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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



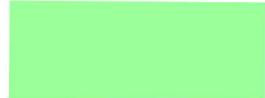
U.S. Citizenship
and Immigration
Services



DATE: **AUG 12 2013**

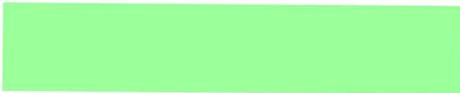
OFFICE: VERMONT SERVICE CENTER

FILE:



IN RE:

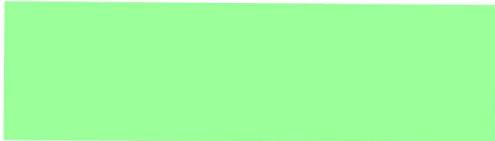
Petitioner:



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)

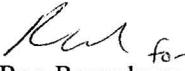
ON BEHALF OF PETITIONER:



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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (“VSC director”), determined that the beneficiary lacked the requisite employment qualifications and thus revoked a previously approved Immigrant Petition for Alien Worker (Form I-140). In its decision to dismiss the petitioner’s appeal of the revocation, the Administrative Appeals Office (“AAO”) affirmed the VSC director’s determination with respect to beneficiary qualifications and, further, identified the marriage fraud bar at section 204(c) of the Immigration and Nationality Act (“Act”), 8 U.S.C. § 1154(c) (2012), as an additional ground of ineligibility.¹ The AAO subsequently reopened the matter and permitted the petitioner to submit a supplemental brief and additional evidence. See 8 C.F.R. § 103.5(a)(5)(ii). Upon review, the AAO will sustain the appeal and reinstate the petition’s approval.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner is a restaurant that seeks to employ the beneficiary permanently in the United States as a cook. The petitioner filed this petition seeking classification of the beneficiary under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3) (2012). As required by statute, the petitioner submitted an individual labor certification, the Application for Alien Employment Certification (Form ETA-750), approved by the United States Department of Labor (“DOL”). In revoking the Form I-140 petition’s approval, the VSC director determined that the petitioner failed to demonstrate that the beneficiary possessed the minimum experience required by the labor certification. Upon reviewing the revocation of the previously approved Form I-140 petition, the AAO affirmed the VSC director’s decision regarding the beneficiary’s qualifications and dismissed the appeal.

Exercising its *de novo* review of the record of proceedings, the AAO also concluded that section 204(c) of the Act required denial of the Form I-140 petition. The record indicated that the beneficiary of the instant Form I-140 petition was the named beneficiary of a separate and prior marriage-based Petition for Alien Relative (Form I-130) filed with the District Director, Boston, Massachusetts (“Boston director”). Concurrently filed with the Form I-130 petition was an Application to Register Permanent Residence or Adjust Status (Form I-485). During his interview in the Boston District Office, the beneficiary indicated that the marriage certificate filed with the Form I-130 petition was fictitious and that he had never met or married the petitioner. The Boston director denied the Form I-130 petition as abandoned and denied the Form I-485 application because the beneficiary was inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) (2012), for misrepresentations relating to the marriage-based Form I-130 petition.²

In a Notice of Intent to Revoke the Form I-140 petition’s approval, the VSC director asserted, *inter alia*, that the Form I-140 petition could not be approved because, pursuant to section 204(c), the beneficiary had previously engaged in marriage fraud in relation to the Forms I-130 and I-485

¹ The AAO conducts appellate review on a *de novo* basis. See *Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

² The Boston director treated the Form I-130 petition as abandoned because the beneficiary disavowed the existence of a marriage and the putative petitioner spouse failed to appear for the interview.

adjudicated by the Boston director. The VSC director did not, however, include a determination regarding section 204(c) in the ultimate revocation decision.

Upon appellate review of the decision to revoke the Form I-140 petition's approval, the AAO independently determined that the Form I-140 petition's approval must be revoked because substantial and probative evidence supported a reasonable inference that the beneficiary conspired to enter into a prior marriage for the purpose of evading the immigration laws. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). As such, the AAO concluded that, in addition to the failure to demonstrate that the beneficiary qualified for the proffered position, section 204(c) required revocation of the Form I-140 petition's approval.

