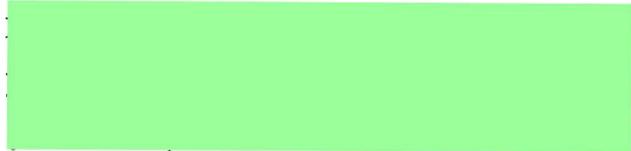


(b)(6)

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



Date: **MAY 03 2012**

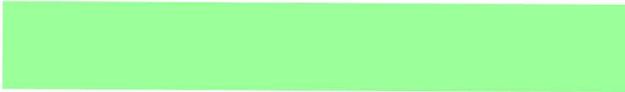
Office: TEXAS SERVICE CENTER

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook 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 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.¹

Basis for Denial of Form I-140

As set forth in the director's October 28, 2008 denial, at issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. The approval of this petition was denied 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 September 6, 1995 by [REDACTED]. 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 Form I-485, Application to Register Permanent Residence or Adjust Status, which was concurrently filed with the Form I-130 and was signed by the beneficiary on August 24, 1995. The record also contains Form G-325, Biographic Information also signed by the beneficiary on August 24, 1995. Both of these documents list [REDACTED] as the beneficiary's spouse. The record also contains photographs of 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 New York district director of the U.S. Citizenship and Immigration Services (USCIS) office located in New York City on September 5, 1996. The decision denied the Form I-130 because the marriage certificate and [REDACTED] birth certificate were found to be fraudulent. The district director states in his decision of denial on September 5, 1996 that "[t]he documents submitted in support of your visa petition, to wit: Birth certification [REDACTED] issued 12/19/90 in Queens and Marriage certificate [REDACTED] issued 6/29/1994 in Hempstead have been verified, and found to be fraudulent."

¹ It is noted that counsel for the petitioner filed Form I-290B on December 11, 2008. That appeal was rejected by the director of the Texas Service Center as improperly filed. As the Texas Service Center did not have jurisdiction over the appeal, the instant appeal will be considered as timely filed.

² The submitted Form I-130 and Form G-325 list her first name as [REDACTED]. The submitted birth certificate lists her name as [REDACTED]. The marriage certificate lists her name as [REDACTED].

Marriage Fraud Statute

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

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.

Relevant Evidence Contained in the Record

The record of proceeding contains the following evidence:

- A photocopy of a Certificate of Marriage ([redacted]) and the beneficiary issued by Town Clerk, Town of North Hempstead, County of Nassau, State of New York on June 29th, 1994;
- A “No Record Certification – Marriage-” issued on June 30, 2004 by [redacted] Registrar of Vital Statistics, Town of North Hempstead, County of Nassau, State of New York. This no record certification certifies that: “a search has been made in this office for the marriage record of [the beneficiary] and J [redacted] ; J [redacted] 1994 at North Hempstead, NY, State of New York and that such record is not on file in this office.”
- Two affidavits signed by the beneficiary on October 4, 2000 and June 17, 2004, respectively;
- An unpublished⁴ Board of Immigration Appeal (BIA) decision that found that section 204(c) did not apply because the marriage in question did not actually take place;
- Copies of the beneficiary’s federal income tax returns jointly filed with [redacted] ; and
- Documents from the New York district attorney’s office and from the American Immigration Lawyers Association that discuss how to file complaints against immigration consultants and *notarios*.

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.

⁴ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Argument on Appeal

On appeal, counsel asserts that:

- Section 204(c) of the Act does not apply to the beneficiary because he was never married to [REDACTED]
- The beneficiary did not conspire to enter into marriage for the purpose of evading immigration laws;
- The beneficiary was the innocent victim of a charlatan posing as an attorney; and
- The beneficiary spoke no English whatsoever at the time he signed the immigration documents; thus, he did not understand what he was signing.

Beneficiary's Statements

According to the beneficiary's affidavits, in 1995 he met and retained an attorney in order to obtain permanent residency. The beneficiary states that "[s]ince I was interested in obtaining a 'green card,' in 1995 I went to an 'attorney' named [REDACTED] who was recommended to me by my fellow worker [REDACTED]. He continues, "[t]he next step was that I had to give to her all the documents she requested, passport, photos, she took my prints, she had me sign various documents bearing only my personal data, and she told me that the rest would be filled out with more time." The beneficiary did not verify which forms he signed.

The record establishes that on September 6, 1995, Form I-130 was filed on the beneficiary's behalf at the USCIS (then INS) New York office. That same day, the beneficiary also concurrently filed his Form I-485 adjustment of status application with the same office. The application filed by the beneficiary included Form I-485 and Form G-325 with his own original signatures.

According to the beneficiary's affidavits, on September 26, 1995 he appeared at the CIS New York Office and obtained an employment authorization document (EAD). Several months later he was alerted by his accountant that his EAD indicated that he had a marriage application pending with the immigration service. Thus, according to his statements, he tried to contact [REDACTED] but she had disappeared. The beneficiary further explained that at that point, another attorney, [REDACTED] found that his application with USCIS was based on marriage and that [REDACTED] had fraudulently filed similar applications for many people. Therefore, the beneficiary continues, he did not appear for an adjustment interview based on that marriage-based petition and never sought to extend the employment authorization card issued in conjunction with that petition. Additionally, the beneficiary stated that he had never known a person by the name [REDACTED] that he never applied for a marriage license anywhere in the U.S., and that he was never married to [REDACTED] nor attempted or conspired to enter into a marriage with her or any other woman for purposes of evading the immigration laws.

Analysis of the Evidence

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.

Counsel asserts that at the time he signed the blank immigration documents in 1995, the beneficiary "was still quite new to the U.S. and spoke no English whatsoever." 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

Beyond the decision of the director, 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 an Italian specialty cook. On the labor certification, the beneficiary claims to qualify for

the offered position based on experience as an Italian specialty cook at [REDACTED] in [REDACTED] New York from December 1994 to the present (December 1997).⁵

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a December 23, 1997 letter from [REDACTED] of [REDACTED] indicating that the beneficiary worked for the restaurant as an Italian specialty cook from December 1994 to the present. The letter does not indicate whether this employment was full- or part-time. If the employment were part-time the petitioner would not have demonstrated that the beneficiary had the requisite experience as of the priority date of the labor certification. As the letter fails to comply with the regulatory requirements, it cannot be accepted to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

Given the above, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

⁵ It is noted that the beneficiary's Form G-325, Biographic Information, signed by him on August 24, 1995 does not mention this employment. Rather, it states that he worked as a self-employed vendor since May 1991. 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). Further, as stated above, the beneficiary's 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).

⁶ It is noted that the record also contains a September 2000 letter on [REDACTED] letterhead signed by [REDACTED], President. The letterhead indicates that [REDACTED]