



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 25 2013

OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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, initially approved the employment-based preference visa petition. The Director, Texas Service Center (director), served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). The director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140), and certified this matter on appeal to the Chief, Administrative Appeals Office (AAO). The AAO will affirm the director's decision, and the petition's approval will be revoked.

Field offices and service center directors may certify decisions to the AAO "when the case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). "A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." 8 C.F.R. § 103.4(a)(4). The regulation at 8 C.F.R. § 103.4(a)(5) also states that cases may be certified to the AAO. The AAO conducts its review on a *de novo* basis, before issuing a decision. *See Soltane v. DOJ*, 361 F.3d 1143 (3d Cir. 2004).

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The procedural history in this case is documented by the record and incorporated into the decision.¹ Further elaboration of the procedural history will be made only as necessary.

The petitioner is a swimming pool manufacturer. It seeks to employ the beneficiary permanently in the United States as a roll operator/sheet metal. The petitioner requested classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act). As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL).

The petitioner's Form ETA 750 was filed on January 20, 1998 and certified by the DOL on October

¹ On August 18, 2006, the officer-in-charge of the New York district office, during the adjudication of the beneficiary's application for adjustment of status, initially issued a notice revoking the petition's approval. The petitioner appealed the revocation of the petition's approval, and the AAO withdrew the officer-in-charge's decision and remanded the matter to the director, as the officer-in-charge lacked jurisdiction to issue the notice. *See* Memo. from Paul W. Virtue, Executive Associate Commissioner (Acting), Office of Programs, U.S. Immigration and Naturalization Service, to Regional Directors, *et al.*, *Revocation of Employment-Based Petitions (I-140s)* (February 27, 1997) (field offices must send petitions that they believe were incorrectly approved to service centers for determinations on whether to initiate revocation proceedings). After deciding that revocation of the petition's approval was proper, the director certified the decision to the AAO. *See* 8 C.F.R. § 103.4(a)(1).

17, 2002. The petition was filed on November 29, 2002 and approved on June 9, 2003. The merits of the petitioner's offered position are not at issue.

The revocation of the petition's approval stems from a previous immigrant visa petition for the beneficiary. The beneficiary's former wife filed a Form I-130, Petition for Alien Relative, for the beneficiary on December 9, 1987. The record contains the previous petition, including signed forms, photographs, and a copy of a marriage certificate between the beneficiary and his former wife, who was a U.S. lawful permanent resident at the time.²

The Director, Vermont Service Center, initially approved the I-130 petition on January 22, 1988. The I-130 petition's approval was ultimately revoked on June 15, 1990, however, after the U.S. Consulate in Guayaquil, Ecuador informed the service center of discrepancies in the testimony of the beneficiary and his former wife during the immigrant visa interview in November 1989. The Director, Vermont Service Center, ultimately determined that the beneficiary and his former wife had engaged in a sham marriage for the purpose of obtaining U.S. lawful permanent resident status for the beneficiary and revoked the I-130 petition's approval accordingly.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), prohibits the approval of petitions 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.

Section 204(c)(1), (2) of the Act, 8 U.S.C. § 1154(c)(1), (2).³

On February 25, 2013, the director issued the NOIR in the instant petition, informing the petitioner of his intent to revoke its employment-based petition based on evidence that the beneficiary and his former wife married for the purpose of evading U.S. immigration laws. The NOIR identified evidence in the beneficiary's application for adjustment of status indicating that he obtained a

² The Notice of Certification identifies the beneficiary's former wife as a U.S. citizen. The evidence of record and USCIS records, however, show that she was a U.S. lawful permanent resident throughout the processing of her petition for the beneficiary.

