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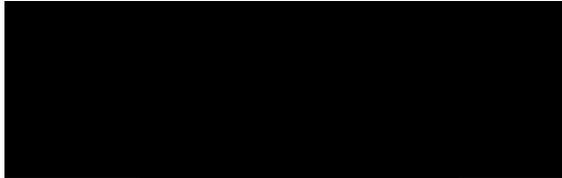
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 09 2009

EAC 04 207 53102

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The approval of the employment-based immigrant visa petition was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed; however, the matter will be remanded as a motion to reopen and reconsider.

The petitioner claims to be a health care service provider. It seeks to permanently employ the beneficiary in the United States as a registered nurse under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification).<sup>1</sup> After initially approving the petition, the director subsequently determined that the beneficiary is subject to the marriage fraud bar under section 204(c) of the Act, and revoked the approval of the petition.<sup>2</sup>

The AAO maintains plenary power to review each appeal on a *de novo* basis. See *Janka v. U.S. Dept. of Transp.*, 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 pertinent evidence in the record, including new evidence properly submitted upon appeal.

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.

At the outset, it is noted that the instant appeal was not timely filed. Counsel's appeal was received by U.S. Citizenship and Immigration Services (USCIS) on April 13, 2007, 30 days after the decision was issued. An appeal of a revocation must be filed within 15 days after service of the decision. See 8 C.F.R. § 205.2(d). If the decision was mailed, the appeal must be filed within 18 days. See 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt by

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<sup>1</sup>The petitioner applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. See also 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the U.S. Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i), an applicant for a Schedule A position would file a petition "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act shall be the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

<sup>2</sup>Section 205 of the Act permits the director to revoke the approval of a petition "at any time, for what he deems to be good and sufficient cause."

USCIS. *See* 8 C.F.R. § 103.2(a)(7)(i). It is noted that the NOR incorrectly states that the petitioner had 33 days to file an appeal the revocation. Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. As the appeal was untimely filed, it must be rejected. The fact that the NOR stated an incorrect period to file the appeal of the revocation does not forgive the late filing. The regulation at 8 C.F.R. § 205.2(d) is sufficient notice to the petitioner of the allotted time to appeal a revocation. Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Following a review of the record of proceeding, it is concluded that the untimely appeal meets the requirements of a motion to reopen and reconsider, and the case will be remanded for further consideration.

As set forth in the director's March 14, 2007 Notice of Revocation (NOR), at issue in this case is whether the beneficiary entered into a marriage for the purpose of evading the immigration laws, and is therefore subject to the marriage fraud bar under section 204(c) of the Act .

The beneficiary, a citizen of Nigeria, was admitted into the United States in B-2 visitor status on September 19, 2002. On January 28, 2003, the beneficiary married [REDACTED], a U.S. citizen. On February 19, 2003, [REDACTED] filed a Form I-130, Petition for Alien Relative (I-130) on behalf of the beneficiary, seeking to sponsor her for lawful permanent residence as an immediate relative of a U.S. citizen pursuant to section 201(b) of the Act. Concurrent with the filing of the I-130, the beneficiary also filed a Form I-485, Application to Adjust Status, and a Form I-765, Application for Employment Authorization.

On October 2, 2003, the local office of the Immigration and Naturalization Service (now USCIS) sent [REDACTED] a notice instructing him and the beneficiary to appear for an interview on October 20, 2003. On October 15, 2003, the beneficiary's former counsel informed the local office that [REDACTED] was incarcerated and was not scheduled to be released until September 2005. Counsel requested that the marriage interview be postponed until after [REDACTED] release.

On February 2, 2004, the beneficiary served [REDACTED] with a Petition for Dissolution of Marriage at the Hardee County Correctional Facility. On May 27, 2004, the beneficiary's marriage to [REDACTED] was terminated. On August 11, 2004, beneficiary's former counsel submitted a Notice of Withdrawal to the local USCIS office, requesting the withdrawal of the marriage-based case.

On June 30, 2004, the petitioner filed the instant petition on behalf of the beneficiary. The director approved the petition on July 7, 2005.

