

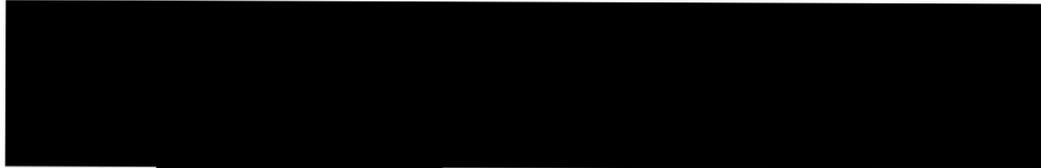


U.S. Citizenship
and Immigration
Services

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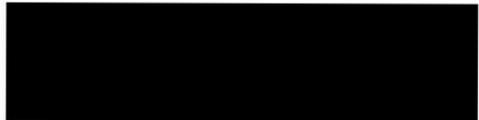
Office: TEXAS SERVICE CENTER

Date:

NOV 15 2007

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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 Director, Texas Service Center, denied the preference visa petition after a determination of fraud and invalidated the labor certification. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, the director's decision will be withdrawn, the labor certification will be reinstated, and the petition will be approved.

The petitioner is an industrial pole and agricultural products coating division. It seeks to employ the beneficiary permanently in the United States as a coating machine operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the beneficiary was not clearly eligible for the benefit sought due to fraud. The director denied the petition and invalidated the Form ETA 750, accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's January 31, 2006 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience with regard to the beneficiary's name.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date.¹ The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is December 4, 2001.

¹ Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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 pertinent evidence in the record, including new evidence properly submitted upon appeal².

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess one year of experience in the job offered of coating machine operator or one year of experience as a corrosion resistance worker/laborer. Block 15 has no additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of coating machine operator must have one year of experience in the job offered of coating machine operator or one year of experience as a corrosion resistance worker/laborer.

The beneficiary, in this matter, claims, on Form ETA-750 Part B, that he has been employed by the petitioner from December 1996 to the present as a galvanizing machine operator. The beneficiary also claims to have been employed by [REDACTED] as a laborer, from August 1995 to November 1996 and to have been employed by Centerline Contracting, Inc., P.O. Box 1018, Round Rock, TX 78680-1018, as a laborer – corrosion resistance, from February 1995 to July 1995.

In the instant case, counsel submitted a letter, dated December 7, 2005, from [REDACTED] Operations Manager, for the petitioner stating:

[REDACTED] Bustos has been working for Oklahoma Galvanizing from December 1996 to present time performing a full time position of Galvanizing Machine Operator.

His job duties are to operate finishing machinery/equipment used to complete the galvanizing/coating process. His [salary] is at least \$12.20/hour.

[REDACTED] also provided an affidavit, including a photograph of the beneficiary, dated December 7, 2005, that states [REDACTED] has been working for Oklahoma Galvanizing from December 1996 until present under the alias name of Armando Peralta Bustos. I verify that the attached picture is of the person known to me as Ruben Bustos-Estrada and Armando Peralta Bustos."

Counsel further submitted a copy of an Oklahoma Driver License, issued January 3, 2005, to Amando Peralta Bustos, with a photograph of the beneficiary, copies of the 2001 through 2004 Forms W-2, Wage and Tax Statements, issued by the petitioner to [REDACTED] and copies of payroll records, issued by the petitioner to [REDACTED] for the three pay periods beginning on August 14, 2005 and ending on September 3, 2005.

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

On December 27, 2005, the director issued a Notice of Intent to Deny (NOID) seeking evidence in support of the visa petition and to reconcile the inconsistencies in the record.³ The director denied the visa petition on January 31, 2006 noting that:

Subsequent to DOL's certification of the ETA-750 labor certification, the Service has discovered that the information presented in the application for labor certification had been misstated to include an employment history that is not accurate or never existed in order to obtain a benefit from DOL and a subsequent benefit from the Service. The petitioner's labor certification has been invalidated in this visa petition proceeding.

