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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

[Redacted]

Date: **JUN 28 2012**

Office: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. The director served the petitioner with notices of 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 petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The petition was filed for classification of the beneficiary 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 was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on April 4, 2001. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on November 28, 2001, which was approved on January 14, 2002.

On November 13, 2003, the director sent a NOIR the instant approved Form I-140, Immigrant Petition for Alien Worker, to the petitioner stating the following:

The record demonstrates that during the beneficiary's scheduled adjustment interview on January 27, 1997, it was revealed that the beneficiary fraudulently filed a Petition for Alien Relative (Form I-130) and Application to Register for Permanent Residence (Form I-485) in order to receive an immigrant benefit.

The AAO notes that the NOIR the instant Form I-140 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 fraud, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

In response to the November 13, 2003 NOIR, the beneficiary, through counsel, provided a letter to the service stating that the beneficiary had been through removal proceedings which were based upon the alleged marriage fraud, and that because the proceedings were terminated without prejudice, the beneficiary should be allowed to adjust status based upon his current employment based visa petition. The record indicates that the proceedings were terminated without prejudice, not because the beneficiary prevailed on the issue of whether or not he committed marriage fraud, but because the beneficiary had actually returned to his native Brazil on his own accord prior to the service filing a Notice to Appear in his removal case.

No other evidence was offered at that time.

Two more NOIRs were issued on July 2, 2007, and December 4, 2007. These notices stated that it appeared the petitioner did not have the ability to pay the proffered wage, and that the beneficiary did not have the required minimum experience. In July 2007, the director requested new experience letters, copies of the beneficiary's Forms W-2 (for 1999-2006), and a new letter from the petitioner's financial officer discussing its ability to pay. In December 2007, the director again asked for a new experience letter, and asked for the petitioner's federal income tax returns from 2002 to 2006.

On May 19, 2008, the director revoked the approval of the I-140 visa petition because the petitioner had not established that the beneficiary had the required minimum experience of two years as a cook at the time of the filing of the application for labor certification.

Marriage Fraud Statute

Section 204(c) of the Act provides for the following:

Notwithstanding the provisions of subsection (b) 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.

Beneficiary's Statements

The record pertaining to the beneficiary's fraudulent Form I-130 includes the following: a marriage certificate showing that he and [REDACTED] were married in [REDACTED] on October 20, 1994; both the beneficiary and putative spouse's signed Forms G-325A, Biographical Information, showing the two shared a residence in [REDACTED]; and, a Form I-485, Application to Register Permanent Residence or Adjust Status, signed by the beneficiary. The beneficiary and his spouse were scheduled to appear at an interview on the beneficiary's adjustment of status application. Only the beneficiary arrived, and upon being questioned, divulged that his application was not based in fact. He alleged that he had neither married, nor met [REDACTED] and that he was in fact married to another woman. He went on to allege that he had paid a woman named [REDACTED] to get him immigration papers. The beneficiary stated he met [REDACTED] once, signed papers, and was given a work authorization (EAD) that same day. Although the beneficiary had been scheduled for an interview with an immigration examiner on his adjustment of status application (based upon his marriage based visa petition), he told the examiner he was unaware of the reason for his

appointment, and stated he believed he was there to request a suspension of deportation. The record reflects that the beneficiary was represented by counsel at this interview. The beneficiary, through counsel, should have known that no notice to appear had been issued, and deportation proceedings had not been commenced against him. Thus, his assertion that he believed to be appearing on a suspension of deportation does not seem credible.

There appears to be no question that the marriage between the beneficiary and [REDACTED] was fictitious. However, the AAO cannot concur with counsel that the beneficiary was not a party to fraud and that section 204(c) of the Act is not applicable here. The Form I-130 relative petition filed on behalf of the beneficiary, and applications for the adjustment of status and employment authorization document concurrently filed by the beneficiary were based on a fraudulent marriage document. Counsel's principal argument, that the beneficiary is not party to fraud because he is not responsible for the contents of the documents that he signed, is not persuasive.

A signatory to a form is responsible for the content and information contained in the form. The beneficiary's disavowal of participation in fraud cannot be sustained in light of his admission of willingly signing a blank document. Specifically, his failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *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*, Interim Decision 3086 (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)).

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary conspired to enter into a marriage for the purpose of evading the immigration laws. The fact that the marriage conspiracy involved an individual who the beneficiary claims he does not know, specifically [REDACTED] does not make the marriage bar under section 204(c) of the Act inapplicable. As stated above, a signatory to a form is responsible for the content and information contained in the form. The beneficiary's failure to review and understand the forms that he filed cannot be accepted as a defense to his misrepresentation and does not absolve him of responsibility for the content of his petition or the materials submitted in support. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005); *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

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 conspired 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 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.

Beneficiary's Qualifications

In the additional NOIRs, the director also determined that the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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. 401, 406 (Comm'r 1986). See also *Madany 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).

In the instant case, the labor certification states that the offered position requires two years of experience as a cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience at multiple locations. However, the only employer to provide a letter corroborating this experience was [REDACTED]. When completing the Form ETA 750, the beneficiary stated that he was a manager at this location from June 1992 to August 1994, and described his duties as managing and overseeing restaurant staff in the production of food. He also claimed to cook. There were a string of letters purportedly from [REDACTED] attempting to support the beneficiary's

claimed experience; however, none of them described the beneficiary as a manager. Indeed, one letter, describing the beneficiary as a cook, purportedly came from a manager whose dates in that position are nearly identical to those claimed by the beneficiary. This is the first of many inconsistencies in the record related to the beneficiary's claimed experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director first noticed that the beneficiary provided a letter from the [REDACTED] which did not comply with the regulations, as it did not include dates of employment. Additionally, the letter was on photocopied letterhead, but bore an original signature. Because the director determined the letter to be insufficient and suspicious, he requested a new letter. In response, the beneficiary provided a new letter on color letterhead, but the new letter bore an address in [REDACTED] which is not associated with any known [REDACTED] establishment.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and the petitioner must explain or reconcile such inconsistencies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Given the unresolved inconsistencies related to the beneficiary's experience and employment history, USCIS has no reliable evidence with which it can evaluate his experience for the proffered job. It is the petitioner's burden to provide necessary evidence not only to prove the beneficiary is qualified for the proffered job, but to explain or reconcile such major inconsistencies. In this case, the petitioner has not carried this burden.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.