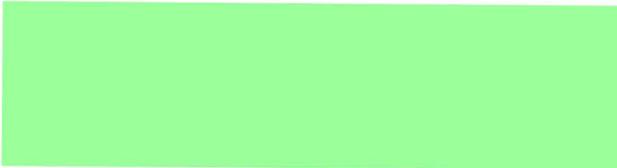




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: SEP 13 2013

OFFICE: TEXAS SERVICE CENTER

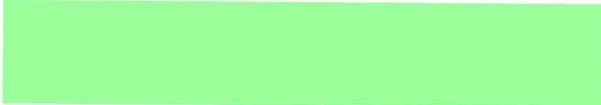
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(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 (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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the AAO's appellate decision will be withdrawn in part and affirmed in part, and the petition will remain denied.

The petitioner owns and operates a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specializing in Italian food. The petitioner requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition. The priority date of the petition is January 13, 1998, which is the date that an office in the DOL's employment services system accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The director's decision concludes that section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), bars approval of the petition. Section 204(c), commonly known as "the marriage fraud bar," precludes the approval of petitions for beneficiaries who married, or who attempted or conspired to marry, "for the purpose of evading the immigration laws." Accordingly, on October 28, 2008, the director denied the petition.

The AAO affirmed the director's decision, finding that the beneficiary more likely than not conspired to marry in an attempt to obtain immigration benefits in 1995. The AAO also determined that the petitioner failed to establish that the beneficiary possessed the minimum employment experience that the labor certification requires by the petition's priority date. Accordingly, on May 3, 2012, the AAO dismissed the petitioner's appeal.

On motion, the petitioner, through counsel, argues that the marriage fraud bar does not apply to the instant petition because the beneficiary did not actually marry his 1995 petitioner. Counsel also argues that the AAO erred in finding that the petitioner failed to establish the beneficiary's qualifications for the offered position.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act 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 203(b)(3)(A)(ii) provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO grants the petitioner's motion to reconsider because it asserts that the AAO erred in applying law or policy of the U.S. Citizenship and Immigration Services (USCIS or Service). *See* 8 C.F.R. § 103.5(a)(3).

The AAO conducts review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion.<sup>2</sup>

### **Application of Section 204(c) of the Act**

On motion, counsel cites an unpublished decision of the Board of Immigration Appeals (BIA). The decision holds that USCIS erred in finding that a woman entered into a marriage for immigration purposes under section 204(c) of the Act where the record lacked evidence of her actual marriage to the previous petitioner.

Counsel concedes that the unpublished BIA decision does not bind the AAO. *See* 8 C.F.R. §§ 103.3(c), 103.10 (b) (only precedent USCIS decisions, which must be designated and published in bound volumes or as interim decisions, bind the agency's employees in the administration of the Act). But counsel argues that the decision is persuasive authority.

The marriage fraud bar states:

Notwithstanding the provisions of subsection (b) of this section 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 Attorney General to have been *entered into* for the purpose of evading the immigration laws, or (2) the Attorney General 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) of the Act (emphasis added).

Subsection (2) of this provision incorporates the Immigration Marriage Fraud Amendments of 1986 (IMFA). Pub. L. No. 99-603, § 4, 100 Stat. 3537 (Nov. 10, 1986). In the IMFA, Congress amended

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<sup>2</sup> The instructions to Form I-290B, Notice of Appeal or Motion, which 8 C.F.R. § 103.2(a)(1) incorporates into the regulations, allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

the marriage fraud bar to apply to cases where “the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.” *Id.* at 3543.

The unpublished BIA decision that counsel cites relies on *Matter of Anselmo*, 16 I&N Dec. 152 (1977) and *Matter of Concepcion*, 16 I&N Dec. 10 (BIA 1976), two precedent BIA decisions that interpreted section 204(c) as it existed before the IMFA. In those cases, the BIA held that the marriage fraud bar does not apply where an alien falsifies documents to represent a marriage’s existence and has not actually entered into a marriage. *See Concepcion*, 16 I&N Dec. at 11 (concluding that section 204(c) did not apply to an alien who never married but falsified marriage documents, because “it cannot be determined that she obtained immediate relative status on the basis of a marriage entered into for the purpose of evading the immigration laws”); *Anselmo*, 16 I&N Dec. at 153 (“In the absence of an actual marriage, section 204(c) does not apply.”).