³ Section 204(c) of the Act, the so-called "marriage fraud bar," applies to all petitions filed on or after November 10, 1986. See Immigration Marriage Fraud Amendments of 1986, Pub.L.No. 99-639, 100 Stat. 3537, 3543. The bar is applicable to both employment- and family-based petitions. See *Oddo v. Reno*, 17 F. Supp. 2d 529 (E.D. Va. 1998) (upholding revocation of I-140 petition based on section 204(c) of the Act).

marriage certificate with his current wife and had a child with her before attending the 1989 immigrant visa interview at the consulate, which was based on his marriage to his former wife. The NOIR also cited discrepancies in the testimony of the beneficiary and his former wife at the consular interview as evidence that the couple had engaged in a sham marriage for immigration purposes.

The director properly issued the NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases hold that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if not explained and rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet its burden of proof.

The director’s NOIR sufficiently identified evidence of marriage fraud in the record, pointing out the issuance of the beneficiary’s marriage certificate with his current wife and the birth of their child before the beneficiary’s immigrant visa interview based on his marriage to his former wife. The NOIR also detailed discrepancies in the testimony of the beneficiary and his former wife at the interview regarding their use of birth control, whether any of the beneficiary’s relatives attended their wedding, and when and how they met. These alleged facts, if not explained and rebutted, warranted denial of the petition under section 204(c) of the Act because they indicated that the beneficiary married his former wife for the purpose of obtaining a U.S. immigrant visa. Thus, the director properly issued the NOIR for good and sufficient cause.

In response to the NOIR, the petitioner provided a March 15, 2013 affidavit of the beneficiary and his former wife,⁴ and copies of the beneficiary’s marriage certificates with his former and current wives. The record also contains previous affidavits of the beneficiary and his former wife, as well as purported photographs of them on their honeymoon.

On April 22, 2013, the director revoked the approval of the I-140 visa petition, finding that the petitioner failed to submit sufficient evidence that the beneficiary and his former wife entered into a *bona fide* marriage.

The Board of Immigration Appeals (BIA) has held that visa revocation pursuant to section 204(c) of the Act may only be sustained if there is substantial and probative evidence in the record to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. *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).

A marriage is a sham if the bride and groom did not intend to establish a life together at the time they were married. *See Bark v. Immigration and Naturalization Service*, 511 F.2d 1200 (9th Cir.

⁴ The affidavit is in the beneficiary’s words. The beneficiary’s former wife signed the affidavit, stating “I agree with this above statement.”

1975). Conduct of the parties *after marriage* is relevant only to the extent that it bears upon their subjective state of mind *at the time they were married*. See *Lutwak v. United States*, 344 U.S. 604 (1953) (emphasis added).

Where there is reason to doubt the validity of the marital relationship, the petitioner must submit 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 spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, the wedding ceremony, shared residence, and shared experiences. See *Matter of Soriano*, I&N Dec. 764 (BIA 1988).

In the instant case, the issuance of the marriage certificate to the beneficiary and his current wife and the birth of their child before the beneficiary's immigrant visa interview supports a reasonable inference that the beneficiary's prior marriage was entered into for immigration purposes. The August 31, 1988, Ecuadoran marriage certificate of the beneficiary and his current wife is not legally valid because his marriage to his former wife was not terminated at the time of the certificate's issuance. See *Matter of H.*, 9 I&N Dec. 640 (BIA 1962) (the United States will not recognize polygamous marriages for immigration purposes). But the timing of the issuance of the marriage certificate to the beneficiary and his current wife and the birth of their child indicates that the beneficiary did not intend to establish a life with his former wife at the time of their marriage.

The issuance of the marriage certificate to the beneficiary and his current wife occurred less than eight months after the approval of his former wife's petition for him on January 22, 1988. The birth of the beneficiary's child with his current wife occurred about three months before the beneficiary's consular interview in November 1989. The beneficiary's marriage to his current wife and their establishment of a family so quickly after the approval of his former's wife petition for him suggests that the beneficiary and his former wife never intended to establish a life together. The attendance of the beneficiary and his former wife at the immigrant visa interview⁵ after his attempt to marry his current wife and the birth of his child with his current wife also indicates that the beneficiary married his former wife for the purpose of obtaining a U.S. immigrant visa.

