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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: DEC 06 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** On July 23, 2001, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director (the director) on November 2, 2001. The director, however, revoked the approval of the immigrant petition. A motion to reconsider the revocation was dismissed by the director on October 4, 2004. The matter was before the Administrative Appeals Office (AAO) on appeal, which was dismissed on August 15, 2006.<sup>1</sup> The petitioner submitted a motion to reopen and reconsider to the AAO on September 14, 2006. In a decision issued on January 22, 2009, the motion to reopen was granted and the AAO's August 15, 2006 decision was affirmed. The AAO dismissed a subsequent motion to reopen and reconsider. It is now on a third motion to reopen and motion to reconsider before the AAO. The motion to reconsider will be granted, the AAO's and the director's decisions will be withdrawn and the petition will be remanded for a new decision.

#### I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner's Form ETA 750 was filed with the DOL on February 22, 2001 and certified by the DOL on April 12, 2001. On July 29, 2003, the director issued a notice of intent to revoke (NOIR) the approval of the petition because the petition did not appear to have been approvable under the provisions of section 204(c) of the Act. The NOIR states that a petition for alien relative (Form I-130) was filed on May 28, 1996 by B-C- for the beneficiary. The petition was denied on December 27, 1996, because an investigation revealed that B-C- and the beneficiary did not marry to begin a life together as husband and wife. It was determined that the marriage was entered into with the sole intention of gaining immigration benefits for the beneficiary. The director gave the petitioner 60 days to submit evidence that would overcome the reasons for revocation. In response to the NOIR, counsel submitted an affidavit from the beneficiary arguing that the beneficiary never entered into a marriage with B-C- and that he is a genuine victim of immigration fraud without his knowledge or participation. The director revoked the approval of the I-140 petition in a notice of revocation (NOR) on May 14, 2004, determining that the beneficiary conspired to enter into a fraudulent marriage for the purpose of evading immigration laws.

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the motion to reopen and motion to reconsider are timely and make 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

*(2) Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .

*(3) Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the AAO's previous decision erred in the appreciation of the facts of the beneficiary's alleged conspiracy and attempt to enter into a fraudulent marriage. The AAO grants the petitioner's motions and finds that the grounds for revocation of the approved Form I-140 immigrant petition have been overcome; however, the petitioner has not otherwise established that the petition is approvable.

## II. ISSUES PRESENTED

### A. The Petitioner's Ability to Pay

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 deficiencies in the record regarding the petitioner's ability to pay the proffered wage.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted on February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$8.41 an hour, or \$17,492.80 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The petitioner files its tax return based on a calendar year of June 1, to July 31 of the following year. On the petition, the petitioner claimed to have been established on November 3, 1988, have a gross annual income of \$326,176, and currently employ four full-time workers and three part-time workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As stated previously, the petitioner's tax year runs from June 1, to May 31 of the following year. Thus, the priority date of February 22, 2001 would fall in the petitioner's 2000 tax year. Thus the beneficiary's wages from tax year 2000 would be relevant in these proceedings. Since the petitioner did not submit any Form W-2 or Form 1099-MISC for the beneficiary for tax year 2000, the AAO cannot determine whether the petitioner paid the beneficiary the proffered wage of \$17,492.80 in 2000. However, the petitioner has established that it paid the beneficiary the following wages in tax years 2001 to 2005 and in 2008: \$12,852.50 in 2001; \$18,851.48 in 2002; \$18,459 in 2003; \$16,461 in 2004; \$15,583.50 in 2005; and \$13,517.50 in 2008. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date; however, it did establish that it paid

the beneficiary more than the proffered wage in tax years 2002 and 2003. Thus, the petitioner must establish its ability to pay the entire proffered wage in tax year 2000, 2006, 2007 and 2009 through the present, and the difference between the beneficiary's actual wages and the proffered wage in tax years 2001, 2004, 2005 and 2008.<sup>2</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$17,492.80 per year from the priority date:

- In 2000,<sup>3</sup> the Form 1120 stated a net income<sup>4</sup> of \$23,905.

<sup>2</sup> The difference between the beneficiary's wages and the proffered wage in tax years 2001, 2004, 2005 and 2008 are \$4,640.30, \$1,031.80, \$1,909.30, and \$3,975.30, respectively.

<sup>3</sup> The tax year in which the February 22, 2001 priority date was established.

