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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



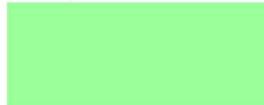
U.S. Citizenship
and Immigration
Services



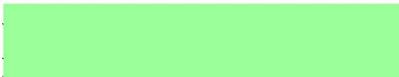
DATE: JUL 30 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

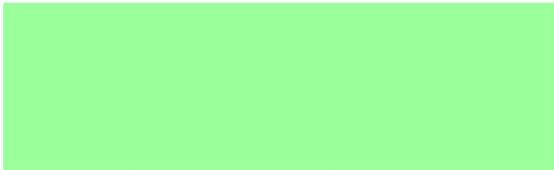


IN RE: Petitioner:
Beneficiary:



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 (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,

Rachel DiToro
RDR

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and a motion to reconsider a decision. The motions will be granted, the previous decision of the AAO 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, 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 regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "[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." Additionally, the regulation at 8 C.F.R. § 103.5(a)(3) states that a motion to reconsider must list 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. The record shows that the motion is properly filed, timely, makes a specific allegation of error in law or fact, and will be reopened. 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 204(c) of the Act provides that no petition shall be approved if the alien "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Section 204(c) of the Act was amended by section 4(a) of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). Prior to IMFA, Congress held hearings on fraudulent marriage and fiancé arrangements and discussed the following fraudulent acts that aliens had committed in order to obtain immigration benefits: concealment of prior undissolved marriages, issuance of counterfeit New York City marriage certificates in support of petitions for permanent residence, and use of "stolen identification documents and stand-in grooms and brides to 'marry' U.S. citizens." See *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 2 (1985) (statements of INS Commissioner Alan C. Nelson and Roger L. Conner, Executive Director Federation of American Immigration Reform). After the hearing, Congress enacted IMFA and added section 204(c)(2) of the Act, 1000 Stat. at 3543. "Paper" marriages are now covered by the "...attempted...to enter into a marriage" language of the statute. Based on the scenarios discussed in the 1985 hearing and the subsequent amendment to the Act, Congress clearly intended that section 204(c) of the Act be applied to aliens who seek an immigration benefit through a fraudulent marriage, even in cases where there is no marriage in fact.

The marriage fraud bar applies to all petitions filed after November 10, 1986; however, the bar may be based upon fraud occurring before that date. *See Ramilo v. DOJ*, 13 F.Supp.2d 1055, 1058 (D.Hawaii 1998)¹.

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)² 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.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, in pertinent part:

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 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.

(citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA

¹ Applicable to both employment-based and family-based petitions. *See Oddo v. Reno*, 17 F.Supp.2d 529 (E.D. Va. 1998)(upholding I-140 revocation).

² 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.

1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

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 in September 1997. The beneficiary also sought lawful permanent residence as the immediate relative of a U.S. citizen (USC). The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a marriage certificate between the beneficiary and USC spouse.

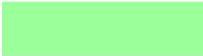
In connection with the Form I-130, a decision was issued by the Immigration and Naturalization Service (INS) on August 30, 2001. The INS denied the Form I-130 because the USC spouse failed to show her marriage to the beneficiary was entered into for a valid reason.

On motion, 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 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. Further, counsel asserts that the beneficiary was poorly represented by prior counsel in previous filings before USCIS.

The AAO finds that 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. Specifically, the petitioner of the Form I-130 was placed on notice by INS on December 30, 1998, through a Notice of Intent to Deny (NOID), which notified the petitioner of the Service's intent to deny the Form I-130 because the marriage was entered into solely for immigration purposes under Section 204(c)(2) of the Act. Then on August 30, 2001, the director denied the Form I-130.

Next, counsel asserts that the beneficiary was represented by ineffective counsel during the adjudication of the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485) filed in connection with the petitioner's immigrant petition. Although counsel claims that the beneficiary's previous counsel was ineffective, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988) on appeal. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant motion addresses this requirement. Counsel offers a formal complaint of ineffective assistance dated February 28, 2013, for the first time on motion. However, the AAO finds that the evidence of the filing of the complaint is not persuasive in these proceedings.

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 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.

On motion, the AAO does find that the petitioner has established its ability to pay the proffered wage in 2010 and 2011.

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 motion to reopen is granted and the decision of the AAO dated January 29, 2013 is affirmed. The petition remains denied.