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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
and Immigration
Services

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Office: TEXAS SERVICE CENTER



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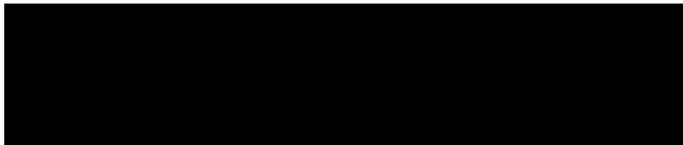
Petitioner:

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:

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 preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's Form I-485A, Application by Cuban Refugee for Permanent Residence (Form I-485A), the director served the petitioner with notice of his intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Specialty Cook, Chinese Cuisine 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 petitioner's Form ETA 750 was filed with the DOL on March 2, 2001 and certified by the DOL on December 19, 2001. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on May 6, 2002, which was approved on October 15, 2002.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. The beneficiary filed a Form I-485A on June 1, 1988 as the spouse of a Cuban Lawful Permanent Resident under Section 1 of the Cuban Adjustment Act of November 2, 1966. The file contains the completed forms, signed by the beneficiary, and a copy of a marriage certificate between the beneficiary and [REDACTED]

In connection with the Form I-485A, a decision was issued by the district director of the USCIS office located in Miami, Florida. The decision denied the Form I-485A because "the petitioner and alien spouse have submitted insufficient evidence to establish the existence of a bona fide marriage, whose primary purpose was other than to procure the alien spouse's entry as an immigrant."

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

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.

- 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.

On January 9, 2008, the director sent a NOIR to the petitioner stating that “it has come to the attention of the USCIS that [REDACTED] has been involved in entering into a marriage in an attempt to circumvent immigration laws.”

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 un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out that “the other evidence fails to establish a marriage that was legitimate between the beneficiary and his spouse.”

In response to the NOIR, the petitioner provided: a marriage certificate dated December 20, 1987; IRS correspondence dated May 8, 1989 reflective of a joint filing; IRS Form 1040A for 1988; a 1987-1988 occupational license for [REDACTED]; a hospital bill in the amount of \$3,296.31 from [REDACTED]; a notarized letter from [REDACTED] dated January 23, 2008; and a notarized letter from [REDACTED] dated July 27, 2006.

On June 25, 2008, the director affirmed his decision to revoke the approval of the I-140 visa petition because the beneficiary has been involved in entering into a marriage in an attempt to circumvent immigration laws.

On appeal, counsel asserts that the director’s decision to revoke the Form I-140 failed to show by substantive and probative evidence that the beneficiary entered into a fraudulent marriage that would subject him to section 204(c) of the Act.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). 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).

The examiner’s interview notes show a number of discrepancies in the statements of the beneficiary and his spouse given during their August 23, 1989 interview.² Counsel states that the “examiner’s

² *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975), set forth procedures for governmental

interview notes...reflect discrepancies in answers to questions about the marriage from which it could reasonably be inferred that [REDACTED] might have been separated at the time of the interview, and given such estrangement, [REDACTED] might have intentionally given false answers to the examiner to undermine her husband's residency application." Counsel provided no evidence to support these claims. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In a decision dated September 26, 1989, the Administrative Appeals Unit noted a number of contradictions during the beneficiary and his spouse's adjustment interview. When questioned about their place of residence during Christmas in 1988, the beneficiary stated that they were living with friends [REDACTED]. His spouse stated that they were living at their current address, [REDACTED]. More contradictions were found when they were asked about the beneficiary's step-son, [REDACTED]. They were asked if [REDACTED] had seen his father regularly. The beneficiary stated that his wife usually takes her son to see his father, but the beneficiary has never met him. The beneficiary's spouse stated that neither she nor her son have met with her ex-husband at any time after [REDACTED].

The record contains a notarized letter from [REDACTED] dated January 23, 2008 and a notarized letter from [REDACTED] dated July 27, 2006. Both letters confirm that [REDACTED] "lived together." The AAO does not find these affidavits to be probative because they do not provide any details about [REDACTED] marriage and relationship. Moreover, the letters do not contain complete details explaining how the persons acquired their knowledge.

In the instant case, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary attempted to enter into a marriage for the purpose of evading the immigration laws.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary attempted to enter into a prior marriage for the purpose of evading the immigration laws. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a permanent resident 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.

The AAO notes that the record does not establish that that the beneficiary possessed the required experience for the offered position as set forth in the Form ETA 750. The petitioner must demonstrate

investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately.

that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The record contains a work experience letter from [REDACTED]. The letter was signed by [REDACTED] 1997. The letter states that the beneficiary worked as a "Chinese cuisine specialty chef" from "January 1994 until 1997." However, this letter is insufficient to support the claimed work experience because it does not provide a sufficient description of the job duties for the beneficiary. The letter does not comply with the regulations pertaining to required evidence to establish a skilled worker's qualifications. 8 C.F.R. §§ 204.5(e)(3)(ii)(A) and (g)(1).

It is further noted that the record does not contain evidence of the petitioner's ability to pay the proffered wage for each of the relevant years. The petitioner submitted bank statements as evidence of its ability to pay the proffered wage. However, the petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage, e.g., tax returns, audited financial statements, or annual reports. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. The approval of the employment-based immigrant visa petition remains revoked.