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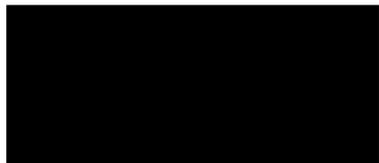
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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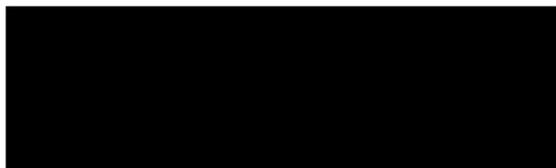
Petitioner:



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:

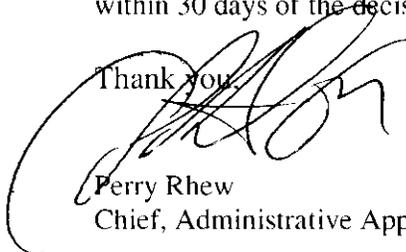


INSTRUCTIONS:

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 your 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 courier and moneygram delivery service. It seeks to employ the beneficiary permanently in the United States as an industrial engineer under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ 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 marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

The petitioner, through current counsel, contends that the marriage bar does not apply as the beneficiary's marriage was a *bona fide* relationship.

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 AAO maintains plenary power to review each appeal on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

¹Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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. The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

²We observe that the Immigrant Petition for Alien Worker (Form I-140) is not approvable based on the current record because, at a minimum, the beneficiary's degree was not obtained as of the priority date. Thus, the petition would not be eligible for approval on this basis even if the fraudulent marriage bar did not apply. 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 *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO's *de novo* authority well recognized).

As set forth on the Form ETA 750, the priority date of this case is April 1, 2003. The terms of the Form ETA 750 requirement for education state that the beneficiary must have four years of college and a B.S. in Industrial Engineering. The only other requirement is one year of experience in the job

As reflected in the record, the petitioner filed the Form I-140 on December 12, 2006. The Service Center director denied it on June 27, 2007, determining that the marriage bar provisions under section 204(c) of the Act, 8 U.S. C. § 1154(c) applied to this case:

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.

Specifically, the Service Center director determined that the Form I-140 petition was ineligible for approval because of a previously filed Petition for Alien Relative (Form I-130), which sought to sponsor the beneficiary as the husband of a U.S. citizen, [REDACTED]. The Service Center director relied upon the district director's Notice of Intent to Deny (NOID) the Form I-130, which had been issued on May 18, 1999. The NOID detailed inconsistencies in an interview with [REDACTED] and the beneficiary, held on May 14, 1999. The NOID alleged that the family based petition had been filed based on a marriage entered into for the purpose of evading the immigration laws. It also referred to section 204(c) of the Act. The district director's denial was issued on October 26, 2000. It briefly cited the receipt of the petitioner's rebuttal, but found that it did not overcome the allegations in the NOID and denied the Form I-130. No appeal was taken.

On appeal from the denial of the Form I-140 petition, counsel asserts that the denial of the Form I-130 was not discussed or analyzed appropriately nor was the evidence submitted in response to the NOID considered by the district director in his denial of October 26, 2000. Counsel also asserts that the inconsistencies which emerged from the district director's interview of [REDACTED] and the beneficiary could be explained by differing memories and perceptions of the same events rather than by any memorized answers in an attempt to make the marriage appear to be *bona fide*. Counsel offers various explanations why the couple would not remember which day they ate a meal, or

offered as an industrial engineer. As stated on the copy of the beneficiary's diploma from California State Polytechnic University at Pomona, California, contained in the record, his B.S. in Manufacturing Engineering and Industrial Engineering was not conferred upon him until December 12, 2003, which was eight months after the priority date. Therefore, the employment-based petition is not eligible for approval, at a minimum, because the beneficiary's required baccalaureate degree was not conferred upon him as of the priority date. None of the beneficiary's prior programs of study stated on Form ETA 750B resulted in a completed degree to meet the required four years of study resulting in a Bachelor of Science degree in Industrial Engineering.

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.

kissed or why their memories differed as to a Valentine gift, or the sequence of how they awakened on the morning of the interview. Counsel asserts that the director's decision denying the Form I-140 also lacked the necessary detail and analysis supporting his finding that the beneficiary was barred due to a previous attempt to be accorded immediate relative status by reason of a marriage determined to have been entered into for the purpose of evading the immigration law. Counsel cites *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *Matter of Tawfik* also noted that in some circumstances, a district director could appropriately rely upon a prior proceeding in which it was determined that a beneficiary entered into a marriage for the purposes of evading the immigration laws. *Id.* at 168. Nevertheless, based upon our own review of the evidence contained in the record, and for the reasons explained below, we find 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 entered into for the purpose of evading the immigration laws.