Since the IMFA’s addition of subsection (2) to section 204(c), an attempt or conspiracy to enter into a marriage also triggers the marriage fraud bar if the purpose of the attempt or conspiracy was to evade the immigration laws.<sup>3</sup>

The IMFA amendments to the marriage fraud bar, however, do not negate the continued applicability of *Concepcion* and *Anselmo*. By its plain language, section 204(c) applies only to an alien who “entered into,” or who attempted or conspired to “enter into,” a marriage. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“It is well established that, when the statutory language is plain, we must enforce it according to its terms.”). Thus, the marriage fraud bar does not apply to an alien who fraudulently submits documents representing a non-existent marriage, but who never “entered into,” or attempted or conspired to “enter into,” an actual marriage.<sup>4</sup>

If there is substantial and probative evidence to support a reasonable inference that a beneficiary conspired to enter into a prior marriage for the purpose of evading immigration laws, the marriage fraud bar precludes a petition’s approval. *See Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990);

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<sup>3</sup> The current, amended marriage fraud bar applies to all petitions filed after November 10, 1986. Fraud that occurred before that date, however, also triggers the bar if the fraud is material to adjudication of a petition filed after that date. *See Ramilo v. Dep’t of Justice*, 13 F. Supp. 2d 1055, 1058 (D. Haw. 1998), *aff’d*, 178 F.3d 1300 (table), 1999 WL 311380 (9th Cir. 1999). The bar applies to both family- and employment-based immigrant visa petitions. *See Oddo v. Reno*, 17 F. Supp. 2d 529 (E.D. Va. 1998), *aff’d*, 175 F.3d 1015 (table), 1999 WL 170173 (4th Cir. 1999) (upholding the revocation of an employment-based immigrant visa petition based on the marriage fraud bar).

<sup>4</sup> The fraudulent or knowing submission of materially false documents, however, would render a beneficiary inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Admissibility determinations occur when a USCIS director adjudicates a beneficiary’s application for adjustment of status, or a U.S. consulate general adjudicates a beneficiary’s immigrant visa application. *See Matter of O-*, 8 I&N Dec. 295, 296-97 (BIA 1959) (holding that immigrant visa petition proceedings are not the appropriate forum for determining an alien’s admissibility).

*Matter of Kahy*, 19 I&N Dec. 803, 805-06 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545, 546-47 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110, 112 (BIA 1972). An adjudicator may rely on any relevant evidence, but should not generally give conclusive effect to determinations in prior proceedings. Rather, the adjudicator should reach an independent conclusion based on the evidence. *Tawfik*, 20 I&N Dec. at 168.

The record in the instant case contains an application for adjustment of status in the beneficiary's name and a petition for an alien relative for him that the Service received together on September 6, 1995.<sup>5</sup> The beneficiary concedes that he signed the Form I-485, Application for Adjustment of Status, and the accompanying Form G-325A, Biographic Information, in the 1995 adjustment application. As that Form I-485 advises, the beneficiary, by signing the form, certified under penalty of perjury that the adjustment application and all evidence accompanying it were true.

The Form G-325A states that the beneficiary married the 1995 petitioner, a purported U.S. citizen named [REDACTED], on June 29, 1994 in North Hempstead, New York.<sup>6</sup> The record contains a copy of a purported June 29, 1994 marriage certificate from North Hempstead, New York and the 1995 petitioner's purported birth certificate from New York City. The record also contains copies of the beneficiary's purported passport pages, birth certificate, and Form I-94 entry card into the U.S.<sup>7</sup>

In sworn affidavits - dated October 14, 2000; August 10, 2001; and June 17, 2004 - the beneficiary portrays himself as an innocent victim of fraud. He claims that an unscrupulous woman, whom he knew only as "[REDACTED]" added false information to blank immigration forms that he had signed at her direction. He asserts that she also submitted false documents to support the marriage-based filings, which he claims she had told him was an asylum application. *See* section 208 of the Act, 8 U.S.C. § 1208 (allowing certain aliens in the U.S. to apply for permission to remain in the country indefinitely

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<sup>5</sup> This marks the third time that the AAO considers this record to determine the applicability of section 204(c) of the Act. In addition to its appellate decision of May 3, 2012, the AAO reviewed the section 204(c)-based revocation of the approval of a previous petition the petitioner filed for the beneficiary for the offered position using the same labor certification. On September 14, 2007, the AAO determined that section 204(c) provided good and substantial cause to revoke the approval of the previous petition and that the petitioner failed to demonstrate the beneficiary's qualifications for the offered position.

<sup>6</sup> Documents in the record also identify the 1995 petitioner as [REDACTED], [REDACTED].

<sup>7</sup> The instant petitioner states on Form I-140, Petition for Alien Worker, and the beneficiary states on Form ETA 750B of the instant labor certification, that the beneficiary last entered the United States without inspection. The Service did not investigate whether the Form I-94 accompanying the 1995 adjustment application is a copy of a genuine document. The 1995 adjustment application also contains a copy of a birth certificate, on which the beneficiary's town of birth and his parents' names differ from those on the birth certificate copy he submitted with his most recent adjustment application in 2000.

if they fear persecution abroad based on their races, religions, nationalities, memberships in particular social groups, or political opinions).

