



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **DEC 19 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner: [Redacted]

Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 (AAO) 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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center and came before the Administrative Appeals Office (AAO) on appeal. The AAO affirmed the director's decision on January 29, 2013. The petitioner filed a motion to reopen and reconsider that decision, and the AAO affirmed its prior decision on July 30, 2013. The matter is again before the AAO as a second motion to reopen and reconsider its decision. The motion will be granted. The previous decisions of the AAO, dated January 29, 2013 and July 30, 2013, will be affirmed and the petition will remain denied.

The petitioner is a medical company. It seeks to employ the beneficiary permanently in the United States as a clerk 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 an ETA Form 9089, Application for Permanent Employment Certification (labor 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 AAO affirmed the director's decision on January 29, 2013 and July 30, 2013 for this same reason.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[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." The regulation at 8 C.F.R. § 103.5(a)(3) states that "[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 must also "establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

As set forth in the director's April 24, 2012 denial, the issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. The instant 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 30, 1997. 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 the completed forms, signed by the beneficiary; photographs; copies of a lease agreement, bank account statements, and bills; a copy of the beneficiary's marriage certificate; affidavits by the beneficiary's former spouse and her mother; and witness affidavits attesting to the validity of the beneficiary's marriage.

The Immigration and Naturalization Service (INS) (now the U.S. Citizenship and Immigration Services (USCIS)) denied the Form I-130 on August 30, 2001, concluding that the U.S. Citizen spouse failed to show that the marriage to the beneficiary was entered into for a valid reason.

On motion, counsel makes several arguments: first, that the AAO failed to address why the beneficiary's complaint against his former counsel was not persuasive in this matter; second, that the AAO failed to explain that its finding was based on "substantial and probative" evidence to support the director's conclusion of marriage fraud; and third, that the evidence in the record, with an additional affidavit from the beneficiary's former spouse, demonstrates by a preponderance of the

evidence that the beneficiary's marriage was *bona fide*.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)<sup>1</sup> 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.

The record reflects that the beneficiary has filed a complaint with the Disciplinary Committee of the Supreme Court of New York, to establish a claim of the ineffective assistance of the beneficiary's former counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). Counsel in the instant matter asserts that the omission of the beneficiary's marriage to [REDACTED] on the Form I-485 and Form G-325A constituted ineffective representation and negatively affected his case. However, as indicated by the AAO in its January 29, 2013 decision, the beneficiary's disavowal of participation in fraud cannot be sustained in light of his admission of willingly signing a blank document. The AAO also stated that the failure of the beneficiary 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 (6<sup>th</sup> 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). Counsel states that in the instant case, the evidence in the record demonstrates that this omission was not "deliberate avoidance." However, the beneficiary shares some responsibility for the omission of the marriage information on the Form I-485 by signing blank forms. Counsel's filing of a claim of the ineffective assistance of counsel does not absolve the beneficiary of the responsibility he shares in this matter by having signed blank forms.

The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11<sup>th</sup> Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5<sup>th</sup> Cir. 1993). To allow the beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a blank document would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit

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<sup>1</sup> 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.

from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution. Therefore, the omission of the beneficiary's marriage on the Form I-485 and Form G-325A cannot be corrected simply by filing a claim of ineffective assistance of counsel against the beneficiary's former counsel.

On motion, counsel states that the differences between the responses given by the beneficiary and his wife at their August 13, 1998 interview were minor and that the affidavits in the record from the beneficiary and his former spouse, [REDACTED] resolve any discrepancies in this interview. After reviewing the record, although there were differences between the responses given at the August 13, 1998 interview, the responses alone do not rise to substantial and probative evidence that the beneficiary and his former spouse, [REDACTED], were not living together. However, the record contains additional evidence, discussed below, which constitutes substantial and probative evidence of marriage fraud and warrants the denial of the instant petition.

As stated above, the record demonstrates that one of the beneficiary's former employers filed a Form I-140 on his behalf that was approved on October 13, 2000 ([REDACTED]). On November 27, 2007, the USCIS issued a notice of intent to revoke the approval of this petition based on the same facts of marriage fraud as in this case under Section 204(c) of the Act.<sup>2</sup> The USCIS did not receive a response. On January 24, 2008, the USCIS revoked the approval of the beneficiary's Form I-140 under Section 204(c) of the Act, concluding that the evidence in the record does not establish that the beneficiary's marriage to [REDACTED] was *bona fide*. The petitioner did not appeal this revocation. As stated above, Section 204(c) states that a petition shall not be approved "if 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 . . . by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws." Because this decision was not appealed, any subsequent petition shall not be approved.

