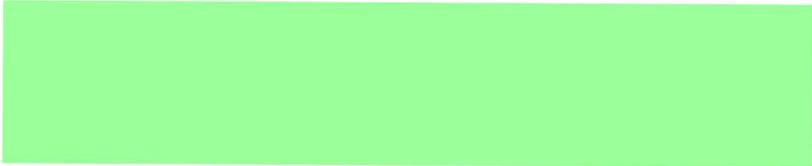
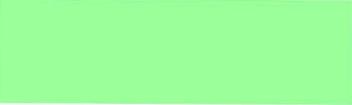




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 05 2014** OFFICE: TEXAS SERVICE CENTER 

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). In accordance with its regulatory authority under 8 C.F.R. § 103.5(a)(5)(i) the AAO will reopen this proceeding on its own motion and withdraw its decision. The case will be remanded to the Director for the issuance of a new decision.¹

The petitioner is a communication construction company. It seeks to employ the beneficiary permanently in the United States as a cable television technician under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). As required by statute, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the United States Department of Labor (DOL).

In a decision dated September 17, 2010, the Director cited evidence of fraudulent birth and marriage certificates submitted in support of an earlier Petition for Alien Relative (Form I-130) filed on behalf of the beneficiary at the New York District Office. Noting that section 204(c) prohibits approval of any subsequent visa petition filed on behalf of an alien who has entered or attempted to enter into a fraudulent marriage for the purpose of evading U.S. immigration laws, the Director determined that the instant petition (Form I-140) must be denied.

In its decision dismissing the appeal, dated November 14, 2012, the AAO affirmed the Director's decision on the ground that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a U.S. citizen through a marriage determined to have been entered into for the purpose of evading U.S. immigration laws.

Application of the Marriage Fraud Bar

Upon further review of the record, the AAO now comes to a different conclusion. For the reasons set forth below, the AAO concludes that the beneficiary is not subject to the marriage fraud bar in section 204(c) of the Act. The statutory language reads as follows:

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.

¹ In the case of a decision that may be unfavorable to the affected party, the Director should provide the affected party an opportunity to submit a brief and/or additional evidence. See 8 C.F.R. § 103.5(a)(5)(ii).

Section 204(c) of the Act, 8 U.S.C. § 1154(c) (emphasis added.) Subsection (2) of this provision incorporates the Immigration Marriage Fraud Amendments of 1986 (IMFA), by which Congress revised the bar to include cases where “the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.” Pub. L. No. 99-603, § 4, 100 Stat. 3537, 3543 (Nov. 10, 1986).

Construing section 204(c) of the Act as it existed prior to IMFA, the Board of Immigration Appeals (Board) held that the bar in section 204(c) did not apply to cases where an alien does not actually enter into a marriage, but rather falsifies documents to represent the marriage’s existence. See *Matter of Concepcion*, 16 I&N Dec. 10, 11 (BIA 1976) (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”); *Matter of Anselmo*, 16 I&N Dec. 152, 153 (BIA 1977) (“In the absence of an actual marriage, section 204(c) does not apply.”).

With the amendment adding subsection (2), it can no longer be said that section 204(c) requires an “actual marriage.” By the express language of section 204(c)(2), an attempt or conspiracy to enter into a marriage will suffice, if the purpose was to evade the immigration laws. But absent even an attempt or conspiracy to enter into a marriage, the IMFA amendments to section 204(c) of the Act do not negate the continued applicability of *Concepcion* and *Anselmo*. By its plain language, section 204(c) of the Act applies only to an alien who “entered into,” or “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.”). An alien who submits false documents representing a non-existent marriage and who never either entered into or attempted or conspired to enter into a marriage may intend to evade the immigration laws, but he or she does not thereby “enter into,” or conspire or attempt to “enter into,” a marriage for purposes of section 204(c) of the Act.

Section 204(c) aside, however, such conduct may render the beneficiary inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i) (2012), when the director adjudicates the Application to Register for Permanent Residence or Adjust Status (Form I-485). See *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (holding that the immigrant visa petition is not the appropriate forum for finding an alien inadmissible).

In the case at hand, the record contains a fictitious marriage certificate dated June 18, 1994, that was filed with a Form I-130 petition in 1995. Based on the entire record, the AAO concludes that the beneficiary has credibly established that the purported marriage never occurred and that he did not otherwise enter into, or conspire or attempt to enter into, a marriage for the purpose of evading the immigration laws of the United States.² Thus, section 204(c) is inapplicable.

² In addition to the beneficiary's affidavit of September 28, 2011 (and an earlier affidavit dated January 3, 2002) denying the existence of the marriage, the AAO has received a confirmation from the State of New York, Department of Health, Bureau of Vital Records, dated December 4, 2013,

Conclusion

Since the Director made no findings in this proceeding on other issues in this case, the petition will be remanded for consideration on the merits. As the petition is reopened, the Director should request additional evidence if it is necessary to reach a determination on the merits. In accordance with any such request, the petitioner may provide additional evidence within a reasonable period of time, to be set by the Director. The Director will then issue a new decision.

The burden of proof in these proceedings rests solely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The AAO's decision of November 14, 2012, as well as the Director's decision of September 17, 2010, are withdrawn. The proceeding is reopened and the petition is remanded to the Director for review on the merits and the issuance of a new decision in accordance with the foregoing discussion.

certifying that a search of its records did not reveal any marriage between the beneficiary and the other person identified on the "Certificate of Marriage" dated June 18, 1994, during the three-year time period from January 1, 1993 to December 31, 1995.