The record indicates that the beneficiary, a native of Peru, [REDACTED], married [REDACTED] on October 24, 1995 Santa Ana, California. [REDACTED] signed the Form I-130 on January 29, 1996,⁴ which was filed with the Service on March 8, 1996. The record indicates that they obtained a divorce on April 11, 2002.

The record also reflects that the beneficiary entered the United States on or about August 20, 1989. According to a biographic questionnaire (Form G-325A) signed by the beneficiary on September 16, 1998, as well as a copy of a California divorce decree, he married [REDACTED] eleven days after he entered the U.S., or on August 31, 1989. Their divorce decree indicates that the petition for dissolution was filed on March 13, 1990 and the final decree occurred on September 18, 1992. It is additionally noted that the beneficiary represented his marital status relevant to this and his subsequent marriage to [REDACTED] in various ways on different documents. On a G-325A, signed by the beneficiary on January 1, 1993, where former husbands or wives are requested to be listed, the beneficiary indicated "none," which failed to acknowledge his 1989 marriage. On a Form I-765, Application for Employment Authorization, signed by the beneficiary on January 13, 1993, marital status of "married," "widowed," "single," or "divorced" is offered as a choice. The beneficiary checked "single," rather than "divorced." On another undated Form G-325A, the beneficiary listed the marriage to [REDACTED] but states that it took place in Lima, Peru.⁵ Copies of the beneficiary's originally filed individual federal income tax returns contained in the record indicate that on the

⁴She filed using her married name.

⁵Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

1996 return and after his marriage to [REDACTED], he filed separately as a married person, and filed as a single person in 1997 and 1998.

[REDACTED] filed her tax returns as head of household during 1996, 1997 and 1998, using her maiden name. She did not claim any exemption for a spouse and claimed her daughter (not the beneficiary's child) as a dependent. The record also contains copies of amended 1996, 1997, and 1998 federal income tax returns filed on behalf of both parties, submitted by current counsel in response to the district director's NOID issued on May 14, 1999, which changed their respective filing status to "married filing jointly." Counsel also submitted a copy of a letter, dated May 20, 1999, from [REDACTED] an enrolled IRS agent. The letter states that Falvy advised the beneficiary and [REDACTED] to file separately in 1997 and 1998 for financial reasons because it was more convenient "even if they were married." He did not mention the 1996 returns.

Documentation filed in connection with the Form I-130 also included a copy of the beneficiary's 1996 state tax return in which he had filed separately, as a married person, a copy of a health insurance form signed by the beneficiary on January 18, 1996, in which he adds [REDACTED] and her daughter, [REDACTED] to the coverage, a copy of a Postal & Federal Employees Credit Union statement dated December 31, 1996 addressed to [REDACTED]. The statement indicates that the account was jointly held with the beneficiary and stated a beginning balance of \$318.44 and an ending balance of \$419.77, with several debits showing. There is no indication whether one or both parties were using the account. A copy of a 1991 grant deed was also submitted, which reflects [REDACTED] granted a one-third interest in real property to herself, [REDACTED] and to [REDACTED].

In response to the NOID, former counsel submitted pictures of the carpets in the living room and bedroom, a copy of a black cordless telephone on a table in the bedroom and a copy of a Valentine's Day card given to [REDACTED] by the beneficiary. It is asserted that the NOID did not address the identical answers given by the parties and dismisses the discrepant testimony as trivial or insignificant. Additional evidence submitted in response to the NOID from current counsel includes copies of two undated Kaiser Permanente health insurance cards issued to the beneficiary and to [REDACTED]. [REDACTED] Also provided is a copy of a muffler shop invoice addressed to both the parties, dated August 20, 1999, copies of two Citibank credit cards issued to both parties indicating a validity date from March 1998 on both, copies of two American Express cards issued to both parties, a May 29, 1999 statement from American Express showing only activity for [REDACTED] (under married name), and an August 29, 1998 American Express statement showing use by both parties although the extent of use is unclear as the entire statement was not submitted. Two additional copies of the Postal & Federal Employees credit union statement were provided, dated July 31, 1999 and April 30, 1999, respectively, and addressed to Ms. Perez under her married name. Again, there is no evidence whether both parties were using the account as opposed to one party using the account as their own

