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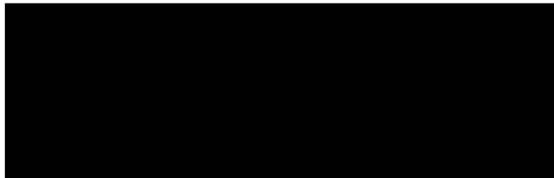
IN RE:

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center on September 10, 2003. In conjunction with the beneficiary's I-485 Application for Adjustment of Status interview, the director revoked the instant petition, stating that a prior I-130 visa petition filed on August 15, 1995 had been revoked on August 9, 1996 based on evidence that the beneficiary had entered into a marriage to evade United States immigration laws. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a precision metal fabricating company. It seeks to employ the beneficiary permanently in the United States as a sheet metal fabricator, Class A under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

The record shows that the appeal is properly filed, 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 denial, the single issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case.

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 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.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of*

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.

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).

Tawfik at 167 states the following, in pertinent part:

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. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

The record of proceeding contains the following relevant evidence, submitted to the record in 1990s:

1. A I-485 Application to Register Permanent Residence or Adjust Status received by the legacy INS New York Office on August 15, 1995. An individual identified as [REDACTED] Astoria, New York, born on February 26, 1961 in San Antonio, Colombia, is the petitioner. The Application type is marked as b: "My spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category which allows derivative status for spouses and children." The petitioner's parents are identified as [REDACTED] and [REDACTED]. In an accompanying G-325, the petitioner identifies [REDACTED] as his spouse, born on May 1, 1967 in New York, and that they were married on April 20, 1994. A photograph is attached to the I-130 petition appears to be a younger photo of the applicant;
2. A copy of a Colombian passport No. [REDACTED] issued in New York City on May 8, 1992 to [REDACTED] with photograph that identifies his birth date as February 26, 1961, in Bello, "Anti," apparently submitted with the I-485 petition. This document has an I-94 Departure Record document that states Mr. [REDACTED] entered the United States at New York on September 26, 1994 as a B-1 visitor;
3. A Form I-130 filed by [REDACTED] for [REDACTED] along with an accompanying G-325A, Biographic Information for [REDACTED]. This document indicates that she married [REDACTED] born February 26, 1961 in San Antonio, Colombia, on April 20, 1994, in North Hempstead, New York. The document also indicates that the alleged spouse last entered the United States on September 26,

- 1994;
4. A birth certificate, Number [REDACTED], issued by the City of New York, Department of Health, Bureau of Vital Statistics on October 21, 1991, that states Sheila Jackson was born on May 1, 1967;
 5. A copy of a certificate of marriage between [REDACTED], born "Feburaray" 26th, 1961, and [REDACTED] from the County Clerk of North Hempstead dated April 20, 1994;
 6. Two copies of a document entitled "Translation of Baptism Certificate" dated February 10, 1994. This document states that the parents of [REDACTED] born February 26, 1961, in Bello (Ant) Colombia are [REDACTED] and [REDACTED];
 7. Three copies of a birth certificate for [REDACTED], born February 26, 1961 in "Belo" that states "[REDACTED]." All three birth certificates have registration stamps on them that are denominated in sucres, the then official money of Ecuador. One copy of the birth certificate has the title "Republica de Colombia" imposed on the top of the document, while the other two copies are blank at the top, with no country identification. The text of all three copies of the birth certificate identify the location of the birth certificate as in the parish of San Antonio, with the child identified in the certificate being the son of [REDACTED] and [REDACTED].

The record also contains a copy of a Request for Interview issued by the legacy INS New York District Office on August 15, 1995. This document instructed [REDACTED] to appear for an interview on August 5, 1996 in connection with an Adjustment of Status application.

Other legacy INS records found in the file include a Decision to Deny an I-130 petition submitted to classify [REDACTED] as the spouse of [REDACTED]. The decision, dated August 9, 1996, states that the birth certificate of [REDACTED] and the marriage certificate between her and [REDACTED] issued on April 20, 1994, in Hempstead were verified and found to be fraudulent. The File Number identified on this document is the beneficiary's A File number [REDACTED].

