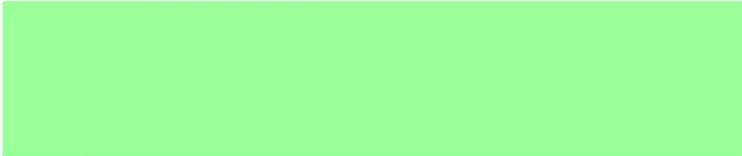


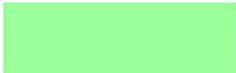
(b)(6)



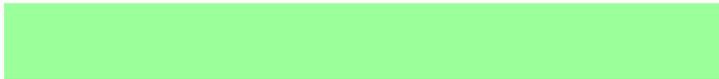
U.S. Citizenship
and Immigration
Services



DATE: **APR 08 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled, Other Worker Pursuant 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,

Ron Rosenberg
Acting 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 liquor store. It seeks to employ the beneficiary permanently in the United States as a cashier 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.

On appeal, counsel asserts that the marriage bar should not apply to the Immigrant Petition to Alien Worker (Form I-140) and that the petition is eligible for approval.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

Based on a review of the record, the AAO determines that there is substantial and probative evidence that the marriage was entered into for the purpose of evading the immigration laws.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) 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 Attorney General to have been entered into for the purpose of evading the immigration laws; or
- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Similarly, the regulation at 8 C.F.R. § 204.2(a) provides in pertinent part:

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.

(1) *Eligibility.* A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.

(ii) *Fraudulent marriage prohibition.* 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. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

The evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. 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).

It is noted that the AAO's appellate jurisdiction may be found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003) and includes appeals from denials of Immigrant Petition for Alien Workers (Form I-140).² Therefore, the AAO has jurisdiction over the director's denial of the

² DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting USCIS the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003).

Form I-140 filed in this case based on his determination that its approval was barred by the fraudulent marriage prohibition contained in section 204(c) of the Act.³

In this case, the record indicates that V.R., a U.S. citizen, and the beneficiary married on March 9, 1996 in Newark, New Jersey. On May 9, 1996, V.R. signed the Form I-130 sponsoring the beneficiary as the spouse of a U.S. citizen. It was filed with the Service and the Form I-130 was subsequently terminated on May 6, 2002. The record indicates that an interview was held pursuant to this application in August 1996 at the Newark district office, which was related to the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485) that had been filed on May 13, 1996.

At this interview, various questions were asked relevant to the *bona fides* of the couple's marriage and their life together. It is noted that V.R. could not recall the name of the beneficiary's mother or the names of his children.⁴ Subsequent site visits to the beneficiary's residence were made, and on August 17, 1999, contact was made with the beneficiary. According to the memorandum of investigation, the beneficiary claimed that V.R. was in Puerto Rico and that he did not know when and if she would return to the United States. The beneficiary claimed that their marriage was valid. The two investigators inspected the apartment except for two locked rooms that belonged to the beneficiary's cousin, and found no evidence that V.R. had ever lived in the apartment. When queried about the lack of belongings attributable to V.R., the beneficiary claimed that she took everything to Puerto Rico when she left. Action on the beneficiary's Form I-485 was subsequently terminated.

On April 3, 2006, the petitioner in the instant proceedings filed an Application for Permanent Employment Certification (ETA Form 9089), with the Department of Labor in order to sponsor the beneficiary as a cashier as set forth by the terms of the approved labor certification. This labor certification was certified by DOL on May 17, 2006. On June 13, 2006, the petitioner filed a Form I-140 with the Service, seeking an immigrant visa for the beneficiary based on the approved labor certification.

The director issued a Notice of Intent to Deny (NOID), questioning, *inter alia*, the *bona fides* of the marriage between V.R. and the beneficiary. In response to this issue, the petitioner provided a copy of V.R.'s 1996 Wage and Tax Statement (W-2), a copy of the 1997 individual tax return of the beneficiary and V.R. jointly filing as married, incomplete copies of the parties' 1998, 1999, 2000, 2001, and 2002 individual tax returns, all showing married filing jointly as the filing status. However, none were accompanied by any copies of V.R.'s W-2s and all reflected only the beneficiary's income. With another response to the AAO's request for evidence, the petitioner provided additional, mostly incomplete copies of the parties' individual jointly filed tax returns, all reflecting only the beneficiary's income along with copies of his W-2s. The beneficiary additionally submitted a statement claiming that the parties separated in 2002 but were still married.

³ See also 8 C.F.R. § 204.2(a).

⁴ The beneficiary and V.R. both have children by other individuals.

The petitioner also provided copies of a July and August 2001 and a March and April 1999 utility statement(s) in both parties' names, a copy of an information sheet relevant to 1999 state income tax addressed to both parties, a copy of some August 2001 mail from the Superior Court/Jury Division addressed to V.R. at the beneficiary's stated residence, copies of some mailing envelopes from accountants addressed to both parties from 1999 and 2001, and copies of various other mail addressed to both parties from 1999, 2000, 2001 and 2002 relating to income tax refunds and the student assistance authority. The petitioner also submitted an unsigned draft letter from [REDACTED] and [REDACTED] stating that they received rent from the beneficiary and V.R. in the years of 1998 to 2002.

It is noted that the unsigned draft of rent received is not probative of the matter asserted. Further, other documentation in the record indicates that the [REDACTED] purportedly receiving rent from V.R. and the beneficiary was the beneficiary's employer and cousin. Further, as the director noted, there is no evidence that such funds were actually received from both parties and were deposited. Additionally, little probative evidence of marital cohabitation has been provided. There is no evidence of children born to the marriage, no evidence of joint ownership of any real or personal property and no evidence of commingled liquid cash assets beyond copies of mailing envelopes from the state of New Jersey referring to income tax refunds addressed to both parties.

An independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary entered a marriage with V.R. for the purpose of evading 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 U.S. Citizenship and Immigration Services (USCIS) to have been entered into for the purpose of evading the immigration laws is affirmed.

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.