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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
and Immigration
Services

B6

FILE:

SRC 06 247 53014

Office: TEXAS SERVICE CENTER

Date:

APR 14 2010

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a production manager 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 an ETA Form 9089, Application for Permanent 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 December 5, 2007 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. The approval of this petition was denied as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on April 28, 2000. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, and a copy of a marriage certificate between the beneficiary and [REDACTED]

On June 14, 2005 [REDACTED] requested that the Form I-130 petition filed on behalf of [REDACTED] be withdrawn. On July 8, 2005 the officer-in-charge of the U.S. Citizenship and Immigration Services (USCIS) office located in Milwaukee, Wisconsin, withdrew the petition.

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.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166

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.

(BIA 1990). 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 Id*; see also *Matter of 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*, 19 I&N Dec. 803; *Matter of Agdinaoay*, 16 I&N Dec. 545; *Matter of La Grotta*, 14 I&N Dec. 110; 8 C.F.R. 204.2(a)(1)(ii).

The record of proceeding contains a copy of the marriage certificate for [REDACTED] and [REDACTED]. The record does not contain any other evidence of the bona fides of the marriage between the beneficiary and [REDACTED].

As noted above, the record contains a Request to Withdraw Petition for Immigrant Visa dated June 14, 2005 and signed by [REDACTED]. The request contains a written statement apparently prepared by [REDACTED] which states, in part, "I feel I was used for [REDACTED] to gain citizenship in the United States."

In addition, the record contains a signed, sworn statement made by the beneficiary on July 18, 2005. In it, the beneficiary states that after his petition for an H-1 visa was denied, he "decided to get married to a [REDACTED]." He further stated that [REDACTED] was willing to "get married if I could give her five grand." The beneficiary provided additional detail in the statement regarding additional payments made to [REDACTED] during the pendency of the petition. The beneficiary further indicated that he did not live with [REDACTED] following their wedding. In addition, the beneficiary stated the following:

This marriage is about helping each other out. And it turns out, opposite. She's been threatening. I wanted to make things favorable for both parties, but it didn't work. She said she can help me to get married and help me to get my green card, and I will take care of her, I would support her I should say. I figure that the amount I gave her is around \$15,000 including taxes, cash, stealing money, rent, and signed documents,

when she asked for money for that.

On appeal, counsel argues that the beneficiary was an innocent victim of fraud and that he actively assisted law enforcement officials in an investigation against [REDACTED]

Counsel's assertion that the beneficiary was an "innocent victim" is inaccurate. According to the beneficiary's sworn statement, the beneficiary's purpose in marrying [REDACTED] was to obtain permanent residency. It is clear from the beneficiary's statement that he and [REDACTED] did not intend to establish a life together at the time they were married. The "fraud" that counsel refers to appears to be the beneficiary's claim that [REDACTED] extracted more money from him than he initially agreed to. Even assuming the beneficiary's claims in this regard are true, it does not alter the fact that the beneficiary, by his own admission, entered into the marriage to [REDACTED] for the purpose of obtaining permanent residency. Therefore, the record establishes that the marriage to [REDACTED] was a sham. *See Bark v. Immigration and Naturalization Service*, 511 F.2d 1200 (1975).

Further, even though it appears that the beneficiary may have assisted authorities in their investigation against [REDACTED], such cooperation is not relevant to whether the alien has entered into a marriage for the purpose of evading immigration laws. Section 204(c) clearly states that no petitions *shall* be approved if the alien has previously been accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by the director to have been entered into for the purpose of evading the immigration laws. There is no language qualifying the statutory language that exempts aliens who cooperate with law enforcement authorities from the application of section 204(c) of the Act.

In the instant case, an independent review of the documentation reflects ample evidence that the beneficiary attempted to evade the immigration laws by marrying [REDACTED] and that attempt 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 USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the decision of the director, the record does not establish that the beneficiary was qualified to perform the proffered position. 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 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).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS 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). A labor

certification is an integral part of this petition, but the issuance of an ETA Form 9089 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the ETA Form 9089, item H.6, states that the minimum experience for a worker to satisfactorily perform the duties of production manager is 24 months of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. 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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.

With respect to the beneficiary's work experience, Part K of the ETA Form 9089 indicates that the beneficiary was employed as production supervisor/owner of Cousins Subs from December 1, 2001 to June 30, 2004. The record contains a letter from [REDACTED] dated May 24, 2006 which states that the beneficiary "was the owner and partner in my Cousins franchise in Milton WI." This letter is insufficient to establish that the beneficiary has two years of experience in the job offered as required by the ETA Form 9089. There is no evidence in the record to establish that [REDACTED] was involved with [REDACTED]. 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)). The record also contains a letter from [REDACTED] which acknowledges the beneficiary's completion of the "In-Store Training Program." However, this letter is insufficient to establish that the beneficiary has the experience required by the Form ETA 9089 because the letter fails to describe the nature or duration of the training received by the beneficiary. Therefore, the petitioner has failed to demonstrate that the beneficiary was qualified to perform the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.