⁶ It is unclear how this supports the *bona fides* of [REDACTED] marriage to the beneficiary, which occurred in 1995, except to note that [REDACTED] is part of the beneficiary's name, which, according to his birth certificate, is derived from his mother. It is unclear as to whether the beneficiary and [REDACTED] had some other kind of family relationship other than their 1995 marriage.

with merely the name of the other party added to the account. Other submissions include a copy of an undated healthcare card issued to [REDACTED] daughter; a copy of an undated note in Spanish from [REDACTED] copies of two Christmas cards sent to [REDACTED]' with one dated December 24, 1998 and signed by [REDACTED] and the other undated with an illegible signature; a copy of an envelope with an illegible date and only the last name of [REDACTED] showing; a copy of a wedding invitation with no mention of either [REDACTED] or the beneficiary's name; a copy of an envelope (with date obscured) from Peru addressed to the beneficiary; copies of two cards in Spanish from Peru dated May 28, 1999 and May 22, 1999, respectively; and copies of unidentified, undated family photographs.

The discrepancies in answers given by [REDACTED] the Form I-130 petitioner and the beneficiary at the interview held at the district office on May 14, 1999 were noted on the NOID and include the following:

[The petitioner] stated that the last time she cooked for him was Sunday. She cooked steak and white rice and [they] ate together at around twelve noon.

[Beneficiary] stated that the last time [the petitioner] cooked was Saturday steak and rice. [The beneficiary] stated that [they] both ate together at around 6:00 p.m.

[The petitioner] stated the last time [the beneficiary] kissed her was this morning in the elevator.

[The beneficiary] stated that the last time was in the parking lot.

[The petitioner] stated that [the beneficiary] did not give her anything for Valentine's Day (2-14-99).

[The beneficiary] stated he gave her a card, and one red rose at home for Valentine's Day.

[The petitioner] stated that [the beneficiary] woke up at 5:00 am on 5-14-99, the morning of this interview by himself. [The petitioner] stated that he then woke her up at 6:30am. Both showered and got ready then left for the I-130 appointment. [The petitioner] also stated she and [the beneficiary] did not eat or drink anything this morning.

[The beneficiary] stated that he was awakened by the baby crying at 5:00 am. [The beneficiary] also stated that [the petitioner] was awakened by the baby (grandchild) at 5:30 am. [The beneficiary] added that he ate a croissant and [they] both drank coffee.

[The petitioner] stated that there is a black cordless phone in her bedroom on [the beneficiary's] side of the bed.

[The beneficiary] stated that there is no phone in the bedroom.

[The petitioner] stated there is a light pink carpet in her bedroom.

[The beneficiary] stated that the phone is located in the dining room. [The beneficiary also stated that the carpet is green.

[The petitioner] stated that [the beneficiary] has not bought anything for the house in regards to any appliances.

[The beneficiary] stated that he bought a television, a video cassette recorder, and a white phone a year ago.

[The petitioner] stated that the mortgage payment is \$1,200 a month. [The petitioner] stated that [they] both pay only \$600.00 monthly to [the petitioner's] brother in cash.

[The beneficiary] stated that the mortgage payment is \$1,300 a month. [The beneficiary] stated that [they] both pay [the petitioner's] brother \$460.00 monthly paid by check and sometimes cash.

The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary in order to evade the immigration laws. It is noted that both former and current counsel advance explanations as to why the beneficiary's and [REDACTED] answers in the district office interview were not the same. It is asserted that part of the interview which indicated that the parties had given the same answers was not analyzed by the district director. We note that it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In this case, we note that the documentation submitted as evidence that the beneficiary and [REDACTED]. [REDACTED] commingled financial resources appeared to be general in nature and primarily based on selected credit card and credit union statements. Some of the other evidence appears to be undated or dated around the time of the district office interview or after the issuance of the NOID. It is noted that there is no documentation relating to jointly held real estate, automobiles or other significantly valuable property. Further, various theories advanced by counsel as to why the beneficiary and [REDACTED] responded so differently to basic questions asked at the district office interview 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). Their household activities, interactions the morning of the interview, as well as purchases made by the beneficiary and the amount of the mortgage would

all be things that a married couple would be expected to know. In view of this, a couple's ability to answer some questions the same does not demonstrate that a marriage was *bona fide* and is outweighed by their inconsistent responses elicited at the interview.

Therefore, an independent review of the documentation reflects substantial and probative evidence⁷ 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 for the purpose of evading the immigration laws is affirmed.

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.

⁷ See *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) (“The substantial evidence standard requires only that the BIA’s decision be supported by record evidence and be substantially reasonable.”)