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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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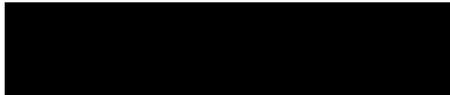
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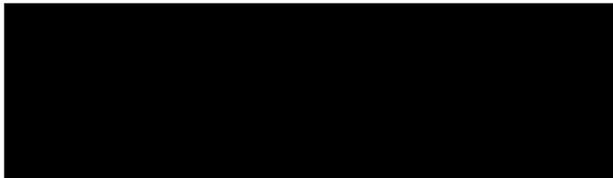
Petitioner:

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 initially denied by the Acting Director, Vermont Service Center. The matter was later reopened, and the petition was approved, but that approval was subsequently revoked by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be sustained. The petition's approval will be reinstated. The AAO also finds that the beneficiary fraudulently and willfully misled United States Citizenship and Immigration Services (USCIS) on elements material to his eligibility for a benefit sought under the immigration laws of the United States.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 burden of proof required to establish that the beneficiary's marriage was bona fide at its inception and was not entered into for the purpose of evading the immigration laws of the United States under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), had not been met. Thus, the director revoked the petition's approval.

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 October 26, 2006 Notice of Revocation (NOR), the primary issue in this case is whether the burden of proof under section 204(c) of the Act has been met.

Section 203(b)(3)(A)(i) of 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.

Section 205 of 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).

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 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.

- (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 beneficiary and [REDACTED], a U.S. citizen, were married on October 1, 1996 in Danbury, Connecticut. The A-file record of proceeding contains a Form I-130, Petition for Alien Relative, filed by [REDACTED] on October 25, 1996 on behalf of the beneficiary as her husband. Concurrently filed with the Form I-130 in 1996 was a Form I-485, Application to Register Permanent Residence or Adjust Status. The Form I-130 and Form I-485 were approved on April 4, 1997. The beneficiary and his wife filed a Form I-751, Petition to Remove the Conditions of Residence, on April 12, 1999. The petition was denied on March 15, 2000, for failing to appear for the scheduled interview. The matter was reopened and the beneficiary filed another Form I-751 on June 5, 2001, stating that he entered the marriage in good faith but the marriage was terminated through divorce. On September 18, 2003, the beneficiary was interviewed by USCIS in connection with the Form I-751. On January 5, 2004, the district director of the Hartford, Connecticut office of USCIS issued a notice of intent to terminate conditional residence to the beneficiary. Upon receipt of additional evidence from the beneficiary, the district director of the Hartford, Connecticut office of USCIS denied the beneficiary's Form I-751 and terminated the beneficiary's conditional resident status on February 25, 2004.

In a statement dated July 31, 2006, submitted in response to the director's Notice of Intent to Revoke (NOIR) the approval of the instant Form I-140 petition, the beneficiary indicated that his relationship with his wife ended in January 2000. However, in a prior statement dated February 2, 2004, submitted in response to the Intent to Terminate Conditional Resident Status (ITCRS) dated January 5, 2004, issued by the Interim District Director of the Hartford, Connecticut office of USCIS, the beneficiary asserted that his wife "decided to abandon me in 2002" and that it devastated him, but he could not keep her against her will. He further stated that he tried to reconcile with her "but apparently she had found someone else." The beneficiary and [REDACTED] divorced on February 21, 2001. In a notarized statement dated January 30, 2004, submitted in response to the ITCRS, [REDACTED] stated that she and the beneficiary were happily married and that their marriage was in good faith, but that problems led to their separation.

The beneficiary married [REDACTED] on November 20, 2002. The beneficiary indicated in a statement dated July 31, 2006, that he met [REDACTED] in Ecuador during a trip to visit his father. He states that at the time he met [REDACTED], he and his wife had started having marital trouble. He states that [REDACTED] moved to Connecticut in March 1999 from Ecuador, prior to the filing by the beneficiary and his wife of a Form I-751 on April 12, 1999. [REDACTED] gave birth to the beneficiary's son on November 23, 1999.² The director noted in the NOR that this child was not mentioned on the Form I-751 filed on

² The birth certificate for the beneficiary's son, [REDACTED], indicates that the address of [REDACTED]

June 5, 2001,³ and that when the beneficiary was interviewed by USCIS on September 18, 2003, he did not disclose that he had a son with [REDACTED] and was married to her. The beneficiary indicated in a statement dated July 31, 2006, that he did not mention his new wife or his child during the interview because he was never asked about them. Counsel states on appeal that the beneficiary's former attorney advised him to not include his son on the Form I-751 because it was not his son with [REDACTED] and his son was a U.S. citizen.⁴

