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U.S. Citizenship
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Services

B6

[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: SEP 27 2007
EAC 04 208 50244

IN RE: Petitioner:
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 Director, Vermont Service Center denied the instant Form I-140 visa petition that is before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the beneficiary had previously entered into or attempted to enter into a sham marriage for the purpose of evading immigration laws and denied the petition pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. As set forth in the director's decision of denial the sole issue in this case is whether or not the petition must be denied based on section 204(c) of the Act.

Section 204(b) states, in relevant part,

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3)¹, the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition

Section 204(c) of the Act states,

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal. In the instant case the record contains (1) Form I-485 Application to Adjust Status submitted January 13, 1995 and approved December 5, 1995 (2) a Form I-751 Petition to Remove the Conditions on Residence submitted

¹ Section 203(b) of the Act is the statute pursuant to which the instant Form I-140 visa petition was filed.

on December 3, 1997, (3) the March 3, 1998 decision of the district director denying the I-751 petition, (4) the March 5, 1999 decision of an immigration judge affirming the Arlington, Virginia district director's denial of the I-751 petition, denying voluntary departure, and ordering the beneficiary removed to Morocco, (5) letters and an affidavit from the beneficiary's ex-wife, (6) affidavits from the beneficiary, his mother, and a friend of his ex-wife who also knows the beneficiary, (7) an affidavit from another friend of the beneficiary's ex-wife, (8) letters from a previous neighbor of the beneficiary and his ex-wife during their marriage, a friend of the beneficiary and his wife, friends of the beneficiary, the beneficiary's employer, and the beneficiary's manager, (9) letters from the beneficiary's ex-wife's mother and a friend, (10) the 1994, 1995, and 1996 joint personal tax returns of the beneficiary and his then-wife, (11) a Decree of Summary Dissolution filed December 23, 1997, declaring the subject marriage of the beneficiary to be dissolved as of January 22, 1998, and other documents pertinent to the dissolution of their marriage, (12) cancelled checks, check registers, account statements, insurance cards, paycheck stubs, letters addressed to the beneficiary's ex-wife, airline ticket stubs and related documents, (13) counsel's brief, mailed July 30, 1999, in support of the beneficiary's appeal of that March 4, 1999 decision, (14) a December 10, 2002 decision of the Board of Immigration Appeals (BIA), (15) a letter from counsel dated June 9, 2003 and delivered to the Arlington District Office that same day, (17) a letter in French dated June 5, 2003 (with English translation) from a doctor in Rabat, Morocco, and (18) counsel's January 27, 2006 brief pertinent to the beneficiary's appeal from the denial of the Form I-751 petition. The record contains no other evidence pertinent to the issue of whether the beneficiary entered into a sham marriage.

In her affidavit and letters, one of which was to the beneficiary's mother and the others to CIS, the beneficiary's ex-wife stated that, although she did not know this at the time, her husband entered into their marriage solely to obtain an immigration benefit. She cited various incidents and conversations in support of that assertion.

In his December 2, 1997 affidavit the beneficiary gave his version of the events leading to his marriage and its subsequent dissolution. He claims that the marriage was not a sham, but subsequently became unsustainable.

The various bank documents, tax returns, and other documentary evidence provided tend to support the proposition that the beneficiary and his ex-wife cohabited during some portion of their marriage, a fact that is undisputed.

Many of the various third party letters and affidavits support the beneficiary's version of events. The letters from the beneficiary's ex-wife's mother and the affidavit from one of her friends, however, strongly suggest that the beneficiary entered into the marriage to obtain an immigration benefit.

In his brief counsel argued that the various affidavits and the other evidence overcome the assertions by the beneficiary's ex-wife that their marriage was a sham intended to circumvent immigration law.

The March 5, 1999 decision of the immigration judge, after considering all of the evidence then before the court, found the affidavit of the beneficiary's ex-wife to be credible, and found that the beneficiary had entered into a sham marriage for the purpose of circumventing immigration law. The court declined to

remove the conditional status and ordered him removed pursuant to INS §§ 237(a)(1)(G)(ii) and 237(a)(1)(D). The court also denied voluntary departure. The beneficiary filed an appeal from that decision.

The December 10, 2002 decision of the BIA reopened the decision and remanded the matter to the Immigration Judge based on a request from the beneficiary. The BIA did not find it “necessary or appropriate to adjudicate the appeal” on its merits.

In his June 9, 2003 letter counsel stated that the beneficiary, while the appeal was pending before the BIA, had left the country to attend to his gravely ill father, unaware that he was unable to do so without being granted an advanced parole. The beneficiary’s May 27, 2003 affidavit confirms the departure as stated by counsel and adds that the beneficiary remained absent from the United States from April 2002 until March 2003.

