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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIA, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved the Director, Vermont Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director served a notice of intent to revoke the approval of the preference visa petition, and his reasons therefor, and ultimately revoked the approval of the petition. The director's decision was appealed. The director determined that the appeal was untimely, treated the appeal as a motion, and affirmed his decision to revoke. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner is an outpatient clinic. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petition was accompanied by an application for Schedule A labor certification.

The approval of the petition was revoked on August 28, 2001. The revocation was based on a finding that the beneficiary is subject to the provisions of section 204(c) of the Immigration and Nationality Act (the Act).

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 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.

The record in this case contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated January 30, 1997, indicating that the petitioner is represented by counsel. The record contains another G-28, dated May 6, 1997, indicating that the same counsel is representing the beneficiary in section 245 adjustment proceedings. There is no indication in the record that the petitioner ever made any change in representation.

Further examination of the record finds three Forms G-28, dated July 18, 2000, January 17, 2001, and September 28, 2001, indicating that a second law firm now represents the beneficiary. There is nothing in the file to indicate that the beneficiary or

the petitioner had dismissed the first counsel.

The director issued a notice of intent to revoke on December 21, 2000, and revoked the preference petition on August 28, 2001. In both instances, notice was sent to the petitioner in care of the beneficiary's second representative using that representative's mailing address. There is no indication in the record that the petitioner ever received any of the correspondence regarding either the intent to revoke or the revocation or is even aware of what has transpired.

The petition, therefore, will be remanded to the director to provide proper notice to the petitioner through the correct representative.

In addition, there are other issues that must be brought to the director's attention.

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 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).

The record shows that an I-130 visa petition was filed by Lisa Kay Spalding-Bautista on October 27, 1983, for the beneficiary, Alex Bautista. That petition was approved by the Officer in Charge, Manila, on November 14, 1983. In an undated statement or letter in the file, the beneficiary claimed that his wife was asking for money from his father, that he did want a want a bad record, and that he wanted to cancel the immigration process. There is no admission of fraud by the beneficiary.

The officer in charge called the beneficiary in for an interview to be held on January 16, 1984. On December 27, 1983, the petitioning spouse withdrew her petition, stating that her husband had deserted her, but that she still loved him.

On January 31, 1984, [redacted] filed a second I-130 for the beneficiary. The petitioner and beneficiary were interviewed separately at that time, and, based on discrepancies in their testimony, the officer in charge concluded that the marriage was a "sham." Later that day, the beneficiary again visited the sub-office, and stated that his wife had only married him so that she could stay in the Philippines. He also stated that he did not desire to be the beneficiary of a petition filed by his wife.

On February 2, 1984, the beneficiary's wife visited the sub-office, and confirmed that she married the beneficiary to remain in the Philippines, and stated that her husband's parents had promised her money and school tuition for her children if she married their son. There is no mention of her husband being a party to this transaction.

On February 6, 1984, the beneficiary's wife attempted to withdraw the second I-130 stating that her husband had married only to gain entrance to the United States. The officer in charge declined to accept her withdrawal, and on February 9, 1984, denied the petition, stating that there was no valid marital relationship and that the marriage was a sham or marriage of convenience. The officer in charge was in error by not accepting the petitioning spouse's withdrawal, and denying the petition. *See Matter of Cintron,* 16 I&N Dec 9 (BIA 1976).

In both the notice of intent to revoke and the revocation, the director indicated that the beneficiary had children and that this was a factor in the petition proceedings. The director is incorrect. The record shows that the children are those of the beneficiary's spouse, and were supposedly a factor in her wanting to stay in Philippines. The director should also ascertain why, on the G-325A biographic information sheet which accompanied the beneficiary's application for adjustment of status, and which he signed on May 6, 1997, he indicated that he had not previously been married.

In determining whether section 204(c) is applicable, the director should resolve the issues noted and should fully review the case in the light of *Matter of Tawfik, supra*.

Accordingly, this matter is remanded to the director for consideration under the above statutory provision and relevant case law, and for proper procedure pursuant to 8 C.F.R. §§ 205.2 and 292.5.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.