

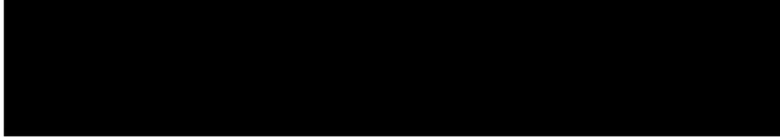
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: DEC 14 2011

Office: NEBRASKA SERVICE CENTER

FILE:

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:

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

The petitioner is a car dealer. It seeks to employ the beneficiary permanently in the United States as a mechanic 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. On appeal, the AAO has identified additional grounds of ineligibility as will be discussed in this decision.

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 March 23, 2008 denial, the primary issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. This petition was denied as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative, was filed on the beneficiary's behalf on November 20, 1997. Concurrent with the filing of the 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]

In connection with the Form I-130, a decision was issued by the district director of the U.S. Citizenship and Immigration Services (USCIS) office located in Houston, Texas on August 6, 2004. The director denied the Form I-130 because the beneficiary's "marriage is not bonafide and that you have engaged in a sham marriage, or a marriage of convenience, contracted solely for the purpose of conferring immigration benefits upon the beneficiary."

Section 204(c) of the Act 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

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.

(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 record contains the following evidence of the bona fides of the marriage: an affidavit from the beneficiary's brother, [REDACTED] a joint affidavit from the beneficiary and his spouse; page 1 of the beneficiary's 2001 joint tax return; the beneficiary's 2002 tax return; an apartment lease for 1996 and 1997; a joint bank statement for May 2002; and a joint electric bill for November 1996 to December 1996.²

On May 6, 2002, the beneficiary and his spouse were interviewed by USCIS in connection with the Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485). The beneficiary was asked to bring evidence of cohabitation to the interview. However, the beneficiary did not submit any evidence of cohabitation. At the conclusion of the interview, they were given a request for evidence (RFE). "It was at this juncture that [the beneficiary] stated that [he] neglected to mention that [he and his spouse] had been separated for a brief period."

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).³

² 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 not submitted sufficient evidence to show that the marriage was not entered into for the purpose of evading the immigration laws in the instant case.

³ 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 *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

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). It is noted, however, that the instant appeal does not involve a revocation of an approval of a Form I-140 petition.

In the instant case, an independent review of the documentation in the record of proceeding finds that there is 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 his spouse have not lived together. The last four addresses for the beneficiary's spouse are: [REDACTED]

The last four addresses for the beneficiary are: [REDACTED]

In addition, the record contains a marriage certificate recorded in Harris County, TX on September 5, 2000 showing that the beneficiary's spouse married [REDACTED] on August 18, 2000, while she was still married to the beneficiary. Moreover, although the beneficiary and his spouse had been married over 6 years when they were interviewed, the record contains minimal evidence of the bona fides of the marriage.

On appeal, counsel states that the "beneficiary was clearly a victim of his wife's deceptions and was never a conspirator in her actions." Counsel submitted an affidavit from the beneficiary to support this assertion. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his claims. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going

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(1)(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.

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 addition, 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).⁴

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,⁵ the petition may not be approved because the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Additionally, the record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

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 ETA Form 9089 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

⁴ 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).

⁵ 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.

that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 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 ETA Form 9089 was accepted on February 6, 2006. The proffered wage as stated on the ETA Form 9089 is \$32,469 per year.

On the petition, the petitioner claimed to have been established in 2000 and to currently employ 3 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 10, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, 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.

The petitioner submitted a Form W-2 for 2006 showing compensation paid to the beneficiary. However, the AAO cannot accept the submitted Form W-2 because the Federal Employee Identification Number (FEIN) listed on the Form W-2 and the 2005 Form 1120-A () is different from the FEIN entered on the Form I-140 and the ETA Form 9089 (). Based on these deficiencies, the Form W-2 from 2006 does not establish that these wages were paid by the petitioner. The wages appear to have been paid by some other entity having a different FEIN. Accordingly, the Form W-2 is not probative of the petitioner's ability to pay the beneficiary's wage. Likewise, the Form 1120-A does not appear to pertain to the petitioner and is similarly not persuasive evidence of the petitioner's ability to pay the proffered wage. Consequently, the record is devoid of the petitioner's ability to pay the beneficiary's wage, and the appeal will be dismissed for this additional reason. 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)).

The petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the 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. at 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).

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires 24 months experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has worked as a mechanic for [REDACTED] from April 1990 to November 1992.

The regulation at 8 C.F.R. § 204.5(1)(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 any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record contains a work experience letter from [REDACTED]. The letter was signed by [REDACTED] on April 25, 2005. The letter states that the beneficiary worked as a chief mechanic from April 1, 1992 to November 10, 1992. 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. Moreover, the letter fails to accurately document that the beneficiary had the full two years of required experience as a mechanic as required by the labor certification. 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)). Therefore, the petitioner has not established that the beneficiary had the required two years of prior experience as a mechanic by the priority date.

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. In addition, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Moreover, the record also does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.