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U.S. Citizenship
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Services



Bb

FILE:

EAC-01-150-55268

Office: VERMONT SERVICE CENTER

Date: MAY 24 2007

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 initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative, the director consequently 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 petition will remain revoked.

The petitioner is a retail meat and vegetables store. It seeks to employ the beneficiary permanently in the United States as a meat cutter (butcher). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director determined that the beneficiary's apparently bigamous February 1993 marriage to Denise White was for the purpose of obtaining United States immigration benefits and to evade United States immigration law. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 8, 2005 revocation, the single issue in this case is whether or not the beneficiary entered into a fraudulent marriage for the purpose of obtaining United States immigration benefits and to evade United States immigration law.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits a brief and resubmits the affidavit of the beneficiary previously submitted in response to the NOIR. The relevant evidence in the record includes an affidavit of the beneficiary. The record does not contain any other evidence relevant to the beneficiary's previous marriage to Denise White.

On appeal, counsel asserts that the beneficiary did not submit a statement "admitting to submitting fraudulent paperwork to the service" and that the beneficiary did not willfully or knowingly attempt to evade the immigration laws through a fraudulent marriage.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Notwithstanding the provisions of subsection (b) of this section 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 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(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 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 named [REDACTED] filed a Form I-130 on behalf of the beneficiary as a United States citizen's spouse with Immigration and Naturalization Services (now CIS) New York District Office on April 23, 1993. The I-130 petition includes a Certificate of Marriage for the United States citizen and the beneficiary issued by City Clerk [REDACTED] the City of New York, State of New York on February 17, 1993. The record contains a certification from [REDACTED] supervisor of record room unit, the City of New York Office of the City Clerk. This certification states that: "a search of the marriage records index has revealed that no record of any marriage for [the beneficiary] and any person for the year's 1993 to 2003 in all of the five boroughs were found." Counsel submitted an affidavit of the beneficiary dated February 11, 2003 in response to the director's NOIR. In the affidavit, the beneficiary asserted that "I married [REDACTED] on November 15, 1975 in Orense, Spain. This is my one and only marriage. I have never met [REDACTED] I have never spoken to [REDACTED] I have never heard of [REDACTED] I have never been married to [REDACTED]" It is clear that the marriage certificate submitted in connection with the beneficiary's marriage-based petition was fraudulent and the petition was based on a fraudulent marriage.

Counsel argues on appeal that the beneficiary has never knowingly submitted fraudulent documents in support of an I-130/I-485 application on his behalf in connection with [REDACTED] that he was never aware that the person representing him in 1993 submitted an I-130/I-485 application based upon a marriage to a United States citizen; that he did not sign any immigration documents with the knowledge that he had entered into a fraudulent marriage, and that he did not know that the actions taken by the person representing him were for the purpose of evading United States immigration laws. 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)). However, the AAO 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 District 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. Both forms contain the beneficiary's signature which appears exactly the same as ones the beneficiary signed in all other documents in the file. Immediately above the space for the beneficiary's signature on the Form I-485 there are two paragraphs: (1) "Penalties: You may, by law, be fined up to \$10,000, imprisoned up to five years, or both, for knowingly and willfully falsifying or concealing a material fact or using any false document in submitting this application"; (2) "Your Certification: I certify, under penalty of perjury under the laws of the United States of America, that the above information is true and correct. Further, I authorize the release of any information from my records which the Immigration and Naturalization Service [now CIS] needs to determine eligibility for the benefit that I am seeking." The form G-325A also contains a penalty warning immediately below the space for signature which reads as "Penalties: Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact." When the forms were given to the beneficiary for signature as alleged by counsel, these words should have reminded the beneficiary to read the contents of the form and to check whether the contents are true and correct in order to avoid the penalties set forth in the forms. Despite of this penalty warning, with his signatures the beneficiary certified that he knew the contents of the forms, he ensured that all the information was true and accurate, and he took responsibility for any false statements of a material fact. Additionally on the Form G-325, the US citizen's name as wife, date of marriage and place of marriage are listed above where the beneficiary needed to sign his name. The beneficiary's marriage to [REDACTED] in Spain on November 15, 1975 was not revealed on the form. Instead the form indicated that the beneficiary had no previous marriage except the current one with [REDACTED]. The beneficiary could not have missed that information before he signed the form. Moreover, the record indicates that the beneficiary filed his employment authorization document (EAD) application with the CIS New York District Office on May 24, 1993 based on the concurrently filed application for adjustment of status with the family-based immigrant petition. He was issued the EAD on the same day for a period from June 4, 1993 to June 3, 1994. He became a recipient of immigration benefits from a fraudulent marriage and continued the benefits even after he indicated that he heard that the immigration officer that issued his EAD was arrested and he knew something was wrong.

In response to the director's NOIR, counsel submitted an affidavit of the beneficiary dated February 12, 2003. In this affidavit, the beneficiary asserted that in 1993 he filed an application for permanent residence, but he did not knowingly and willfully file this application based upon a marriage to [REDACTED] and that he had never knowingly and willfully submitted any false application or documents to the Immigration and Naturalization Service explaining the processing as follows:

In the summer of 1992 a woman I knew as [REDACTED] would come to my store two or three times a week. During a conversation with her she told me that she owned an income tax preparation and a travel agency in the Washington Heights section of New York City. She stated that she knew someone at the Immigration and Naturalization Service who would help me obtain my permanent resident status. During the summer she would bring some of her clients to the store who had obtained their residence through her services. After two months I agreed to have her represent me. I paid her \$5000 in cash as an initial payment to obtain permanent resident for me and my wife, [REDACTED]. A balance of \$5000 was due when we received our residence.

