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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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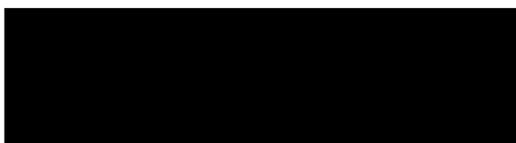


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DATE: **DEC 01 2011** OFFICE: TEXAS SERVICE CENTER

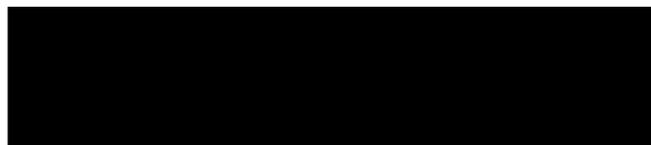
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition, Form I-140, was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a private individual. He seeks to permanently employ the beneficiary as a live-in house worker and to classify her as an “other worker . . . performing unskilled labor” pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The petition is accompanied by a copy of a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(3)(A)(iii) of the Act allows preference classification to be granted to “other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”

The Director denied the petition on the ground that the evidence of record indicated that the beneficiary had engaged in marriage fraud with the intent of securing an immigration benefit under the Act.

The petition currently on appeal is the fifth Form I-140 filed by the petitioner, [REDACTED] on behalf of the beneficiary for the proffered position of house worker under a Form ETA 750 that was accepted for processing at the DOL on July 30, 1993, and certified by the DOL on September 15, 1994. The first petition ([REDACTED]) was filed on May 26, 2005, and denied by the Vermont Service Center Director on January 18, 2006. The second petition ([REDACTED]) was filed on April 19, 2006, and denied by the Nebraska Service Center Director on October 31, 2006. The third petition ([REDACTED]) was filed on March 30, 2007, and denied by the Texas Service Center Director on January 26, 2008. The fourth petition ([REDACTED]) was filed on March 31, 2008, and denied by the Texas Service Center Director on November 26, 2008. All four of these previous petitions were denied on the same ground as the current petition, and no appeals were filed. The current petition ([REDACTED]) was filed on March 2, 2009, and denied by the Director on May 12, 2011. Unlike the previous four denials, the petitioner appealed this one on May 31, 2011.¹

¹ A sixth Form I-140 petition was filed on behalf of the beneficiary by [REDACTED] on April 1, 2010 ([REDACTED]), accompanied by a new labor certification, ETA Form 9089, which was accepted for processing at the DOL on May 13, 2009, and certified by the DOL on February 26, 2010. This documentation indicates that the petitioning business is owned by [REDACTED]. Unlike the other five I-140 petitions filed by [REDACTED] individually, the petition filed by the jewelry business sought to employ the beneficiary as a market research analyst and to classify her as an advanced degree professional under section 203(b)(2) of the Act. The petition was initially approved on June 17, 2010, but the approval was subsequently revoked by the Director on May 12, 2011, for the same reason (and on the same day) that the current petition was denied – because the record indicated that the beneficiary had engaged in marriage fraud to obtain an immigration benefit.

On its face, the appeal (Form I-290B) filed by [REDACTED] (counsel for both [REDACTED] individually and [REDACTED]) is unclear as to which petitioner – the individual or

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 this decision. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Legal context

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides as follows:

Notwithstanding the provisions of subsection (b)³ 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.

Section 204(c) of the Act was amended by section 4(a) of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). Prior to IMFA,

the business – is the intended appellant. On page 1 of the form, where counsel is asked to identify the individual, business, or other organization he is representing, [REDACTED] left the line for an individual blank and entered “[REDACTED]” in the line for business. On page 2 of the form, however, counsel identified the relevant petition as Receipt # [REDACTED] (which was filed by [REDACTED] not [REDACTED]). Adding to the confusion, in his appeal brief dated May 25, 2011 counsel refers to the petitioner as [REDACTED], but the relevant petition as Receipt # [REDACTED] (which was filed by [REDACTED]). In the body of the brief counsel twice identifies [REDACTED] as the petitioner for whom the appeal was filed, but he also objects to “[t]he decision made by USCIS to revoke the petition,” which clearly refers to the petition filed by [REDACTED]. USCIS records show that the Texas Service Center, which accepted the appeal, recognized [REDACTED] (not [REDACTED]) as the appellant in this proceeding. The AAO accepts this determination.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). There is no reason to preclude consideration of any materials newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ 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.

