



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: FEB 07 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.

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 Director, Vermont Service Center (the director), initially approved the preference visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. In his Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a banquet captain under Section 203(b)(3) of 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). On August 4, 2009, the director revoked the petition's approval based upon the determination that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and revoked the petition's approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c).

The record reflects the following: the Form I-140 petition was filed on December 8, 2000; the director approved the petition on September 14, 2001; a NOIR was issued by the director to the petitioner on January 20, 2009 and May 11, 2009; the petitioner responded to the NOIRs on February 23, 2009 and June 11, 2009, respectively; the director issued a NOR to the petitioner on August 4, 2009; and the petitioner appealed the revocation of the petition's approval on August 24, 2009. On March 5, 1997, legacy Immigration and Naturalization Service (INS) issued a notice of intent to deny (NOID) the Form I-130 petition charging the petitioner and beneficiary [the parties to the marriage] with section 204(c) of the Immigration and Nationality Act (the Act) based on numerous discrepancies. On March 18, 1997, the beneficiary withdrew the marriage petition. On March 21, 1997, a divorce decree was issued dissolving the marriage between the beneficiary and his U.S. citizen spouse. On April 4, 1997, legacy INS denied the Form I-130. On February 3, 1999, legacy INS issued a NOID of a second Form I-130 petition filed on behalf of the beneficiary by his second U.S. citizen spouse, charging the beneficiary and his second spouse with section 204(c) of the Immigration and Nationality Act (the Act) based on his prior marriage. On March 6, 1999, a divorce decree was issued dissolving the marriage between the beneficiary and his second U.S. citizen spouse. On October 14, 1999, legacy INS issued a denial of the second Form I-130.

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.

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.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under Section 205 of the Act, the BIA has stated:

*In Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval.

As set forth in the director's NOR, the 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 revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130 petition was filed on the beneficiary's behalf on January 13, 1995. Concurrent with the filing of Form I-130 petition, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a United States citizen. The file contains the completed forms, signed by the beneficiary, copies of documentation purportedly evidencing the beneficiary's *bona fide* marriage, and a copy of a marriage certificate between the beneficiary and R-E-<sup>1</sup>.

In connection with the Form I-130 petition, a decision was issued by the district director of the Washington, D.C. legacy INS District Office on April 4, 1997. The decision denied the Form I-130 petition because the petitioner had failed to respond to the NOID describing numerous discrepancies between hers and the beneficiary's testimony during their USCIS Stokes interview on February 28, 1997.<sup>2</sup>

<sup>1</sup> Name withheld to protect the identity of the individual.

<sup>2</sup> The AAO notes that spouses are separated during a Stokes interview. A USCIS officer will question each individual in order to elicit information about the other. The questions posed regard their relationship, home life, and daily interactions. R-E- and the beneficiary were given ample time to provide evidence to rebut the findings in the NOID and instead chose to withdraw the beneficiary's petition. On appeal, counsel contends that couples will always have inconsistent answers to some questions and that, this is not conclusive evidence of the *bona fides* of the marriage and that, if the petitioner and R-E- had been given time to prepare for the interview they would have been able to provide a multitude of additional documentation to establish the *bona fides* of their marriage; however, as stated above, R-E- and the beneficiary were given ample opportunity to provide contemporaneous documentation to rebut the findings on the NOID and the inconsistent answers between the petitioner and R-E- were substantial and reflect that the couple attempted to conceal that they did not currently reside together and were separated. Counsel contends that R-E- and the beneficiary did not receive a copy of the NOID; however, the record reflects that the NOID

The record of proceeding contains the following relevant evidence: affidavits from R-E- and her mother attesting to the validity of the marriage; the beneficiary and his wife's marriage certificate from 1994; the beneficiary's United States Internal Revenue Service (IRS) Individual Income Tax Form 1040 for 1994 indicating that he was married, filing separately; a letter from [REDACTED] indicating that the bank is unable to add R-E- to the beneficiary's checking account due to negative information on R-E-; various bills, such as energy, car insurance and phone bills, from 1995 listing both the beneficiary and his wife's names<sup>3</sup>; a copy of a life insurance policy adding R-E- to the beneficiary's plan as a rider<sup>4</sup>; a copy of R-E-'s driver's license with the same address as that of the beneficiary issued November 21, 1996; a document from a [REDACTED] in Fairfax, Virginia evidencing the separation of the beneficiary and R-E- on February 7, 1996 and dissolution of the marriage on March 21, 1997; a letter from beneficiary's counsel requesting the withdrawal of the beneficiary's petition; a legacy INS letter to R-E- dated March 5, 1997 stating that it intended to deny her Form I-130 petition for her husband; and a legacy INS letter to R-E- dated April 4, 1997 stating that her Form I-130 petition for her husband had been denied.

On August 24, 2009, the director revoked the Form I-140 petition's approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c). Specifically, the director found that the evidence submitted by the petitioner, which included documentation showing joint bills and the affidavit of a third party having knowledge of the *bona fides* of the marriage relationship, was insufficient to overcome evidence in the record of proceeding that supported a reasonable inference that the petitioner's prior marriage with R-E- was entered into for the purpose of evading immigration laws.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)<sup>5</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 regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

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was forwarded to the last known addresses of both parties and their legal representative.

<sup>3</sup> Public databases indicate that the petitioner and beneficiary never resided together.