The beneficiary claims that the Service granted him employment authorization on September 26, 1995, based on the immigration filings. On September 5, 1996, the District Director, New York City Field Office (district director), denied the marriage petition and the adjustment application, finding that both the marriage certificate and the petitioner's birth certificate in the petition were "fraudulent."

The beneficiary maintains that he did not know that [REDACTED] filed a marriage-based petition and adjustment application for him until after their submissions. He also claims that he has never met, and has no knowledge of, the 1995 petitioner, whom the filings identify as his wife. He claims that [REDACTED] the filings' preparer, lied to him about the nature of the filings and submitted them to the Service with false information and documents.

The instant petitioner also submitted a copy of a "No Record Certificate" from North Hempstead, New York, stating that the town could find no record of a marriage there between the beneficiary and the 1995 petitioner from January 1, 1993 through December 31, 1996. The record also contains copies of the beneficiary's federal income tax returns from 1992 through 1999, and from 2001 through 2003. The tax returns indicate that the beneficiary jointly filed them with his purported actual wife, who was not the 1995 petitioner. The beneficiary's most recent adjustment application, which he filed in 2000, states that he and his wife married in Paraguay in 1984.

In its previous decision in this matter, the AAO found that the beneficiary conspired to enter into a marriage to evade the immigration laws because the petitioner failed to establish that the beneficiary was unaware that the 1995 immigration filings were false. *See Kahy*, 19 I&N Dec. at 806-07 (where the record contains evidence that the beneficiary actively participated in a marriage fraud conspiracy, the burden shifts to the petitioner to establish that the beneficiary did not seek a benefit based on a prior, fraudulent marriage). Regardless of whether the beneficiary knew the 1995 filings were false or not, however, the marriage fraud bar in section 204(c) of the Act does not apply to the instant petition because the record lacks evidence that he "entered into," or attempted or conspired to "enter into," an actual marriage.

The district director determined that both the marriage certificate and the petitioner's U.S. birth certificate in the 1995 petition were "fraudulent" documents. The "No Record Certificate" from North Hempstead, New York also indicates that the town did not issue a marriage certificate to the 1995 petitioner and the beneficiary as the petition purported. Because the record lacks evidence that the beneficiary "entered into," or attempted or conspired to "enter into," an actual marriage with the 1995 petitioner, the AAO finds that the marriage fraud bar of section 204(c) of the Act does not apply to the instant petition. The AAO therefore withdraws that portion of its previous decision. *Cf. Kahy*, at 806-07 (finding "a marriage fraud conspiracy" triggered section 204(c) where a Lebanese man actually married a U.S. citizen for purposes of evading the immigration laws, but she never petitioned for him).

Because the instant petition's adjudication does not depend on whether the beneficiary knew that the 1995 immigration filings were false, the AAO declines to decide whether the petitioner has established that the beneficiary was an innocent victim of [REDACTED] fraud as he claims. The AAO also withdraws the portion of its previous decision finding that the beneficiary more likely than not knew that the 1995 filings were false. Such a determination pertains to whether he misrepresented material facts to the Service and his admissibility to the U.S. *See Matter of O-*, 8 I&N Dec. at 296-97 (holding that immigrant visa petition proceedings are not the appropriate forum for determining an alien's admissibility).

### **The Beneficiary's Experience for the Offered Position**

Counsel also argues that the AAO erred in finding that the petitioner failed to establish the beneficiary's possession of the required experience for the offered position by the petition's priority date of January 13, 1998.

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, 160 (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 Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of Italian specialty cook requires four years of high school and two years of full-time experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience in the job offered at [REDACTED] in Armonk, New York from December 1994 to at least December 16, 1997, the date the beneficiary signed the labor certification.

The petitioner must support the beneficiary's claimed qualifying experience with letters from employers giving the names, addresses, and titles of the employers, and descriptions of the beneficiary's experience with them. *See* 8 C.F.R. § 204.5(i)(3)(ii)(A). The record contains a letter on [REDACTED] stationery, dated December 23, 1997, stating that the restaurant employed the beneficiary since December 1994 in the offered position. The letter also provided a description of the beneficiary's job duties and stated that he received \$700 a week in wages.

In its May 3, 2012 decision, the AAO found [REDACTED] experience letter insufficient to establish the beneficiary's qualifying experience for the offered position. The AAO noted that the letter did not state whether the beneficiary worked full- or part-time for the restaurant. The AAO stated that the beneficiary may not have possessed two years of full-time experience in the offered position by the

petition's priority date if he worked only part-time during that period.