On July 5, 2006, the director issued the NOIR. The director cited section 204(c) of the Act and requested additional evidence of the bona fides of the marriage between the beneficiary and [REDACTED]. The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The AAO notes that the NOIR complied with *Arias* and *Estime*. In response to the NOIR, the petitioner submitted additional evidence of the bona fides of the marriage. On October 26, 2006, the director revoked the approval of the I-140 visa petition. In his NOR, the director concluded that the beneficiary's marriage to [REDACTED] was not bona fide at its inception and was entered into for the purpose of evading the immigration laws of the United States.

On appeal, counsel submits a brief; two statements from the beneficiary dated July 31, 2006; a copy of Form I-751, Petition to Remove the Conditions of Residence, filed by the beneficiary on May 3, 2001; medical evidence regarding the beneficiary's head trauma in July 2003; correspondence from the beneficiary's prior counsel regarding Form I-751; evidence regarding the arrest of the beneficiary's prior counsel; a judgment for divorce between the beneficiary and [REDACTED] dated February 21, 2001; correspondence regarding the termination of the beneficiary's conditional resident status; a statement dated January 30, 2004, from [REDACTED] attesting to the bona fides of her marriage with the beneficiary; additional evidence of the bona fides of the marriage including an apartment lease, bank statements, credit cards, phone bills, insurance statements, income tax returns, personal statements of individuals who knew the couple, and pictures of the couple.⁵

Pauto was the same as the beneficiary's address on November 23, 1999; however, the beneficiary filed a joint tax return in 1999 with [REDACTED] listing the same address.

³ Part 5 of Form I-751 filed by the beneficiary on June 5, 2001, requesting the beneficiary to list all of his children, was left blank.

⁴ There is no allegation of ineffective assistance of counsel in the record of proceeding. See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

⁵ Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. See *Matter of Soriano*, I&N Dec. 764 (BIA 1988). The petitioner has

In her brief, counsel states that the beneficiary and ██████████ met in September 1995 and married on October 1, 1996. The Form I-130 filed by ██████████ on the beneficiary's behalf was approved on April 4, 1997. She states that on April 12, 1999, the beneficiary and ██████████ jointly filed a Form I-751 to remove the conditions on the beneficiary's residence. By the time an interview was scheduled for the Form I-751, counsel asserts that the marriage between the beneficiary and ██████████ had irrevocably broken down. The beneficiary filed for divorce on August 29, 2000, and the divorce was finalized on February 21, 2001. Counsel states that the beneficiary withdrew the jointly filed I-751 and filed a new Form I-751, prepared by his former counsel, on May 3, 2001. Counsel asserts that the beneficiary's interview for the new Form I-751 was scheduled two months after the beneficiary suffered a traumatic head injury. Counsel notes that the beneficiary's prior counsel was convicted of a crime in federal district court on February 10, 2004, and is no longer a practicing attorney.⁶ Counsel cites *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), for the proposition that while a failure to present sufficient evidence of the bona fides of a marriage may be sufficient to support the denial of an application for admission, it is not necessarily sufficient to support a finding of fraud for the purposes of section 204(c) of the Act. Counsel asserts that there has been no finding of fraud by USCIS and that the petitioner has met its burden of proof in the instant case.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*. In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. *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). In the instant case, an independent review of the documentation in the record of proceeding finds that there is not substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary's prior marriage was entered into for the purpose of evading immigration laws. The record establishes that the beneficiary and ██████████ lived together for approximately two years; that they had joint checking accounts; joint credit card accounts; joint bills for cable television and telephone service; that they had a post office box where they both received mail; that they filed joint tax returns; and that ██████████ was a named driver on the beneficiary's car insurance.⁷

The record contains an affidavit dated July 31, 2006, from ██████████ the owner of the petitioner in the instant case, stating that the beneficiary has been his employee for over 13 years, and that the beneficiary and his wife lived together for two years and separated at the end of 1999.

submitted sufficient evidence to show that the marriage was not *entered into* for the purpose of evading the immigration laws in the instant case.

⁶ *See n. 4, supra.*

⁷ A petitioner's marriage was a sham if the bride and groom did not intend to establish a life together at the time they were married. *See Bark v. Immigration and Naturalization Service*, 511 F.2d 1200 (1975). Conduct of the parties *after marriage* is relevant only to the extent that it bears upon their subjective state of mind *at the time they were married*. *See Lutwak v. United States*, 344 U.S. 604 (1953).