The record also contains a Decision dated August 9, 1996 addressed to [REDACTED] Astoria, New York. This document states that [REDACTED] application for status as a permanent resident is denied and that [REDACTED] would be further advised of procedure to effect his departure from the United States. This document also notes that any EAD that the applicant has been issued is terminated. A certified mail envelope is also in the record that has the following handwriting on it: "4th time still no such number Unknown." The envelope's original date is August 14, 1996.

² Accompanying the beneficiary's I-485 application filed in 2002, is a certificate of baptism from the Church of St. Maria Goretti, Bello, Antioquia, Colombia with a certified translation that states his parents are [REDACTED] and [REDACTED].

Subsequent materials submitted by current counsel to the record on June 23, 2005 include a copy of a Employment Authorization Document (EAD) issued to [REDACTED] under the provision 274A.12(C)(09) valid until September 12, 1996, as well as a cancelled passport Number [REDACTED] that is stamped "Anulado, Cancelled." This passport is identical to the uncanceled passport previously submitted to the record in conjunction with the earlier I-130 and I-485 petitions. As stated previously, this passport and accompanying I-94 departure record indicate the beneficiary's September 26, 1994 entry into the United States as a B-1 visitor.³

On appeal, counsel submits a document from the Town of North Hempstead, New York Registrar of Vital Statistics, dated February 9, 2007 that states no record has been found in the office for the marriage between [REDACTED] and [REDACTED] on April 20, 1994. Counsel also submits documentation on the suspension from the practice of law by the beneficiary's former counsel, [REDACTED]. Counsel also submits, in Exhibit Seven, a brochure and various Internet articles on immigration fraud involving sham marriages to obtain immigration documents.

The record also contains an affidavit from [REDACTED], dated June 23, 2005 that states the beneficiary is her youngest brother and he came to the U.S. in November 1986. Ms. [REDACTED] states that the beneficiary contacted Attorney Richard William in Stamford, Connecticut to get a green card but that the beneficiary only received a work permit. The beneficiary's sister stated when her brother's friend got deported, her brother asked the attorney to check his case to see if his documents were real, but was reassured by the attorney that his case never existed in immigration records and it was alright to file a new petition for his green card. [REDACTED] states that her brother had been married only one time in Norwalk, Connecticut.

On appeal, counsel states that USCIS contends the beneficiary conspired to fraudulently procure an immigration benefit through marriage. Counsel states that he received no evidence through his Freedom of Information Act enquiry to refute this charge. Counsel states that he conducted his own separate investigation and submits the letter from the Office of the Registrar, North Hempstead as evidence that no marriage ever took place between the beneficiary and [REDACTED]. Counsel states that the director's revocation is based on a purported marriage. Counsel states that the ban contained in Section 204 (c) of the Act, that no other petitions may be approved, is triggered by the alien entering into a marriage, and that the beneficiary of the instant petition did not enter into a marriage. Counsel also states that it is USCIS' burden to prove that the I-130 forms and I-485 forms in the record were prepared by the beneficiary. Counsel states, that even if the signatures on these forms were the beneficiary's, he apparently signed blank forms. Counsel states that the beneficiary fell prey to an unscrupulous person promising permanent residence who had the beneficiary sign blank forms, a common scam. Counsel contends that the beneficiary was not party to any conspiracy because he was the victim of it.

Counsel's assertions are not persuasive. The evidence in the record includes a previous I-130 and I-

³ The AAO notes that counsel submitted additional documentation that indicated an earlier entry into the United States in the 1980s.

485 petition submitted by the beneficiary based on a claimed marriage. Whether the beneficiary himself filled out the forms or was provided blank documents to sign is a moot point. Either way, he participated in a fraudulent attempt to procure an immigration benefit. The use of the beneficiary's uncanceled Colombian passport and what appears to be his photo as identification for the initial I-130 petition is significant evidence of the beneficiary's involvement in the fraudulent I-130 petition.

In evaluating the evidentiary weight to be given the affidavit submitted by the beneficiary's sister, versus the USCIS records, the AAO views the USCIS records as more probative and credible. Further, an affidavit by the beneficiary as to the events involving the filing of the fraudulent petition would carry more weight than his sister's affidavit.