<sup>4</sup> The record contains a copy of the beneficiary's employment application for the petitioning entity on the Form I-140 which reflects that the beneficiary designated only his cousin as a beneficiary of his life insurance.

<sup>5</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.

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.

Section 212(a)(6)(c)(i) the Act states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

On appeal, counsel urges USCIS to consider the affidavits from R-E- and her mother attesting that the beneficiary and R-E- lived together and maintained a real and *bona fide* marriage until they separated in 1996. On appeal, counsel submits a new affidavit from R-E- to establish the *bona fides* of the marriage. The AAO notes that the first two affidavits submitted are nearly identical to one another in their content, paragraph structure, and information relayed and were submitted only in response to the NOID of the beneficiary's second Form I-130. The AAO notes that the new affidavit relays very little new information in regard to the actual *bona fides* of the marriage, providing a review of the circumstances surrounding the interview of R-E- and statements that R-E- is not easily fooled and that the beneficiary did not marry her for immigration purposes. The fact that these documents are not contemporaneous with the events, coupled with the similarity of the testimony lessens the probative weight of this evidence.

The AAO also notes that all of the evidence submitted regarding the beneficiary and his wife's commingling of lives and residence appears to be general in nature. Though R-E-'s mailing address appears to be the same as that of the petitioner, there is no concrete evidence showing that she actually lived there or that they had a *bona fide* relationship. For example, during the Stokes interview, the petitioner and beneficiary gave differing accounts of how they met and recent activities together. While counsel contends that the discrepancies were as a result of the separation of the couple in 1996, at no point during the interview did the beneficiary or petitioner indicate that they were no longer residing together. Moreover, the separation of the couple does not account for the discrepancies in how they initially met. Furthermore, the first wife's explanation for the discrepancies conflicts with documentary evidence. In her affidavits the Form I-130 petitioner, R-E- indicates that she and the beneficiary separated and she went to live with her parents in February 1996; however, the record contains a driver's license for R-E- issued on November 21, 1996 indicating that the petitioner resided with the beneficiary.

The AAO notes that the legacy INS Officer who conducted the beneficiary and his wife's Stokes interview on January 28, 1997 documented the discrepancies and inconsistencies between their testimonies, which were given under oath, e.g., how the couple had met, information regarding their respective families, basic information regarding their household schedule and activities. With respect to these personal matters, the beneficiary and his wife consistently provided contradictory information to the officer.<sup>6</sup> Additionally, the testimony provided by the petitioner and beneficiary belies the petitioner's explanation that the couple had separated in February 1996. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho* also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Id.* at 591-592. Neither the beneficiary nor counsel has provided sufficient explanation for those discrepancies and inconsistencies.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that there was an attempt to enter into a sham or fraudulent marriage. We find that R-E- and the alien beneficiary, by fraud or by willfully misrepresenting a material fact, are in violation of Section 212(a)(6)(c)(i) of the Act first mentioned above.

We find that there is substantial and probative evidence of an attempt or conspiracy by the alien and other individuals who have attempted or conspired to enter into a marriage in violation of the regulation 8 C.F.R. § 204.2(a)(1)(ii) for the purpose of evading the immigration laws. The beneficiary by submitting fraudulent documents or by conspiring with others to submit fraudulent documents that on their face presented evidence of a valid marriage where none existed as a basis of that petition, committed fraud.

The standard for revocation is found in statutory authority at Section 205 of the Act as stated above, and it is that standard that is applicable in this case. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

An independent review of the documentation establishes that the beneficiary attempted to evade the immigration laws by marrying R-E-, 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

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<sup>6</sup> For example, R-E- stated that she and the beneficiary had visited her family for a week in Harrisonburg approximately 3 to 4 weeks after Christmas. The beneficiary stated that he last visited the petitioner's family six months ago (July/August). R-E- stated that she and the beneficiary drove down together to visit her family in Harrisonburg on Christmas Eve and returned Christmas night. The beneficiary stated that he worked Christmas Day until 4pm and returned home to find the petitioner at a friend's house who lives nearby.

by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

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. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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. 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered position. On the labor certification, the beneficiary claims to qualify for the proffered position based on his experience as a banquet captain at the [REDACTED] Herndon, Virginia from September 1988 until October 1990.

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 letter on [REDACTED] letterhead, dated March 13, 2000, from [REDACTED] Banquet Manager, indicating that the beneficiary worked for him as a headwaiter (banquet captain) at the [REDACTED] from September 1988 until October 1990 and describes the beneficiary's job duties. The letter, however, is not written on [REDACTED] letterhead, the beneficiary's qualifying employer, but on [REDACTED] letterhead, the petitioning employer. Thus, the letter cannot be considered as evidence of the beneficiary's employment at the [REDACTED]. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter indicates that the beneficiary was employed by [REDACTED], an employer other than that listed on the labor certification.

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.

The petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* However, the record does not contain annual reports, federal tax returns, or audited financial statements for the petitioner.

The petitioner's failure to provide annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to revoke the approval of the petition. The

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record contains a 2001 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement for the beneficiary and copies of various paychecks issued to the beneficiary in 2002 and 2007. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Moreover, the evidence submitted would only be *prima facie* evidence of payment of the proffered wage in 2001.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

According to USCIS records, the petitioner has filed other I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.