On appeal, counsel submits a letter, additional copies of payroll records, issued to [REDACTED] (1996 through February 2006), copies of the 1996 through 1999 and 2001 through 2005 Forms W-2, issued by the petitioner to [REDACTED] an affidavit from [REDACTED] dated March 22, 2006, stating that [REDACTED] from 1996 until 1999," and an affidavit from [REDACTED] dated March 22, 2006, stating that [REDACTED] lived at [REDACTED] from 1999 until 2001." [REDACTED] also stated that "we moved to [REDACTED] from 2001 until 2003 and from 2003 to present time we are living in our house that is located at the address [REDACTED]"

On appeal, counsel further submits several other documents (bank statements, utility bills, warranty deed, insurance letters, etc) in the name of [REDACTED] five mail envelopes addressed to or from [REDACTED] [REDACTED] a copy of a Mexico Matricula Consular (Consular ID Card), issued on January 24, 2006, to [REDACTED] and a letter, dated March 2, 2006, from [REDACTED] General Manager, for the petitioner that states:

[REDACTED] a.k.a. [REDACTED] has been working for Oklahoma Galvanizing from December 1996 to present time performing a full time position of Galvanizing Machine Operator then moved to a Crew Leader. [REDACTED] worked for Oklahoma Galvanizing through the end of 1998, and then Oklahoma Galvanizing was bought by Valmont Industries. From 1999 to 2006 he has worked for Valmont Industries – Oklahoma Galvanizing. We do not have access to old pay stub records from just Oklahoma Galvanizing (year 1996 – 1998). You will find attached replicas of old pay stubs from 1999 to 2006.

His job duties are to operate finishing machinery/equipment used to complete the galvanizing/coating process. His hourly wage is \$14.17.

Counsel states:

In the original denial notice, the Texas Service Center indicated that there was an inconsistency with the information provided on the ETA 750 part B and the I-140 form particularly dates of employment. The I-140 form indicated that the last time [REDACTED] entered the U.S. was April

³ The director noticed that the I-140 stated that the beneficiary arrived in the United States in April 2000 while the ETA 750 claimed that the beneficiary had been employed by the petitioner since December 1996 to the present (December 7, 2005). This fact along with the different names used by the beneficiary were the inconsistencies found by the director to be unacceptable.

2000. The ETA 750 indicated that [REDACTED] had been employed since December 1996 with Oklahoma Galvanizing. Both statements are true.

Mr. Estrada has been employed with Oklahoma Galvanizing from December 1996 to present time. He left in April 2000 to return to Mexico for a couple of days and then returned to the U.S. to resume working for Oklahoma Galvanizing.

* * *

As you can see from the picture, this is clearly the same person and that [REDACTED] has just been using the alias of [REDACTED] to be able to gain employment and support his family in the U.S.

At no time has [REDACTED] or Oklahoma Galvanizing made any false statements concerning employment or his presence in the U.S. Both [REDACTED] and Oklahoma Galvanizing have always been truthful and therefore ask that you grant the I-140 approval.

The regulation at 8 C.F.R. § 103.2 provides guidance in evidentiary matters. It states in pertinent part:

(b) Evidence and processing—

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

In the instant case, counsel has submitted letters from the petitioner, Forms W-2, an Oklahoma Driver License, pay statements, mail envelopes, bank statements, etc. with the names of [REDACTED] with the letters from the petitioner, the Oklahoma Driver License, and the Mexico ID card all showing the same person on all items and having the same addresses. Therefore, it is reasonable to assume that [REDACTED] are the same person. While the director is correct when stating that "identity is a central matter in establishing the requisite experience in this visa petition proceeding," the AAO has concluded that the beneficiary and [REDACTED] are one and the same person.

