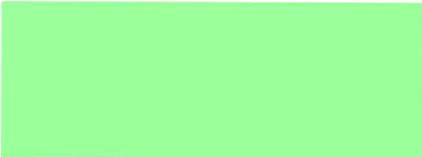


(b)(6)

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



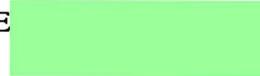
U.S. Citizenship  
and Immigration  
Services



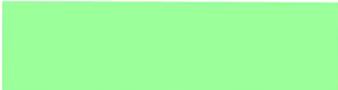
DATE: FEB 28 2013

OFFICE: TEXAS 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 preference visa petition was denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The petitioner is a yacht manufacturing company.<sup>2</sup> It seeks to employ the beneficiary permanently in the United States as an electrician 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 (ETA Form 9089 or labor certification), approved by the United States Department of Labor (DOL). The director determined that the petition was filed without a labor certification and that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

The petitioner's ETA Form 9089 was filed with the DOL on May 16, 2006 and certified by the DOL on December 12, 2007. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on January 14, 2008, which was denied on October 20, 2009.

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.

The director's October 20, 2009 denial identified two issues, whether or not the petition was filed with a labor certification and whether or not the marriage bar under section 204(c) of the Act applies to this case. On appeal, the AAO has identified another issue, whether or not the petitioner has established that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date.

On appeal, counsel asserts that the petition was filed with a labor certification. A review of the record indicates that the petition was filed with a valid labor certification.

The approval of this petition was denied, in part, as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed by [REDACTED] on the beneficiary's behalf with USCIS on or about February 7, 2003. Concurrent with the filing of Form

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The record contains variations of the petitioner's name, for example the petition was filed using the variant [REDACTED]; the labor certification was filed using the variant [REDACTED] and the petitioner's tax returns are filed using the variant [REDACTED]

I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen.<sup>3</sup> The file contains the completed Form I-130 signed by [REDACTED] the completed adjustment of status application signed by the beneficiary; copies of civil ceremony wedding photographs; a copy of a marriage certificate between the beneficiary and [REDACTED] indicating the date of marriage as August 15, 2002; copies of some greeting cards; a letter from a bank showing [REDACTED] and the beneficiary opened a joint checking account and a joint savings account on November 5, 2003, over a year after the date of marriage, and the respective balances in those accounts along with copies of a check, a savings withdrawal ticket, and check cards from the joint accounts; a letter dated October 29, 2003 indicating that [REDACTED] and her children were listed as dependents on the beneficiary's health plan;<sup>4</sup> a copy of [REDACTED] 2002 federal tax return, which does not reflect her as having been married in 2002; a copy of [REDACTED] amended 2002 federal tax return wherein the beneficiary was shown as the spouse of [REDACTED]; and a letter dated November 5, 2003 from [REDACTED] and the beneficiary to USCIS explaining why they filed an amended 2002 federal tax return.

In connection with the Form I-130, the beneficiary and [REDACTED] were interviewed on October 30, 2003. On January 20, 2004, the district director of the USCIS office located in Cherry Hill, NJ (Cherry Hill director) issued a Notice of Intent to Deny (1<sup>st</sup> Notice) the Form I-130 to [REDACTED]. The Notice allowed [REDACTED] 15 days to respond and to present any documentation to overcome the reason for the denial. The Notice was returned to USCIS as undeliverable. The case was administratively closed, but later reopened. A second Notice of Intent to Deny (2<sup>nd</sup> Notice) was sent to [REDACTED] on September 2, 2005. [REDACTED] did not respond. The 1<sup>st</sup> Notice and 2<sup>nd</sup> Notice stated the reason for denial of the Form I-130 as being inconsistent answers given by [REDACTED] and the beneficiary to the same interview questions.<sup>5</sup> Specifically, the 2<sup>nd</sup> Notice states:

On October 30, 2003, an Officer of the Service interviewed you (refers to [REDACTED] and the beneficiary together and separately. At the conclusion of that interview the

<sup>3</sup> The beneficiary obtained employment authorization.

