



U.S. Citizenship  
and Immigration  
Services

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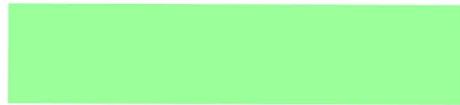


DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

**JAN 29 2013**

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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, 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 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.

As set forth in the director's April 24, 2012 denial, the primary issue in this case is whether the marriage fraud bar under section 204(c) of the Act applies to this case. The 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. The beneficiary also sought lawful permanent residence as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a marriage certificate between the beneficiary and United States Citizen (USC) spouse.

In connection with the Form I-130, a decision was issued by the Immigration and Naturalization Service (INS) on August 30, 2001. The INS denied the Form I-130 because the USC spouse failed to show her marriage to the beneficiary was entered into for a valid reason.

Section 204(c) of the Act 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.

On appeal, counsel asserts that, because INS did not make a final conclusive marriage fraud finding, the Texas Service Center Director failed to consider the beneficiary's plausible claim that the

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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.

beneficiary signed blank forms and failed to have an adequate English proficiency during the 1998 INS interview in which he gave numerous conflicting answers regarding his purported life together with his claimed USC spouse.

First, the beneficiary's disavowal of participation in fraud cannot be sustained in light of his admission of willingly signing a blank document. The beneficiary claims that his claimed marriage to the USC was later omitted in immigration forms because these were prepared by a prior attorney who failed to complete the forms properly. Specifically, his failure 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). 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).

Further, the beneficiary was provided an opportunity to reschedule his August 1998 INS interview in or order to procure a translator; however, he refused the opportunity to reschedule. The director noted that there was no evidence of a failure by the beneficiary to understand the questions posed by the interviewer. Upon being separated, the beneficiary and the USC spouse failed to consistently answer questions posed by the interviewer, such as the owner of the car which brought them to the interview, the type of alarm clock owned by the couple, when the couple wakes up in the morning, when the USC spouse gets home from work, the location of the couple's telephones, where the couple does its laundry and how to get to the laundry room in their claimed apartment building, the type of air conditional and cooking stove in the home, where dirty laundry is kept, and what the couple did on July 4<sup>th</sup>.<sup>2</sup>

Although counsel submits various documents, including a lease, bank account statements, bills, and witness affidavits, which claim that the beneficiary and the USC lived as husband and wife in a bona fide marriage, these documents, after full consideration by USCIS, fail to overcome the other evidence in the record which show that the beneficiary and the USC spouse were not sharing a life together when they were interviewed in 1998. To the contrary, it is most likely that the beneficiary entered into the marriage with the USC spouse for the purpose of evading the immigration laws. See *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) ("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. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that

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<sup>2</sup> *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975) sets 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 alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative").

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. The fact that the Form I-130 denial does not specifically mention section 204(c) of the Act is of no consequence if the evidence in the record documents the fraudulent marriage.

Therefore, an independent review of the documentation reflects ample evidence that the beneficiary attempted to evade the immigration laws by marrying the USC 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 U.S. Citizenship and Immigration Services (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 failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. In this case, the priority date is December 9, 2010. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's

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<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner did not employ the beneficiary, and the only evidence submitted of its ability to pay the wage after the priority date is the first page of the petitioner's 2010 Form 1120S, U.S. Tax Return for an S Corporation. The petitioner did not submit a complete copy of its 2010 tax return, including Schedule K. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). As the petitioner did not submit Schedule K, it cannot be determined whether it had sufficient net income to pay the proffered wage since the priority date. Also, the petitioner did not submit Schedule L to its Form 1120S; thus, it also cannot be determined whether the petitioner had sufficient net current assets to pay the wage.<sup>4</sup>

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> A corporation's year-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.