that date. See *Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1993) (marriage fraud in 1985 and petition filed in 1992); *Matter of Khaly*, 19 I & N Dec. 803, 803-04 (BIA 1988) (marriage fraud in August 1986 and petition filed in May 1987). The focus is thus on the date the petition was filed, not when the fraud occurred. The instant petition was filed after the enactment of § 204(c).

In this case, the application of section 204(c) is proper. The I-140 petition filed on March 7, 2003, is barred from approval by section 204(c) of the Act based upon the beneficiary's fraudulent marriage in 1974.

On motion, counsel briefly asserts that the AAO had no evidentiary basis to dismiss the beneficiary's employment verification letter submitted on appeal as fraudulent. Counsel's assertion is not persuasive.

As noted in the previous AAO decision, the approved labor certification (item 14) required the beneficiary to have six months of experience in the position offered as a "baker." Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), "any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien."

Conflicting information submitted by the petitioner to the record included the beneficiary's statements on the ETA 750B that he worked for the ██████████y in Pakistan from June 1997 to December 1999 as a baker, later contradicted by his admissions in a interview with agents of Immigration and Customs Enforcement (ICE) that he had worked as a server/cashier, not as a baker, and that he was employed from June 1997 to December 1998. Further questions were raised by a January 1, 1999, letter on a letterhead of the ██████████, signed by a "Managing Director" without identifying that individual, claiming that the beneficiary was employed as a baker from June 1997 to December 1998. Finally, a new letter, dated May 31, 1997, from ██████████, signed by ██████████" as managing director, states that the beneficiary was a doughnut and pastry maker from March 1995 to May 1997.

In its earlier decision, the AAO noted the fraudulent representations emerging from the beneficiary's interview with ICE, as well as the conflicting information appearing on the ETA 750B and the initial employment verification letter. It found that the overall questions arising out of the record, including the prevalence of fraudulent conduct and the lack of a credible explanation for the omission of other pertinent employment experience on the ETA 750B raised too many doubts to accept the credibility of an employment verification letter submitted for the first time on appeal. Upon review of these materials, there is ample reason to question the credibility of the letter provided on appeal. The petitioner failed to reconcile or credibly resolve these inconsistencies on appeal. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO concludes that there is no reason to alter its finding in this regard.

The AAO also found in its decision that the petitioner had not demonstrated its continuing ability to pay the beneficiary the prevailing wage of \$27,726.40 beginning on the priority date. The petitioner does not address this issue on motion. The AAO affirms its previous findings and incorporates by reference the discussion of the issue from its August 15, 2006 dismissal of the appeal.

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 previous decision of the district director and AAO are affirmed. The petition remains denied.