On November 27, 2006, the director issued a Notice of Intent to Revoke (NOIR) the petition, stating that "[i]t has now come to the attention of this office that you have a Petition for Alien Relative (Form I-130), that is suspected of being marriage fraud." The NOIR further states that the "fact that suspected fraud was found on a prior petition raises doubts for the Service that the present filing is valid. Further evidence would be necessary to establish a valid current job offer such as pay stubs, W-2 forms, or any other financial documentation."

Counsel filed a response to the NOIR on December 26, 2006. On March 14, 2007, the director issued a Notice of Revocation (NOR), revoking the approval of the instant petition. The NOR states that the response to the NOIR contained letters from the beneficiary's ex-husband and a letter from former counsel "which do not address the issues of marriage fraud." The NOR also states that "no documentary evidence to establish that the marriage was a bona fide marriage was submitted with the petition."

On appeal, counsel asserts that the beneficiary and her husband lived together as husband and wife, that the beneficiary did not attend her marriage interview because her husband was incarcerated, and that the beneficiary divorced her husband because of his criminal activities.

The evidence in the record of proceeding includes a letter from [REDACTED], sister of [REDACTED], dated April 6, 2007, describing the beneficiary's marriage to [REDACTED]; letter from [REDACTED], dated April 6, 2007, stating that the beneficiary and [REDACTED] lived at her house as husband and wife, and describing the relationship; letters between [REDACTED] and the beneficiary during his incarceration, dated October 28, 2003, November 21, 2003, November 25, 2003, and December 5, 2003; Money order, dated December 2, 2003, issued to [REDACTED] from [REDACTED] for \$30; Return of Service Affidavit dated February 2, 2004, testifying that [REDACTED] was served with a Petition for Dissolution of Marriage at Hardee County Correctional Facility; the beneficiary's divorce decrees from two prior marriages in Nigeria; marriage certificate indicating that the beneficiary and [REDACTED] were married on January 28, 2003; Final Judgment of Dissolution of Marriage, dated May 27, 2004, terminating the marriage of the beneficiary and [REDACTED]; undated letter from the beneficiary submitted to USCIS in response to the NOIR; and several photographs purportedly of [REDACTED] and the beneficiary.

Section 204(c) of the act states that 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 [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.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states:

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 an 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.

An NOIR is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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. *Matter of Li*, 20 I&N Dec. 700, 701 (BIA 1993); *Matter of Arias*, 19 I&N Dec. 568, 569-570 (BIA 1988); *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

The NOR can only be sustained if there is substantial and probative evidence in the alien's file to the effect that the prior marriage was entered into for such purpose, and, where the district director concluded that there was evidence in the record from which it could "reasonably be inferred" that a marriage had been entered into for the primary purpose of obtaining immigration benefits, the substantial and probative evidence, requisite to the revocation of a subsequently approved visa petition, was not presented. *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In making a determination that a beneficiary's prior marriage comes within the purview of section 204(c) of the Act, the director should not give conclusive effect to determinations made in prior proceedings, but, rather, should reach an independent conclusion based on the evidence of record, although any relevant evidence may be relied upon, including evidence having its origin in prior USCIS proceedings involving the beneficiary or in court proceedings involving the prior marriage. *Id.*

In the instant case, the director did not raise any factual issues to support the revocation. Neither the NOIR nor the NOR state any factual evidence in the record from which it could be reasonably inferred that the beneficiary's marriage was fraudulent. Further, the NOIR instructed the petitioner to provide evidence of the *bona fides* of the job offer, not of the beneficiary's prior marriage. Where a NOIR is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of the derogatory evidence, revocation of the visa petition cannot be sustained. *Matter of Arias*, 19 I&N Dec. at 570.

In view of the foregoing, the decision of the director would be withdrawn if it were not being rejected as untimely filed. The petition is remanded to the director as a motion.

**ORDER:** The appeal is rejected. The petition is remanded to the director as a motion to reopen and reconsider for further action in accordance with the foregoing and entry of a new decision.