Congress held hearings on fraudulent marriage and fiancé arrangements and discussed the following fraudulent acts that aliens had committed in order to obtain immigration benefits: concealment of prior undissolved marriages, issuance of counterfeit New York City marriage certificates in support of petitions for permanent residence, and use of “stolen identification documents and stand-in grooms and brides to ‘marry’ U.S. citizens.” See *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 2 (1985) (statements of INS Commissioner Alan C. Nelson and Roger L. Conner, Executive Director Federation of American Immigration Reform). After the hearing, Congress enacted IMFA and added section 204(c)(2) of the Act, 1000 Stat. at 3543. “Paper” marriages are now covered by the “...attempted...to enter into a marriage” language of the statute. Based on the scenarios discussed in the 1985 hearing and the subsequent amendment to the Act, Congress clearly intended that section 204(c) of the Act be applied to aliens who seek an immigration benefit through a fraudulent marriage, even in cases where there is no marriage in fact.

The standard for reviewing section 204(c) appeals in the context of a revocation of a petition approval is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board of Immigration Appeals (BIA) 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 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). *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 (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)). *Tawfik* states that the revocation decision may be made at any time and is properly determined by the district director in the course of his adjudication of the subsequent visa petition. *Id.* at 168 (citing *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)).

The language of *Tawfik* is reflected in the regulation at 8 C.F.R. § 204.2(a)(1)(ii), which states as follows:

Fraudulent marriage prohibition. 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.

Director's decision

Based on the documentation of record, and consistent with the findings of the Vermont, Nebraska, and Texas Service Center directors in the previous I-140 proceedings, the Director made the following findings of fact in his decision of May 12, 2011:

The record shows that the beneficiary, [REDACTED] (aka: [REDACTED] [sic]) entered the United States on July 29, 1991, at New York, New York, as a nonimmigrant visitor with authorization to remain for a temporary period not to exceed one year. The record is not supported with evidence to show that the beneficiary's period of stay was extended or that she changed to another valid nonimmigrant status. On May 28, 1992, the beneficiary married [REDACTED], a United States citizen. On July 10, 1992, [REDACTED] filed a Petition for Alien Relative (Form I-130). The Form I-130 filed on behalf of the beneficiary was signed and dated June 2, 1992, five (5) days after the marriage. Furthermore, on July 10, 1992, the beneficiary filed an Application to Register Permanent Resident or Adjust Status (Form I-485). The basis of the request to adjust status was the beneficiary's marriage to a United States citizen, [REDACTED].

The beneficiary and [REDACTED] were scheduled to appear for an interview on September 29, 1992 at the District Office in Buffalo, New York. The day before the interview the Service [now USCIS] received a telephone call stating that the beneficiary's intentions in the marriage were not honorable. A second call was received on the date of the interview and on October 1, 1992, [REDACTED] appeared at the Buffalo District Office to provide a sworn statement regarding his relationship to the beneficiary. The statement indicated that the marriage was never consummated. [REDACTED] believed that he had been used and that [REDACTED] (beneficiary) was married to a man in Russia and had at least one child. This action was followed by a withdrawal of the Form I-130 and a petition to the State of New York for annulment of his marriage.

The beneficiary filed a second Form I-485 under the Diversity Visa Program on January 27, 1995, at Newark, New Jersey. This Form I-485 was denied on December 13, 1995, at the discretion of the District Director because the beneficiary had committed marriage fraud and had provided false testimony by omitting information regarding her marriage in the Ukraine. By her own admission, she had married [REDACTED] in October 1983.

“In light of the aforementioned facts,” the Director concluded, “it appears that the marriage between [redacted] [sic] and [redacted] was a sham and was entered into solely for the purpose of procuring immigration benefits on behalf of the beneficiary.”

After citing applicable statutory provisions on the legal consequences of marriage fraud, and noting the petitioner’s failure to respond to a Notice of Intent to Deny that was issued on January 3, 2011, the Director denied the petition for failure of the petitioner to prove by a preponderance of the evidence that the beneficiary was eligible for the benefit sought – *i.e.* employment-based immigrant classification as an “other” (unskilled) worker.

Arguments on appeal

Counsel asserts that the issue of fraud on a prior petition is irrelevant to the current petition, and “should be raised at the time of adjustment of status.” The AAO does not agree. The statutory and regulatory provisions previously quoted – section 204(c) of the Act and 8 C.F.R. § 204.2(a)(1)(ii) – as well as the BIA decision in *Tawfik, supra*, make it clear that the commission of marriage fraud is a bar to immigration benefits in all future proceedings, not just in the proceeding in which it was first ascertained.

