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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



B6

DATE: **AUG 10 2012** 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based 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 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 director determined that the petitioner had failed to establish the ability to pay the proffered wage. The director also determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

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 director determined in his April 2, 2009, decision that the petitioner had failed to establish the ability to pay the proffered wage because it had submitted its tax records for only 2006. On appeal, the petitioner provided its tax documents establishing its sustained ability to pay the \$26,000 proffered wage as of the priority date through 2008. Therefore, this portion of the director's decision will be withdrawn.

However, the director's denial also found that the marriage bar under section 204(c) of the Act applies to this case. The current petition was denied, in part, as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on October 17, 1995. Concurrent with the filing of 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, photographs, and a copy of a marriage certificate between the beneficiary and

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 New York, New York, on January 3, 1996. The director denied the Form I-130 because the petitioner "submitted fraudulent documentation in support of the visa petition, to wit: the Rhode Island birth certificate of [REDACTED] allegedly issued on June 9, 1993; marriage certificate [REDACTED] allegedly issued to [REDACTED] on February 6, 1995 at [REDACTED]

[REDACTED] It has been determined that these are, in fact, counterfeit documents." The director of the New York office also denied the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, on January 3, 1996, finding that the beneficiary's marriage certificate to [REDACTED] was a counterfeit. The denial of the Form I-130 was not appealed and the director's finding that the beneficiary sought to evade the immigration laws through a

fraudulent marriage in that proceeding is final.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)<sup>1</sup> 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.

On appeal, counsel asserts that the director's decision was overly vague and objects that the director did not offer the petitioner an opportunity to rebut the information prior to the denial of the petition.

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.

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 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.

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<sup>1</sup> 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.

(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)).

Therefore, an independent review of the documentation reflects ample evidence that the beneficiary attempted to evade the immigration laws by submitting a fraudulent marriage certificate 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.

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.