Counsel's submission of the statement from the Office of the Registrar that no marriage record could be found further supports the director's determination that the marriage certificate found in the record purportedly issued by the same Registrar's office is fraudulent. The birth certificates found in the record to establish the beneficiary's birth in Colombia are blatantly fraudulent based on the Ecuadorian stamps placed on them and the obvious alteration of information as to the county of origin.

The AAO acknowledges that counsel's documentation submitted on appeal shows that the beneficiary did not enter into a marriage. However, the record supports the conclusion that the beneficiary's documents including his passport had been used in conjunction with a fraudulent I-130 filing that resulted in the issuance of an EAD document⁴ for one year to the beneficiary. The record indicates that USCIS officials in New York considered the documents submitted to the record in connection with the Form I-130 to be fraudulent. USCIS records indicate that action on the I-130 petition was terminated for this reason. Based on the fraudulent marriage certificate, no marriage took place in connection with the filing of the previous immediate relative petition. 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 to section 212(a)(6)(c)(i) of the Act.⁵ The director's decision dated January 25, 2006 shall be withdrawn. Nevertheless, the petition will be denied based on fraud.

Beyond the decision of the director, the AAO notes that the petitioner has not established its ability to pay the beneficiary the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United*

⁴ The provision under which the EAD card was issued, namely, 274A.12(C)(09), and its 1995 to 1996 dates of validity establish that it was issued in conjunction with an I-130/I-485 Adjustment of Status petition and that it was most likely issued in conjunction with the fraudulent I-130 petition.

⁵ Section 212(a)(6)(C)(i) states: "Misrepresentation-In general-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

States, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$23 per hour (\$47,480 per year). The Form ETA 750 states that the position requires four years of work experience in the proffered position.

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 pertinent evidence in the record. With the initial petition, the petitioner submitted a document entitled "D and B Express Report" that describes the petitioner's business operations and officers. The petitioner also submitted a report on the beneficiary's wages during the period June 29, 2002 to November 21, 2002. This report indicates that for a forty and a half hour work week, the beneficiary received gross pay of \$815, and that the beneficiary's hours varied from week to week. In a Request for Evidence dated May 29, 2003, the director cited 8 C.F.R. § 204.5(g)(2) and requested further evidence as to the petitioner's ability to pay the proffered

wage. The director also noted that the record indicated the petitioner had employed the beneficiary since January 1997 and requested that the petitioner submit either a copy of the beneficiary's 1998 and 2002 W-2 Forms or the petitioner's 1998 and 2002 U.S. federal corporate income tax returns with all schedules and attachments, or audited reports for the same two years.

In response, the petitioner submitted the beneficiary's W-2 Forms for tax years 1998 and 2002. These documents indicated the petitioner paid the beneficiary \$42,893.97 in 1998 and \$44,513 in 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record does not indicate how the petitioner is structured. On the petition, the petitioner claimed to have been established in 1965, to have a gross annual income of \$2,000,000 and to currently employ 22 workers. On the Form ETA 750, signed by the beneficiary on December 12, 1997, the beneficiary claimed to have worked for the petitioner since January 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary wages of \$42,893.97 in 1998 and \$44,513 in 2002, and that it paid the beneficiary wages of \$12,997.50 for a five month period during the 2002 tax year. None of the established wages is equal to or greater than the proffered wage of \$47,480. Therefore the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages in 1998 and 2002 and the entire proffered wage during tax years 1999,2000, and 2001, based on the petitioner's net income or net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis

for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.

The record before the director closed on August 25, 2003 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return would have been the most recent return available. The AAO notes that the record does not contain any of the petitioner's federal corporate income tax returns. The record is not clear why the director in his RFE did not note this omission or why he only requested the petitioner's tax returns from the 1998 priority date year and tax year 2002. The regulation at 8 C.F.R. § 204.5(g)(2) clearly states that the petitioner has to establish its ability to pay the proffered wage "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."

Thus, the petitioner has to establish its ability to pay the proffered wage of \$47,480 in tax years 1998, 1999, 2000, 2001, 2002, and 2003, based on either the beneficiary's wages, or the petitioner's net income or net current assets. Without these documents, the AAO cannot examine whether the petitioner can pay the difference between the beneficiary's actual wages and the proffered wage, or the entire proffered wage, as applicable. Thus, the petitioner has not established its continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.