According to counsel, USCIS did not issue a Notice of Intent to Deny (NOID) prior to denying the petition, and thus gave the petitioner no chance to present its case. This claim is incorrect. The Director (Texas Service Center) issued a NOID to the petitioner on January 3, 2011, which reviewed the documentation in the beneficiary’s file underlying the previous findings of fraud and gave the petitioner 33 days to submit additional evidence to overcome the ground for denial. The petitioner did not respond to the NOID within 33 days, or any time thereafter up to the date the denial decision was issued in May 2011.

Counsel contends that the finding of fraud by USCIS was based on erroneous factual findings and legal conclusions going back to the Form I-130, Petition for Alien Relative, filed by the beneficiary’s former husband in 1992. According to counsel, a NOID has been issued on that petition, but no final decision. On the ground that the Form I-130 petition is still pending, counsel asserts that the findings in that proceeding are not final and should not be utilized in this proceeding.

Once again, counsel’s claims are faulty. The Form I-130 petition is not still pending. The beneficiary’s A-file clearly shows that the petition, filed by [redacted] on July 10, 1992, was withdrawn by him on October 1, 1992. The record includes a letter to [redacted] from the District Director in Buffalo, New York, dated April 23, 1993, stating that:

This will confirm your withdrawal on October 1, 1992 of the immediate relative visa petition which you filed in behalf of [redacted]

You are hereby advised that the petition is considered withdrawn and is no longer under active consideration.

The record also includes the Decision on Application for Status as a Permanent Resident issued to [REDACTED] by the District Director in Buffalo, New York, on the same day – April 23, 1993. The decision states as follows:

Upon consideration, it is ordered that your application for status as a permanent resident [Form I-485] be denied for the following reasons:

The I-130 Visa Petition filed in your behalf on July 10, 1992 by [REDACTED] has been withdrawn.

In the absence of a valid immigrant visa petition, or any other grounds of eligibility, your application for adjustment of status to that of a lawful permanent resident is hereby denied.

Counsel quotes various excerpts from the Director's decision and claims that the key factual findings and legal conclusions are based on hearsay and innuendo. According to counsel, [REDACTED] mother made the telephone calls to the Buffalo District Office accusing the beneficiary of entering into marriage with her son under false pretenses. The accusation was untrue, counsel claims, but the immigration authorities took the story at face value and did not afford the beneficiary adequate rebuttal opportunity. Counsel also asserts that [REDACTED] was forced by the Immigration Officer "at [the] time of the initial interview" to sign the statement withdrawing his Petition for Alien Relative (Form I-130) on October 1, 1992.

The AAO is not persuaded by these claims, for which no documentary evidence has been submitted. The assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record does not corroborate counsel's assertion that the beneficiary had no opportunity to demonstrate the *bona fides* of her marriage and that [REDACTED] was railroaded into withdrawing his I-130 petition. To the contrary, documentation in the beneficiary's A-file provides a reasonable basis for the Director's finding that the beneficiary married [REDACTED] for the purpose of evading U.S. immigration laws and obtaining an immigration benefit. The evidence of record indicates that the beneficiary left her husband's household in September 1992, shortly before their scheduled immigration interview, moved to the New York City area, and began working for the petitioner as a live-in house worker in March 1993. It was shortly after the beneficiary moved out of his house that [REDACTED] signed the statement withdrawing his I-130 petition. That document, dated October 1, 1992, was signed by [REDACTED] directly below a sentence reading: "I make this withdrawal voluntarily with no threats or promises made to me." [REDACTED] also sued for divorce, which was granted by a New York State judge on February 3, 1994 "by reason of abandonment of the Plaintiff by the Defendant for more than one year." In the divorce decree the judge noted that the defendant, though personally served, did not answer the summons and did not appear in the proceedings.

As previously discussed, the beneficiary need not have been convicted of, or even charged with, a criminal act. As long as there was “substantial and probative evidence” in her A-file that she entered into the marriage with [REDACTED] for the purpose of evading U.S. immigration laws and securing a benefit to which she would not otherwise have been entitled, the Director was authorized under section 204(c) of the Act and 8 C.F.R. § 204.2(a)(1)(ii) to deny immigrant status to the beneficiary. That evidentiary threshold was satisfied in this case.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. See *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

In this case, therefore, the petitioner bears the burden of proof to rebut the evidence of marriage fraud by the beneficiary and establish her eligibility for immigrant classification. For the reasons discussed above, the petitioner has not met that burden.

Conclusion

The AAO affirms the director’s determination that the beneficiary is ineligible for employment-based immigrant classification based on the evidence of record that she previously entered into a marriage for the purpose of evading U.S. immigration laws and obtaining an immigration benefit.

ORDER: The appeal is dismissed.