In the spring of 1993 [REDACTED] had me and my wife sign some papers. She did not explain them to me. She took me and my wife to the Immigration and Naturalization Service office at [REDACTED] in New York City on separate days to obtain our employment authorization cards. I went first. At the INS office I briefly met an Immigration Examiner whose name was [REDACTED], who was a tall man of Hispanic background. He did not speak to me. He only spoke to [REDACTED]. At the office I was photographed, fingerprinted, and I signed documents. I do not know what I signed because the documents were in English, and I don't understand English very well. That was the one and only time I met [REDACTED].

I was issued an Employment Authorization Card at the office. My wife went through the same process shortly after I did.

In April 1993 [REDACTED] told me and my wife would have to go back to the INS office sometime around the beginning of May to finish the process of obtaining our residence. I then paid the \$5000 balance to [REDACTED]. On the day [REDACTED] said she was coming by to take me to the INS office she did not come. I called a number she had given me and I spoke to a man who said he was her husband. He told me that he did not know where [REDACTED] was, and that [REDACTED] had been arrested. I tried to locate [REDACTED] but I could not find her. I did not go to the INS office to ask about my residence because I was afraid something was wrong.

Although counsel contends on appeal that the beneficiary did not submit a statement "admitting to submitting fraudulent paperwork to the service" as stated in the director's decision dated July 8, 2003, in his affidavit submitted in response to the director's NOIR, the beneficiary indicated that the person named [REDACTED] was neither an immigration service professional, nor an immigration attorney, and that the only reason the beneficiary agreed to have [REDACTED] represent him and paid \$10,000 was that she knew someone in the CIS who could obtain him permanent residence. **The beneficiary implicitly admitted the processing of immigration paperwork on his behalf was started for the purpose of evading immigration laws.**

The beneficiary claimed that he did not know what he signed at the CIS office because the documents were in English. That assertion is not persuasive. The record shows that the beneficiary entered the United States as a B-1 or B-2 visitor in 1983 and was granted a change of nonimmigrant status to E-2 treaty investor to run business in 1984. It is not persuasive that the beneficiary did not know what he signed because he did not understand English very well after he stayed and ran business for 10 years in the United States. The beneficiary could have asked [REDACTED] or the Hispanic background immigration office to translate the documents if he did not understand the documents.

The beneficiary's assertion that he has never knowingly and willingly submitted any false applications or documents to the CIS is not persuasive. The beneficiary did not submit any evidence to support his assertion except the affidavit from himself. However, the AAO notes that beyond the director's decision the record also contains adverse evidence regarding the beneficiary's qualification for the proffered position. CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with

the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The certified Form ETA 750 in the instant case indicates that the proffered position of meat cutter (butcher) requires two years of experience in the job offered. The beneficiary submitted an experience letter from [REDACTED], the beneficiary's wife, as the vice president of [REDACTED], located at [REDACTED] verifying the beneficiary was employed as a butcher from April 1992 to May 1995 under her supervision ([REDACTED]'s letter). The record does not contain any documentary evidence to support said employment of the beneficiary. Instead, the record shows that the beneficiary filed a Form I-526, Immigrant Petition by Alien Entrepreneur, to seek lawful permanent residence in the United States with the CIS Nebraska Service Center on February 23, 1995. The documents show that on October 12, 1993, the beneficiary formed a corporation named [REDACTED] in Union City, New Jersey to operate a baking business; he claimed on the form that he owned 100% of shares of the company stock; that he was the president and that he intended to work 8 hours a day from Monday to Friday; and that he worked as a baker for that company at [REDACTED] from October 12, 1993 to the present (i.e. February 17, 1995, the date he signed the Form I-526). The submitted [REDACTED]'s tax returns for 1993 and 1994 indicated in Schedule E that each of the beneficiary and his wife owned 50% of corporation common stock and devoted 100% of time to the business. In the affidavit dated July 21, 1995, the beneficiary stated that in 1991 he purchased the business of [REDACTED] in the City of Union City, New Jersey, and invested in this business all of his savings knowing well that this business would increase in size, and would provide more than 15 jobs in the next year. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). There are inconsistencies between [REDACTED] letter and the beneficiary's I-526 petition. One of them provided a false statement or fraudulent document to CIS. It is most likely that [REDACTED] experience letter is fraudulent. Therefore, it appears that the beneficiary did submit a fraudulent document to CIS in order to obtain his permanent residence.

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 fraudulent. 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. There is ample evidence that the beneficiary conspired to evade the immigration laws 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.

Beyond the director's decision and counsel's assertions, the AAO finds that the director had another good and sufficient cause to revoke the approval of this petition. Section 205 of the Act provides that Secretary of Department of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 and the realization by the director that

the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

As discussed above, the AAO finds that the experience letter from [REDACTED] pertinent to the beneficiary's qualifications is most likely fraudulent, and thus cannot be considered as primary regulatory-prescribed evidence to establish the beneficiary's qualifications. The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a full time butcher for the proffered position prior to the priority date. The director erred in approving the instant petition by accepting a fraudulent experience letter as primary regulatory-prescribed evidence of the beneficiary's qualifications.

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. The director's decision is affirmed. The petition remains revoked.