

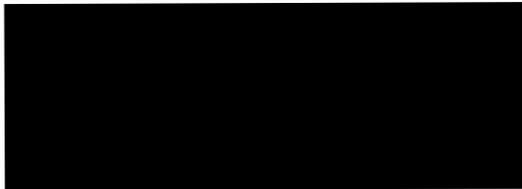
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U.S. Citizenship  
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FILE: [REDACTED]  
EAC 02 091 52229

Office: VERMONT SERVICE CENTER

Date: NOV 29 2007

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center initially approved the instant Form I-140 visa petition. The acting director served the petitioner with notice of intent to revoke approval of the preference visa petition, and subsequently revoked that approval. The matter is before the Administrative Appeals Office on appeal. The case will be remanded for further consideration.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The acting director determined that the beneficiary had previously entered into or attempted to enter into a sham marriage for the purpose of evading immigration laws and revoked approval of the petition pursuant to section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c).

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. As set forth in the acting director's decision of revocation the sole issue in this case is whether or not approval of the petition must be revoked based on section 204(c) of the Act.

Section 204(b) states, in relevant part,

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3)<sup>1</sup>, the [director] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Section 204(c) of the Act states,

Notwithstanding the provisions of subsection (b) 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.

Section 212(a)(6)(c)(i) the Act states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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<sup>1</sup> Section 203(b) of the INA is the statute pursuant to which the instant Form I-140 visa petition was filed.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup> In the instant case the record contains (1) a Form I-485 Application for Adjustment of Status, (2) two G-325 Biographic Information forms, and (3) a letter dated July 12, 2004 from the beneficiary. The record contains no other evidence pertinent to the issue of whether the beneficiary entered into a sham marriage.

The beneficiary signed the Form I-485 application on May 22, 2002. Page two of that form contains a block pertinent to marital status. The applicant, who is the beneficiary of the instant petition, was required to check a block to indicate that he was then married, single, divorced, or widowed. The beneficiary did not check any of those boxes.

On one of the Forms G-325 the beneficiary indicated that on November 17, 1986 he married [REDACTED] in [REDACTED]. The beneficiary signed that form on February 24, 1992. On the other Form G-325 the beneficiary, who signed that form on May 22, 2002, indicated that he had no current spouse and no former spouse. This discrepancy between the two Forms G-325 caused the issuance of the notice of intent to revoke.

In his July 12, 2004 letter the beneficiary stated that he married on November 17, 1986 and that a petition was filed on his behalf during 1992. He added that shortly before the interview pertinent to the spousal petition his wife abandoned him, that he has had no further contact with her, and that he does not know where she is. Although he did not indicate that the marriage had been dissolved he stated that he has considered himself single for several years and, therefore, indicated that he was not married.

Based on the evidence initially submitted, the Director, Vermont Service Center, approved the visa petition on March 16, 2002. Subsequently, after issuing a Notice of Intent to Revoke on March 3, 2004, the Acting Director, Vermont Service Center, revoked approval on June 28, 2004.

On appeal, counsel asserted that the evidence relied upon is insufficient to support the finding that the beneficiary sought to obtain an immigration benefit based on a sham marriage.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the prior marriage was entered into for the purpose of evading immigration laws. *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 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*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)). *Tawfik* states that the revocation decision may be made at any time and is properly determined by the district director in the course of his adjudication of the subsequent visa petition. *Id.* at 168 (citing *Matter of Samsen*, 15, I&N Dec. 28 (BIA 1974).

The record demonstrates that the beneficiary misstated his marital status on the Form G-325 that he executed on May 22, 2002, in that he indicated that he had no current and no former spouse. That is a suspicious circumstance, and the beneficiary's explanation, that he considered himself single, does not satisfy this office that his misstatement was inadvertent. If the beneficiary no longer considered himself to be married, then he considered that he had a former spouse, rather than a current spouse, which the beneficiary also denied.

That misstatement, however, is insufficient to show that the beneficiary's marriage was fraudulent. No further evidence in support of that proposition appears in the record. This office agrees with counsel that the evidence in the record does not support the acting director's finding that the beneficiary entered into a marriage for the purpose of evading immigration laws. Based on the evidence now in the record the revocation of approval of the Form I-140 visa petition was improper, as there is not substantial and probative evidence in the record of proceeding to support a reasoned inference that the prior marriage was entered into to evade immigration laws.

The acting director had also erred prior to issuing the decision of revocation. The March 3, 2004 notice of intent to revoke issued in this matter states the conclusion that the beneficiary tried to receive immigration benefits through what appears to be a fraudulent marriage. The only evidence in support of that conclusion, however, as was noted above, was the fact that the beneficiary misstated his marital status.

*Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) both held that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The notice of intent to revoke

in the instant case described no such good and sufficient cause and failed to sufficiently cite to detailed adverse evidence.

Notwithstanding that the beneficiary's misstatement is insufficient to support a finding that the beneficiary's marriage was fraudulent, it is sufficiently suspicious that this office is inclined to provide the service center an additional opportunity to pursue this issue. The matter will be remanded. The service center is free to explore this issue further and to conduct investigation as necessary.

The service center may also consider any other issues pertinent to the revocability of the instant visa petition. This office specifically notes that the service center may require the petitioner to submit additional evidence of its continuing ability to pay the proffered wage beginning on the priority date.

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 matter is remanded for further consideration and action in accordance with the foregoing. The resulting decision shall be certified to this office for review.