He affirms that he has met [REDACTED] several times and that “you can see that [the beneficiary and [REDACTED] truly care for each other.” The record also contains an affidavit dated July 31, 2006, from [REDACTED], the former landlord of the beneficiary and [REDACTED] Mr. [REDACTED] affirms that the beneficiary and [REDACTED] lived together and that he “saw [the beneficiary] and [REDACTED] together on many occasions going about everyday life.”

The record also contains an affidavit dated July 31, 2006, from [REDACTED] a co-worker of the beneficiary. [REDACTED] affirms that he visited the beneficiary’s house numerous times during his marriage to [REDACTED], that the couple was “very much in love,” and that during the time they were together, “they cared for each other and tried to make their marriage work.”⁸ The record also contains pictures of the beneficiary and [REDACTED] together.

The record of proceeding does not contain evidence that a family-based immigrant petition was filed to fraudulently obtain an immigration benefit for the beneficiary. The marriage failed but appears to have been properly entered into. Therefore, the AAO finds that approval of the petition is not precluded under section 204(c) of the Act. The evidence submitted on appeal overcomes the director’s NOR. Therefore, the director’s decision to revoke the approval of the petition is withdrawn.⁹ The petition’s approval is reinstated.

However, the beneficiary omitted his child on the Form I-751 filed by him on May 3, 2001. On September 18, 2003, the beneficiary was interviewed by USCIS in connection with the Form I-751. During that interview, the beneficiary did not disclose that he had a son with [REDACTED] and was married to her. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she “by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.” See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).¹⁰

⁸ It appears that the affidavits from [REDACTED] and [REDACTED] were sworn to by the declarants before an officer that has confirmed each declarant’s identity and administered an oath. See *Black’s Law Dictionary* 58 (West 1999).

⁹ We note that the AAO issued a Notice of Derogatory Information (NDI) to the petitioner on March 5, 2009, requesting evidence relating to the identity of the petitioner, the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, and the beneficiary’s qualifications to perform the duties of the proffered position. The petitioner responded with the requested evidence. In the instant case, the evidence submitted establishes that [REDACTED] is the successor-in-interest to the petitioner; that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date through 2003; that the petitioner’s successor-in-interest had the continuing ability to pay the proffered wage from 2003 through 2007; and that the beneficiary has the required qualifications to perform the duties of the proffered position.

¹⁰ In *Matter of Estime*, the BIA made two conclusions: (a) “[a] determination of statutory ineligibility is not valid unless based on evidence contained in the record of proceedings” (*Matter of Estime*, 19 I&N 450, 451-452 (BIA 1987)); and (b) the review on appeal is limited to the record of proceedings before the director. *Id.* See also 8 C.F.R. § 103.8(d):

The term “willfully” in the statute has been interpreted to mean “knowingly and intentionally,” as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant’s eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). Under this test, the beneficiary made a material misrepresentation in omitting his child on the Form I-751 filed by him on May 3, 2001, and by failing to disclose to USCIS that he had a son with [REDACTED] and was married to her at the interview for the Form I-751. Information pertaining to the beneficiary’s children, including the fact that the beneficiary had a child with a woman other than his U.S. citizen wife while he was married to the U.S. citizen wife, is material to the bona fides of a marriage-based immigrant petition and the applicability of 204(c) to employment-based immigrant petitions. Concealment of that fact shows a willful intention to shut off a line of inquiry relevant to the applicant’s eligibility.

By omitting his child on the Form I-751 filed by him on May 3, 2001, and by failing to disclose that he had a son with [REDACTED] and was married to her at the interview on the Form I-751, the beneficiary

The term *record of proceeding* is the official history of any hearing, examination, or proceeding before [USCIS], and in addition to the application, petition or other initiating document, includes the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the [USCIS] officer’s determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.

USCIS administrative procedure requires the creation of a permanent A-file to house the appellate record of any denied *immigrant* visa petition. USCIS Adj. Field Manual 22.2(l)(2) (“If the grounds of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with 8 CFR 103.3.”). If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

sought to procure a benefit provided under the Act through a willful misrepresentation of a material fact. The beneficiary is inadmissible pursuant to section 212(a)(6)(c) of the Act.

Based on the foregoing, we withdraw the director's basis of revocation. However, we find that the beneficiary fraudulently and willfully misled USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.

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 met that burden.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. The appeal is sustained. The petition's approval is reinstated.

FURTHER ORDER: The AAO finds that the beneficiary fraudulently and willfully misled USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.