- In 2001, the Form 1120 stated a net income of \$18,383.
- In 2004, the Form 1120 stated a net income<sup>5</sup> of \$11,854.
- In 2005, the Form 1120 stated a net income of \$8,007.
- In 2006, the Form 1120 stated a net income of -\$8,566.
- In 2007, the Form 1120 stated a net income of -\$10,973.
- In 2008, the Form 1120 stated a net income of -\$39,512.
- In 2009, the Form 1120 stated a net income of -\$20,639.
- In 2010, no tax return was submitted.
- In 2011, the Form 1120 stated a net income of -\$12,297.

Although the petitioner's net income in tax year 2000 through 2005 was greater than the proffered wage of \$17,492.80 or the difference between the proffered wage and the actual wages paid to the beneficiary, USCIS records demonstrate that the petitioner filed I-140 petitions for three additional workers, with priority dates for two workers of March 13, 2000,<sup>6</sup> and a priority date of August 1, 2001 for the third worker. The petitioner must show that it had sufficient income to pay all the wages for all petitioned beneficiaries at the priority date. The petitioner submitted no further evidence with regard to the wages paid to these three additional workers, or the proffered wages offered to these employees. Therefore, the record does not establish whether the petitioner could have paid either entire wages or differences between actual wages and proffered wages for the additional three workers based on the petitioner's net income. Further, the petitioner failed to submit its tax returns for 2010 and the tax returns for 2006 through 2011 reflect insufficient net income to pay the proffered wage of the instant beneficiary, let alone the three other beneficiaries.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-

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<sup>4</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>5</sup>The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

<sup>6</sup>For these two petitions, the petitioner's Federal tax return for tax year 1999 would be relevant, as the March 13, 2000 priority day is within the period of time covered by the petitioner's 1999 tax return, namely, June 1, 1999 to May 31, 2000. As stated in the previous AAO dismissal, the petitioner's net income in 1999 was \$18,228. If the wages for the other workers were similar to the instant beneficiary's proffered wage, this sum would be sufficient to cover only one worker's wages.

<sup>7</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most

end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 1999<sup>8</sup> were \$57,883.
- The petitioner's net current assets during 2000 were -\$21,415.
- The petitioner's net current assets during 2001 were \$63,450.
- The petitioner's net current assets during 2002 were \$96,636.
- The petitioner's net current assets during 2003 were \$108,762.
- The petitioner's net current assets during 2004 were \$103,112.
- The petitioner's net current assets during 2005 were \$109,349.
- The petitioner's net current assets during 2006 were \$100,280.
- The petitioner's net current assets during 2007 were \$87,428.
- The petitioner's net current assets during 2008 were \$53,754.
- The petitioner's net current assets during 2009 were \$37,248.
- No tax return was submitted for 2010.
- The petitioner's net current assets during 2011 were \$11,547.

Therefore, the record reflects that the petitioner may have had<sup>9</sup> sufficient net current assets to pay for additional workers for tax year 1999, 2002, 2003, 2004, 2005 and 2006. However, the petitioner's negative net current assets are not sufficient to establish that the petitioner could have paid the proffered wages of the two additional workers in tax year 2000 or three additional workers in tax year 2001. The petitioner has failed to submit its 2010 tax records. The petitioner's net current assets were insufficient to pay the instant proffered wage in 2011 and may have been insufficient to pay the instant proffered wage and the additional workers for 2008 and 2009.

Therefore, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date.

#### B. Application of the Marriage Fraud Bar

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cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>8</sup> This figure is included in these calculations for illustrative purposes, because two of the additional workers had March 2000 priority dates. The petitioner would have had to establish its ability to pay the proffered wage for these two additional worker from tax year 1999 and onward.

<sup>9</sup> As stated previously, the petitioner has provided no further evidence as to the proffered wages for these additional workers, or any actual wages paid to them.

For the reasons set out below, the AAO 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.<sup>10</sup> 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. Thus, section 204(c) is inapplicable.

### III. CONCLUSION

Therefore, the petition will be remanded to the director for the consideration of the petitioner's ability to pay, the beneficiary's qualifications, and any other issue the director deems appropriate. The director may request additional evidence from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable time period to be set by the director. The director will then issue a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

**ORDER:** The director's decision dated May 14, 2004 is withdrawn. The petition is remanded to the director for the issuance of a new decision.

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<sup>10</sup> A letter dated September 21, 2004, from the City of New York's Office of the City Clerk confirms that the marriage certificate for the beneficiary and B-C- is fraudulent and that no such marriage exists in the records.