In addition, the discrepancies in the testimony of the beneficiary and his former wife at the consular interview indicate that they lacked basic knowledge about their relationship. Inconsistencies in a married couple's statements may support a determination that the couple did not intend to enter into a *bona fide* marriage. *Nikrodhanondha v. Reno*, 202 F.3d 922 (7th Cir. 2000) (although a married couple had two children together, the court upheld a BIA determination that the couple did not intend to enter into a *bona fide* marriage where they stated different years of when they met, different reasons for their initial breakup, and different periods of time when the wife was in Thailand for their wedding).

⁵ The record shows that the beneficiary physically attended the interview at the consulate in Ecuador, while a consular officer interviewed the beneficiary's wife, who was in the United States, by telephone.

In the March 15, 2013 affidavit, the beneficiary claims the discrepancies at the interview were “misunderstandings,” which he and his former wife were not given an opportunity to clarify. But, in the affidavit, the beneficiary fails to explain many of the discrepancies.

For example, at the consular interview, the beneficiary stated that he met his former wife, who immigrated to the U.S. from Ecuador as a child, when he picked her up at the airport in Guayaquil, Ecuador in 1981 at the request of her family. He also stated that the couple had written to each other previously. His former wife, however, stated that the couple met in Ecuador in 1979 at the movies, where his sisters introduced her to him. In the affidavit, the beneficiary agrees with his former wife that they first met at the movies in 1979. He states that he also picked her up at the airport in 1981. But he does not explain why he failed to mention the initial 1979 meeting at the interview. The failure to explain his inconsistent answer at the consular interview casts doubt on the validity of the affidavit, the true date on which the beneficiary met his former wife, and the *bona fides* of their marriage. See *Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Also at the consular interview, the beneficiary stated that he and his former wife were not using birth control, while she stated that she was using a diaphragm. In the affidavit, the beneficiary states that he “wasn’t using any protection and ... didn’t even know what a diaphragm was.” He states that his former wife “was private about the fact that she was using protection.” Thus, the beneficiary confirms that he did not know that his former wife was using birth control. As birth control and related questions of whether and/or when to have children are topics that most married couples discuss, the beneficiary’s ignorance of his wife’s use of birth control tends to show that they did not intend to establish a life together.

Finally, at the consular interview, the beneficiary stated that his aunt attended his wedding to his former wife in Ecuador. But his former wife stated that none of the beneficiary’s family members attended the ceremony. In the affidavit, the beneficiary maintains that his aunt attended the wedding. Neither he nor his former wife, who also signed the affidavit, explain why the beneficiary’s former wife did not know that his aunt was at the ceremony. His former wife’s ignorance of the beneficiary’s only relative at the wedding, as well as the general lack of family members at the ceremony, tends to show that the couple did not intend to establish a life together.

In the affidavit, the beneficiary states that his former wife returned to the United States after their honeymoon in the Galapagos Islands because she did not want to lose her job in the U.S. He states that he “got angry” at the delay in receiving permission to join his former wife in the U.S. and told her that he “was going to start seeing someone else.” He states that his former wife told him that she was going to divorce him and that he obtained the 1988 marriage certificate with his current wife under the belief that his former wife had already divorced him.

After he received immigrant visa processing information from the U.S. consulate in Guayaquil, the beneficiary states that he contacted his former wife and learned that she had not divorced him. He states that his former wife did not know about his current wife, and he “still had feelings for [his

former wife] so we decided to go ahead with the interview.” The beneficiary claims that he “still had hope that [he] could make a life with [his former wife] in the U.S.” He states that he knew that he “would have to break up with [his current wife] and promised [himself that he] would send her support for our child.”

The beneficiary states that his relationship with his former wife “seems like a youthful fantasy.” He states that he believes “most people have youthful relationships they can look back at and think they were pretty foolish.” He claims that, other than the honeymoon photographs, no evidence of their relationship exists. They cannot provide telephone records after their “numbers have been changed several times,” according to the beneficiary, and “any correspondence between us has been destroyed.”