The June 5, 2003 doctor’s certificate states that the beneficiary’s father sustained a severe respiratory collapse and was transported to Bordeaux, France during March 2002. That certificate further states that the beneficiary’s presence there was “indispensable.” That certificate does not state when the beneficiary’s presence in France was no longer required. The certificate also does not state whether the doctor who wrote the certificate was present in Bordeaux or what other basis he may have had for the assertion that the beneficiary’s presence there was indispensable.

Based on the evidence then in the record, the director issued a notice of intent to deny the instant Form I-140 petition on July 18, 2005. After considering the response of the beneficiary and counsel the director denied the petition on September 27, 2005.

On appeal, counsel asserts that the only evidence in the record that the beneficiary’s marriage was a sham is a letter from the beneficiary’s spouse, and that the evidence in opposition is more credible and outweighs the beneficiary’s ex-wife’s letter. Counsel urges that the petition should therefore be approved.

On March 5, 1999 the immigration judge found, based on all of the competent evidence then in the record, that the beneficiary’s previous marriage was a sham designed to obtain an immigration benefit. The beneficiary was entitled to appeal that decision, and an appeal was filed. Sometime during April 2002, however, while that appeal was still pending, the beneficiary left the United States for almost a year. Counsel acknowledged that the beneficiary received no advance permission to make that trip.

This office will not engage in a detailed analysis of the evidence relating to the beneficiary’s marriage. The director reasonably based his decision on the immigration judge’s finding that the beneficiary was deportable. *Matter of Agdinaouy*, 16 I&N Dec. 545, 547 (BIA 1978). See also *Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

The regulation at 8 C.F.R. § 1003.4 states, in pertinent part, “Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens, as defined in section 1001(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.”

While the beneficiary may, as alleged, have had personal reasons for leaving, the beneficiary effectively withdrew his appeal taken from the denial of the I-751 Petition to Remove the Conditions on Residence by departing the United States. The March 5, 1999 decision of the immigration judge and the finding that the beneficiary entered into a marriage for the sole purpose of evading immigration laws is valid as though never appealed, and is apparently now unappealable. The record does not establish that the immigration judge's decision constituted a gross miscarriage of justice that might warrant a collateral attack on that proceeding. *Matter of Agdinaouy*, 16 I&N Dec. at 547. Pursuant to section 204(c) of the Act the petition may not be approved. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of denial.

The beneficiary detailed his salient work experience on the Form ETA 750B submitted in this matter. The beneficiary stated that he worked (1) for J.W. Marriot Hotel in Miami from March 2001 to June 2001, (2) for Amphora Restaurant in Herndon, Virginia from July 2001 to September 2001, (3) for [REDACTED] in Great Falls, Virginia from September 2001 to March 2002, (4) for Auberge du Vieux Port in Villenave d'Ornon, France from July 2002 to March 2003, and (5) for Mienyu restaurant in Washington, D.C. April 2003 at least until the 750 was filed on June 14, 2004.

The instructions to the Form ETA 750B required the beneficiary to "List all jobs . . . related to the occupation for which the alien is seeking certification" As the proffered position in this matter is Assistant Restaurant Manager, the beneficiary's response indicates that the beneficiary had no other experience relevant to that position.

The experience the beneficiary relied upon to show that he is eligible for the proffered position, however, is employment as a manager for [REDACTED] also in DC, from May 1998 to January 2001. That employment is mentioned in a letter, dated June 20, 2004, from the petitioner's owner, and an employment verification letter from that restaurant was provided, supporting that employment claim.

The discrepancy between the beneficiary's employment history as stated on the Form ETA 750B and that claimed in his employment verification letter renders the beneficiary's claim of qualifying employment, and his eligibility for the proffered position pursuant to the terms of the labor certification, questionable.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petition should have been denied on this additional basis. Because the decision of denial did not discuss this issue, however, the petitioner has not been accorded the opportunity to address it, and today's decision does not rely on that issue. If the petitioner wishes to pursue this matter further, however, it should provide independent objective evidence of the beneficiary's employment for [REDACTED], as required by *Matter of Ho*.

Further, the regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Although the petitioner was required to submit copies of annual reports, federal tax returns, or audited financial statements with the petition to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, April 24, 2001, and continuing, the record contains no such evidence after 2001, even though the petition was filed on July 8, 2004.

Consistent with 8 C.F.R. § 103.2(b)(8) the service center should have issued a request for evidence conforming to the requirements of 8 C.F.R. § 204.5(g)(2). Because it did not, today's decision does not rely, even in part, on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If the petitioner wishes to further pursue this matter, however, it should provide evidence to satisfy the requirements of 8 C.F.R. § 204.5(g)(2).

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.