II. ISSUES PRESENTED

A. The Beneficiary's Qualifications

Section 203(b)(3)(A)(i) of the Act provides visa preference classification to immigrants qualified to perform skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. To be eligible for approval, a beneficiary must possess all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg. Comm'r 1977). The priority date of the petition is the date that DOL accepts the labor certification for processing. 8 C.F.R. § 204.5(d).

In the prior decision dismissing the petitioner's appeal, the AAO identified inconsistencies that precluded the petitioner from establishing the beneficiary's qualifications. With supplemental evidence submitted after the AAO reopened its prior decision, the petitioner has adequately "resolve[d] the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner has established through relevant, probative, and credible evidence that it is more likely than not that, as of the priority date, the beneficiary possessed the education, training, and experience specified on the Form ETA-750. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

B. Application of the Marriage Fraud Bar

For the reasons set out below, the AAO also concludes that the beneficiary is not subject to the marriage fraud bar in section 204(c) of the Act. Section 204(c) of the Act provides:

Notwithstanding the provisions of subsection (b) of this section 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.

(Emphasis added.) Subsection (2) of this provision incorporates the Immigration Marriage Fraud Amendments of 1986 (IMFA), by which Congress revised the bar to include cases where “the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.” Pub. L. No. 99-603, § 4, 100 Stat. 3537, 3543 (Nov. 10, 1986).

Construing section 204(c) of the Act as it existed prior to IMFA, the Board of Immigration Appeals (Board) held that the bar in section 204(c) did not apply to cases where an alien does not actually enter into a marriage, but rather falsifies documents to represent the marriage’s existence. *See Matter of Concepcion*, 16 I&N Dec. 10, 11 (BIA 1976) (concluding that section 204(c) did not apply to alien who never married but falsified marriage documents, because “it cannot be determined that she obtained immediate relative status on the basis of a marriage entered into for the purpose of evading the immigration laws”); *Matter of Anselmo*, 16 I&N Dec. 152, 153 (BIA 1977) (“In the absence of an actual marriage, section 204(c) does not apply.”).

Of course, with the amendment adding subsection (2), it can no longer be said that section 204(c) requires an “actual marriage.” By the express language of section 204(c)(2), an attempt or conspiracy to enter into a marriage will also suffice, if the purpose was to evade the immigration laws. But absent even an attempt or conspiracy to enter into a marriage, the IMFA amendments to section 204(c) of the Act do not negate the continued applicability of *Concepcion* and *Anselmo*. By its plain language, section 204(c) of the Act applies only to an alien who “entered into,” or “attempted or conspired” to enter into, a marriage. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must enforce it according to its terms.”). An alien who submits false documents representing a non-existent marriage and who never either entered into or attempted or conspired to enter into a marriage may intend to evade the immigration laws, but he or she does not thereby “enter into,” or conspire or attempt to “enter into,” a marriage for purposes of section 204(c) of the Act.

Section 204(c) aside, however, such conduct may render the beneficiary inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) (2012), when the director adjudicates the Application to Register for Permanent Residence or Adjust Status (Form I-485). *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (holding that the immigrant visa petition is not the appropriate forum for finding an alien inadmissible).

In the case at hand, the record contains a fictitious marriage certificate filed with the Form I-130 petition. Nonetheless, the AAO concludes that the beneficiary credibly established that the purported marriage never occurred and that he did not otherwise enter into, or conspire or attempt “to enter into,” a marriage for the purpose of evading the immigration laws of the United States.³ Thus, section 204(c) is inapplicable.

³ From his initial interview on the adjustment application through his subsequent assistance in USCIS’ investigation of an unauthorized practitioner of immigration law, the beneficiary credibly demonstrated that he did not willfully misrepresent a material fact or otherwise know that a preparer

III. CONCLUSION

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361 (2012). With respect to the beneficiary's eligibility for the I-140 petition, the petitioner has met that burden.

ORDER: The appeal is sustained.

had done so in benefit requests relating to him. The beneficiary persuasively established that he first realized that he was the subject of a marriage-based immigrant visa petition when he appeared for an interview with USCIS and was asked about the purported marriage. The beneficiary confirmed at the interview that he never met or married the purported petitioner and verified that the presented marriage certificate was false.