<sup>4</sup> The letter was issued to the beneficiary by the [REDACTED]

[REDACTED]. The beneficiary is named as a participant in the health plan, but the record does not establish that he was ever employed by a hotel or restaurant. Thus, it is not clear how he was eligible to be a participant in the union's health plan. His Form G-325A signed on December 10, 2002 indicates employment in Peru as a cashier and gas station owner. The labor certification filed in the instant matter indicates his employment as an electrician with the petitioner and as an electrician in Peru. 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*, 19 I&N Dec. 582, 591 (BIA 1988).

<sup>5</sup> *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975), set forth procedures for governmental investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately. The questions posed regard their relationship, home life, and daily interactions.

following discrepancies were found in your answers, and the answers of the beneficiary to the same questions. You stated that you drove to the interview in your friend [REDACTED] car, and that there were three people in the car when you drove from Atlantic City. The beneficiary stated that there were four persons in the car, and [REDACTED] drove the car. You stated that your bedroom has a linoleum floor. The beneficiary stated that your bedroom has a wall-to-wall beige carpet. You stated at your interview that the bedroom that you and the beneficiary share contains two windows located on the same wall, a ceiling fan with one light, no mirror and no lamps. The beneficiary stated that the bedroom that you share together has two windows on different walls, no ceiling fan or light, one wall mirror, and a lamp.

The director opined that the beneficiary and [REDACTED] were not residing together in a bona fide marital relationship and cited Section 204(c) of the Act. On November 2, 2005, the Cherry Hill director issued his denial of the Form I-130. [REDACTED] did not appeal the denial.

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)<sup>6</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.

In the instant case, to support the Cherry Hill director's denial, the record of proceeding contains the USCIS officer's interview notes from the *Stokes* interview. The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary in order to evade the immigration laws.

On appeal, counsel asserts that the beneficiary is now divorced from [REDACTED] and that there is no truth to the allegation that the beneficiary entered into a fraudulent marriage with [REDACTED]. As evidence, counsel submits a copy of the beneficiary's and [REDACTED] marriage certificate, their 2002 amended federal tax return, their 2003 tax return, and a letter dated November 5, 2003 to USCIS from the beneficiary and [REDACTED] stating why their 2002 federal tax return was amended. The only new evidence counsel submitted was the 2003 federal tax return; however, this does not address the inconsistent answers given by [REDACTED] and the beneficiary in their October 30, 2003

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<sup>6</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.

*Stokes* interview.

Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. *See Matter of Soriano*, I&N Dec. 764 (BIA 1988).

There is no evidence of how the beneficiary and [REDACTED] met or evidence of their courtship. There is no evidence of shared credit, jointly held insurance, property leases or jointly owned property that would support an intent to establish a life together. There is no evidence regarding shared experiences such as evidence regarding vacations and gatherings with family and/or friends. It is not clear when the couple divorced or the circumstances leading to the divorce. Counsel does not address the fact that during the October 30, 2003 *Stokes* interview, [REDACTED] and the beneficiary gave different answers to the same questions.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary attempted to enter into a prior marriage 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 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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'r 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 24 months of experience as an electrician. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an electrician for [REDACTED] in Arequipa, Peru from January 11, 1980 until December 31, 1983.

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 foreign-language document from [REDACTED] Administrative Chief, South Region on [REDACTED] letterhead, which according to the accompanying translation states that the beneficiary worked in the position of maintenance of heavy machinery specializing in electricity from November 1, 1980 until December 31, 1983. The letter does not list the beneficiary's duties and does not indicate whether the beneficiary's employment was full- or part-time. Additionally, the start dates of employment are inconsistent as between the labor certification and the experience letter.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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. Therefore, the petitioner has not established that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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