Counsel argues that the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) does not require a letter from a former employer to specify whether the beneficiary's employment was full-time in nature. Counsel also asserts that the amount of pay stated in [REDACTED] letter confirms the beneficiary's full-time employment there.

As counsel argues, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) does not expressly require a previous employer's letter to specify whether the beneficiary's employment was full-time. The regulation requires letters to include only the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § (1)(3)(ii)(A).

As discussed above, however, case law requires the petitioner to establish that the beneficiary possessed all the requirements specified on the labor certification as of the petition's priority date. *See Katigbak*, 14 I&N Dec. at 49 ("A petition may not be approved for a [position] for which the beneficiary is not qualified at the time of its filing.") The petitioner does not dispute that the offered position requires two years of full-time employment experience in the job offered. The petitioner must therefore demonstrate that the beneficiary possessed two years of full-time experience in the job offered by the petition's priority date of January 13, 2008.

The letter from [REDACTED] fails to establish that the beneficiary worked in the offered position full-time for at least the required two years. The amount of wages that the employer paid the beneficiary does not demonstrate how many hours he worked.

Also, the letter from [REDACTED] fails to state the title of its author as the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) requires. The letter identifies the author as [REDACTED]. It is unclear whether "[REDACTED]" are initials in the author's name, or whether they stand for "General Manager," the author's possible title at the restaurant. Because the letter does not establish the employer's title, it fails to meet the requirements of 8 C.F.R. § 204.5(1)(3)(ii)(A).

Further, the beneficiary's 1995 Form G-325A does not state his purported employment with [REDACTED]. [REDACTED] also appears to have been known by the same name as the petitioner, "[REDACTED]," and the petitioner's owner appears to also have owned [REDACTED]. The Form G-325A's failure to state the beneficiary's employment with [REDACTED] casts doubt on the beneficiary's claimed qualifying experience for the offered position. His previous business relationship with the petitioner's owner casts doubt on the *bona fides* of the instant job offer to him. The AAO noted these issues in its previous decision in this matter, but the petitioner has not addressed them on motion. In any future filings, the petitioner must overcome the doubts raised with independent, objective evidence of the beneficiary's full-time, qualifying employment experience before the petition's priority date. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

For the foregoing reasons, the AAO finds that the petitioner has failed to demonstrate that the beneficiary possessed the required two years of full-time experience in the offered position as stated on the labor certification by the petition's priority date.

### **The Petitioner's Ability to Pay the Proffered Wage**

Beyond the AAO's previous decision, the petitioner has also failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2).

USCIS records show that the petitioner has filed at least nine I-140 petitions since 2001 for other beneficiaries. The petitioner filed eight of the petitions under the name [REDACTED]" and one, for the beneficiary's purported actual wife, under the name [REDACTED]. Accordingly, the petitioner must establish that it has the continuing ability to pay the combined proffered wages of all of the beneficiaries whose petitions were pending between the January 13, 1998 priority date of the instant petition and the date the instant beneficiary obtains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977).

The evidence in the record does not establish the priority dates, proffered wages, or wages the petitioner paid to the other beneficiaries. Nor does the evidence show 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, the AAO concludes that the petitioner has not established its continuing ability to pay the combined proffered wages of the beneficiary and the beneficiaries of its other petitions.

In any future filings, the petitioner must provide independent, objective evidence of its continuing ability to pay the proffered wage from the petition's priority date onward.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law, even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane*, 381 F.3d at 145 (noting that the AAO conducts review on a *de novo* basis).

### **Conclusion**

In summary, the AAO grants the petitioner's motion to reconsider. After reviewing the motion and carefully reconsidering its previous decision based on the record, the AAO finds that the marriage fraud bar of section 204(c) of the Act does not apply to the instant petition and withdraws that portion of its previous decision. The AAO also withdraws the portion of its previous decision finding that the beneficiary more likely than not knew that the 1995 immigration filings were false, as that finding pertains to a decision on the beneficiary's admissibility and is not properly made in these proceedings.

However, the AAO affirms the portion of its previous decision finding that the petitioner failed to establish that the beneficiary possessed the minimum employment experience for the offered position as set forth on the labor certification by the petition's priority date. In addition, the AAO finds that the petitioner has failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

The AAO will affirm its previous decision dismissing the petitioner's appeal for the reasons stated above, with each considered as an independent and alternative basis for the petition's 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; *see also Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

**ORDER:** The motion is granted, the AAO's decision of May 3, 2012 is affirmed in part and withdrawn in part, and the petition remains denied.