Additionally, the record reflects that the beneficiary was interviewed on December 4, 2003 and stated that he had lived alone during the time he lived in Connecticut. When asked whether he had lived alone during the 13 years that he had lived in the United States, he stated, "I always live by myself." The beneficiary also testified under oath at this interview that he lived in Connecticut from 1995 to June 1997 and that he moved to [REDACTED] in June 1997. This was prior to the beneficiary's marriage to [REDACTED] and public records demonstrate that she never lived at this address. The beneficiary has since claimed that he did not understand the questions asked at this interview. However, the meaning of his statement, "I always live by myself," is one that may be understood regardless of how he understood the question that was being asked. Further, the beneficiary had given the interviewer dates and addresses that indicated he had lived

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<sup>2</sup> The record demonstrates that the decision revoking the approval of the petition ([REDACTED]) was mailed to the petitioner.

alone and his statement supported this conclusion. The beneficiary applied for adjustment of status on December 6, 2000 based upon the approval of his Form I-140 filed by [REDACTED]. On this Form I-485, and the accompanying Form G-325A, the questions about the beneficiary's spouse were left blank even though he was married to [REDACTED]. The December 4, 2003 interview was in relation to the adjustment of status based on the Form I-140 filed by [REDACTED]. Therefore, it appears that the beneficiary's statement under oath regarding where he lived and when; his statement that he had always lived alone; and the fact that the Form I-485 and Form G-325A did not state the beneficiary's prior marriage to [REDACTED] together tend to demonstrate that the beneficiary's marriage to [REDACTED] was not *bona fide*.

The record also demonstrates substantial evidence that the beneficiary's marriage was entered into for the purpose of obtaining an immigration benefit. The record reflects the following aspects of the instant matter that should be considered in the totality of the circumstances:

- On September 23, 1997, the beneficiary married [REDACTED], New York.
- On September 30, 1997, [REDACTED] filed a Form I-130, Petition to Classify Alien Relative, on the beneficiary's behalf one week after the marriage, which, coupled with the fact that [REDACTED] later established a pattern of helping foreign nationals obtain immigration benefits, casts doubt on the purpose of her marriage to the beneficiary.
- On August 13, 1998, the beneficiary and [REDACTED] attended an interview on the merits of their marriage.
- On December 30, 1998, the INS issued the petitioner a Notice of Intent to Deny (NOID) the Form I-130 petition on the basis that the petitioner had not established that the marriage was not entered into for the purpose of evading immigration laws. The petitioner did not respond to this NOID.
- On May 30, 1999, the beneficiary submitted a change of address form to USCIS, indicating a new address at [REDACTED]. Public databases demonstrate that [REDACTED] never lived at this address.
- On October 13, 2000, an I-140 petition [REDACTED] was approved on the beneficiary's behalf.
- On December 6, 2000, the beneficiary filed a Form I-485 Application for Adjustment of Status based upon the approval of his Form I-140 filed by [REDACTED]. On this Form I-485, and the accompanying Form G-325A, the questions about the beneficiary's spouse were left blank even though he was married to [REDACTED].
- On December 21, 2000, the beneficiary and [REDACTED] were divorced.
- On March 15, 2001, the beneficiary married [REDACTED]. The short period of time of this marriage in [REDACTED] approximately three months following the beneficiary's divorce from [REDACTED] tends to cast doubt on the purpose of the beneficiary's marriage to [REDACTED].
- On August 30, 2001, the INS denied the Form I-130 filed on the beneficiary's behalf,

concluding that [REDACTED] failed to show that her marriage to the beneficiary was entered into for a valid reason. The petitioner did not appeal this decision which, in conjunction with the later pattern [REDACTED] exhibited toward helping foreign nationals receive immigration benefits, tends to cast doubt on the validity of her marriage to the beneficiary.

- On November 27, 2007, the USCIS issued a notice of intent to revoke the approval of the Form I-140 filed by [REDACTED] based on the same facts of marriage fraud as in the instant case under Section 204(c) of the Act.
- On January 24, 2008, the USCIS revoked the approval of the Form I-140 filed by [REDACTED], and the petitioner did not appeal this decision.

Each of the above facts, viewed together, further demonstrate substantial and probative evidence that the beneficiary's marriage to his former spouse was not a *bona fide* marriage, but that it was entered into for the purpose of evading immigration laws.

Therefore, an independent review of the documentation reflects sufficient evidence that the beneficiary attempted to evade the immigration laws by marrying [REDACTED] and that attempt is documented in the alien's file. 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.

Additionally, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.