The director also stated that "the beneficiary has patently misstated his or her employment history in order to obtain a benefit from DOL and to apply for a subsequent benefit before the Service. This decision includes a concurrent invalidation of the supporting labor certification for a find of willful misrepresentation in its filing." However, although the beneficiary has used an alias while working for the petitioner, it does not appear that either the beneficiary or the petitioner misstated the beneficiary's work history on the labor certification. The beneficiary used his correct name, and although the work history was earned under an alias, the petitioner has shown that it did employ the beneficiary during the pertinent years (1996 to the present). Therefore, without a consultation with the Department of Labor, the director was incorrect in invalidating the labor certification for willful misrepresentation.⁴

After a review of the instant case, the AAO has determined that the labor certification should be reinstated, that the petitioner has shown that the beneficiary met the experience requirements of the labor certification before the priority date, and the visa petition should be approved. However, it is noted that the beneficiary has used an alias,⁵ continues to use the alias,^{6 7 8} is using

⁴ Please note that the willful misrepresentation must pertain directly to representations made on the labor certification. See 20 C.F.R. § 656.30(d). CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁵ Under 8 U.S.C. § 1324c, possession of a counterfeit document to satisfy any requirement of the Immigration and Nationality Act (the Act) is prohibited.

⁶ Title 18 U.S.C.A. § 1028A states in pertinent part:

[Aggravated identity theft] a) *Offenses.*

1. *In general.* Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment for such felony, be sentenced to a term of imprisonment of 2 years.

⁷ Oklahoma Statutes, Title 21 § 1533.1 states in pertinent part:

Fraudulently Obtaining Personal Identity of other Persons.

- A. It is unlawful for any person to willfully and with fraudulent intent obtain the name, address, social security number, date of birth, or any other personal identifying information of another person, living or dead, with intent to use, sell, or allow any

a social security number that does not belong to him,⁹ is probably filing income taxes using the alias and bogus social security number,¹⁰ and probably used the alias for the purpose of subverting the employer verification system.^{11 12}

other person to use or sell such personal identifying information to obtain or attempt to obtain credit, goods, property, or service in the name of the other person without the consent of that person.

- B. It is unlawful for any person to use with fraudulent intent the personal identity of another person, living or dead, or any information relating to the personal identity of another person, living or dead, to obtain or attempt to obtain credit or anything of value.
- C. It is unlawful for any person with fraudulent intent to lend, sell, or otherwise offer the use of such person's own name, address, social security number, date of birth, or any other personal identifying information or document to any other person with the intent to allow such other person to use the personal identifying information or document to obtain or attempt to obtain any identifying document in the name of such other person.
- D. Any person convicted of violating any provision of this section shall be guilty of identity theft. Identity theft is a felony offense punishable by imprisonment in the custody of the Department of Corrections for a period not to exceed two (2) years, or a fine not to exceed Ten Thousand Dollars (\$10,000.00), or by both such fine and imprisonment.

⁸ In order to convict defendants of aggravated identity theft, government was required to prove only that defendants knowingly possessed fraudulent identity documents, and that those documents contained identifying numbers that belonged to real people; government did not have to prove that defendants had knowledge that the identifying number on the fraudulent documents in their possession belonged to a real person. *U.S. v. Contreras-Macedas*, D.D.C. 2006, 437 F.Supp.2d 69.

⁹ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the

Act made it a Federal crime when anyone

...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

¹⁰ Title 26 USC § 7206(1) and (2) states:

Fraud and false statements

Any person who -

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

(2) Aid or assistance

Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .

- Shall be imprisoned not more than 3 years
- Or fined not more than \$250,000 for individuals (\$500,000 for corporations)
- Or both, together with cost of prosecution

¹¹ If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C.A. § 1324a(a)(2). Employers who violate the Immigration Reform and Control Act of 1986 (IRCA) are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b).

¹² Therefore, should the beneficiary file a Form I-485, Application to Register Permanent Residence or Adjust Status, he should be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to establishing that the beneficiary met the requirements of the labor certification, the petitioner has sustained that burden. Accordingly, the appeal is sustained, the decision of the director is withdrawn, the labor certification is reinstated, and the visa petition will be approved.

ORDER: The appeal is sustained, the January 31, 2006 decision of the director is withdrawn, the labor certification is reinstated, and the petition is approved.

[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.