In an August 14, 2006 affidavit, the beneficiary’s former wife stated that she believes “we both married for love and spent a wonderful honeymoon together for two weeks.” However, during their physical separation while waiting for the beneficiary to obtain an immigrant visa, she states that “the distance took its toll on our relationship.” By the time of the consular interview, the beneficiary’s former wife states that “we had stopped communicating but we both thought that we should give our relationship a try to make it work again.” She states that “[a]fter [the beneficiary] was denied his immigrant visa[,] we gave up on being together ever again and we eventually divorced.”

In response to the director’s NOIR, counsel argued that “[t]he explanations given by [the beneficiary] are totally plausible and the beneficiary should be given the benefit of the doubt owing to the number of years that have intervened and the absence of other records of telephone communications and correspondence between [the beneficiary and his former wife] due to the passage of time.”

Despite counsel’s arguments, the burden of proof remains with the petitioner to establish the *bona fides* of the beneficiary’s marriage to his former wife. *Matter of Esteime*, 19 I&N Dec. 451; *see also Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968). Other than the five honeymoon photographs, which have limited probative value, the only evidence of a *bona fide* marriage are the statements of the beneficiary and his former wife. These statements lack sufficient detail and corroboration to demonstrate the purported couple’s courtship or a developing relationship between them. The statements document that the couple had only “three separate visits” with each other before marrying. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972). The petitioner has also failed to resolve many of the discrepancies in the testimony of the beneficiary and his former wife at the consular interview. *See Matter of Ho*, at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Although the passage of time may now prevent the gathering of certain evidence regarding the *bona fides* of the beneficiary’s marriage to his former wife, the petitioner has not submitted other evidence that is presumably available. The record does not contain any statements from friends or family

members of the beneficiary and/or his former wife regarding their purported relationship. In the March 15, 2013 affidavit, the beneficiary states that he “located [his former wife] through [his] family when this problem with immigration first arose in 2006 ...” So, it does not appear that family members are unavailable to provide statements. The record also contains a March 21, 2006 affidavit from the beneficiary’s mother and father in support of the beneficiary’s application to waive grounds of inadmissibility, which the beneficiary submitted with a motion to reopen his adjustment application. But the statement of the beneficiary’s parents does not address the validity of his first marriage, nor does it even mention the marriage.

If the beneficiary and his former wife intended to establish a life together, it is reasonable to expect that friends and/or family members knew of their relationship and can attest to its validity. The lack of evidence from friends and/or family members casts doubt on the *bona fides* of the marriage of the beneficiary and his former wife.⁶ See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). Counsel’s arguments do not overcome the evidence in the record showing that the beneficiary and his former wife entered into their marriage for immigration purposes.

In summary, a careful review of the documentation in the record shows substantial and probative evidence supporting a reasonable inference that the beneficiary married his former wife for the purpose of evading the U.S. immigration laws. Thus, the AAO affirms the director’s determination that the beneficiary sought to be accorded preference status as the spouse of a U.S. lawful permanent resident by reason of a marriage determined to have been entered into for the purpose of evading the immigration laws.

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 decision certified to the AAO is affirmed. The approval of the employment-based immigrant visa petition is revoked.

⁶ The record also contains evidence that the beneficiary and his former wife are first cousins whose mothers are sisters. USCIS records show that, in U.S. immigration filings, the mothers of the beneficiary and his first wife identify parents with the same names, suggesting that they are daughters of the same parents. The marriage certificates of the beneficiary and his parents also show that his mother and the mother of his former wife share the same family maiden name. Because the director did not cite the possible prior family relationship between the beneficiary and his former wife as evidence of a fraudulent marriage, the AAO does not consider it. See *Matter of Arias*, 19 I&N Dec. at 570 (a revocation decision can only be grounded upon, and the petitioner need only respond to, factual allegations in the notice of intent to revoke).