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

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 18 2008
EAC 03 224 52286

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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, Vermont Service Center, revoked the approval of the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The visa petition will be approved.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], 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 realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding the burden upon Citizenship and Immigration Services (CIS) to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman,* 736 F.2d 1305 (9th Cir. 1984).

The petitioner is a meat by-products rendering facility. It seeks to employ the beneficiary permanently in the United States as a tallow/filter systems operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Act, 8 U.S.C. § 1154(c). The director revoked the petition 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 29, 2005 revocation, the only issue in this case is whether or not the beneficiary is ineligible for the benefit sought due to the marriage fraud provision of section 204(c) of the Act, 8 U.S.C. § 1154(c).

Section 203(b)(3)(A)(iii) of 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.

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 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 regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

> *Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the 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. The Director will deny a petition for immigrant visa classification filed on behalf of any alien whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Section 212(a)(6)(C)(i) of 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.

The subject CIS Form I-140 employment based petition was filed by the petitioner on July 31, 2003. The labor certification was accepted for filing on April 30, 2001, the priority date of the petition.[1] The director issued a notice of its intent to revoke (NOIR) the approval of the petition on August 5, 2005.

In the NOIR, the director informed the petitioner of the following:

> The record includes a copy of a marriage certificate for [the beneficiary] and [redacted], married on August 20, 1994. The record appears to establish the beneficiary attempted to obtain an immigration benefit through fraud.[2]
>
> This letter shall serve as notice that it is the intention of the Service to revoke the approval previously granted for the aforementioned petition.
>
> The Service will not make a final decision regarding the revocation of your petition's approval for thirty (30) days. During that time, you may submit any evidence that you feel will overcome the reasons for revocation.
>
> Submit clear and convincing evidence to establish that the marriage between [redacted] and [redacted] was not entered into for the purpose of evading any provision of immigration law. Such evidence may include but is not limited to:

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[1] The regulation at 8 C.F.R. § 204.5(d) states in pertinent part:

> *Priority date:* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor.

[2] It is noted that the I-130 was denied due to the birth certificate for [redacted] being a fake, and the marriage certificate for the beneficiary and [redacted] also being a fake. The I-485 was also denied since the visa petition supporting the application (I-130) was denied.

a) Documentation showing joint ownership of property, such as mortgage agreements or payments, property titles, or property registration;
b) Lease(s) showing joint tenancy at a common residence signed by you, your spouse and the individual(s) renting the property;
c) Documentation showing commingling of financial resources such as:
   I. Jointly held bank account(s) or credit card statements.
   II. Utility bill(s) such as telephone, gas, electric, water, etc. or statement(s) issued in both your names.
   III. Jointly held insurance policies, or policies in which one of you is listed as the dependent of the primary carrier.
   IV. Jointly filed income taxes.
d) Birth certificate(s) of child(ren) born to you and this spouse.
e) Affidavits of third parties having knowledge of the bona fides of the marriage relationship.

Affidavits should be supported, if possible, by one or more types of documentary evidence listed above. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit; and his or her relationship to the petitioner, beneficiary, or indicated spouse, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit.)

Also, submit a valid marriage certificate for the marriage for [the beneficiary] and [redacted]. An appropriate civil authority should issue a marriage certificate. In order for the marriage to be considered valid for immigration purposes, it must have been registered with a civil authority from the location where the marriage took place. The document must contain the seal of the issuing office including the date of registration and signature of the registrar. Please note, a religious authority such as a priest, minister, or rabbi is not considered to be a civil authority.

The beneficiary filed a new I-485 on January 20, 2005 after the I-140 filed by the petitioner was approved. Under Part 7 of the I-140, the beneficiary does not list a spouse or children. The beneficiary's address is given as [redacted] Dracut, MA 01826. The I-485 lists the beneficiary's address as [redacted] Lowell, MA 01852. Under Part 3, Processing Information, of the I-485, the beneficiary answers the question: "Have you ever before applied for permanent resident status in the U.S.?" as yes, with a date of April 17, 1995 in New York, NY and indicates that the a lication was denied. Under B of Part 3, the beneficiary lists a wife, [redacted][3] and a son, [redacted] (born January 9, 2004).

The director received counsel's response to the notice of the intent to revoke on September 6, 2005. Counsel's response included an affidavit from the beneficiary, dated July 8, 2004, a copy of a No Record of Certification from County of Nassau, a copy of the beneficiary's Brazilian passport, a copy of the beneficiary's Brazilian birth certificate with translation, a copy of the visa page, obtained from a FOIA request, a copy of an English translation and Brazilian birth record, not the beneficiary's, obtained by the FOIA request, and an attorney's certification, signed on April 17, 1995, by [redacted]. Counsel claimed:

[3] The beneficiary and [redacted] were married on December 23, 2003 in Lowell, Massachusetts.

To validate the applicant's credibility that he had no knowledge of what was submitted and after reading his affidavit it can be summed up that he gave the appropriate information about his family life and entry in to the United States, a copy of his passport and two photographs. As he stated he signed forms in the blank and was told that the forms would be completed from the information that was given. He then became a victim of a scam and was duped into believing that he was being assisted properly.

Upon review of his FOIA it can be concluded that the applicant was a victim of a scam. The documents that were submitted are not his, he could not have obtained those documents and the information on the applications is not accurate. All to be considered to the credibility of the applicant that he had no knowledge of what had transpired. The following information is to be considered as not relating to he [sic] applicant:

1) The applicant never resided in New York, as the address states on the forms;
2) The applicant was not married;
3) The applicant entered the United States with a valid visa on 6/11/1990, see a complete copy of applicant's Brazilian passport. In the marriage petition file, the applicant's first page of his valid passport was submitted but the "visa" page submitted is not from the same passport; the passport number is different; the name on the visa is "blanked" out and the entry date is not applicant's entry date;
4) No city of birth is listed for the applicant;
5) A Brazilian birth certificate is submitted, however a review of the translation versus the Brazilian birth document reveals;
    a. The listed civil registry is from two different cities;
    b. The date of birth is not the same;
    c. There is no name on the foreign document;
    d. There are hand-written entries on the foreign document.
6) The marriage certificate is not valid. This was confirmed in our I-485 package by our investigation into the issuance of this document.

The director issued a decision revoking the petition's approval on December 29, 2005 noting:

A review of the record indicates the beneficiary signed the Petition for Alien Relative (Form I-130), Application to Register Permanent Residence or Adjust Status (Form I-485), and the Form G-325A indicating the beneficiary was attempting to obtain an immigration benefit through a marriage to a United States citizen. The record does not establish a valid marriage or that the beneficiary had no knowledge of the type of petition being filed on his behalf. The record establishes the beneficiary attempted to obtain an immigration benefit through a marriage to a United States citizen.

On January 13, 2006, the petitioner appealed the denial.

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 appeal[4]. Relevant evidence submitted on appeal includes counsel's brief; previously submitted documentation, documentation from the FOIA request, a copy printed from United States Citizenship and Immigration Services website viewed on February 16, 2006, a press release from the office of Debra W. Young, United States Attorney, Central District of California, by Thom Mrozek, Public Affairs Officer, August 10, 2004, and an article entitled *Corruption at the Gates,* September 12-13, 2002 from a website at http://www.npr.org/programs/atc/features/2002/sept/bordercorruption.

On appeal, counsel states:

> In considering [the beneficiary's] response [to the NOIR], the Service failed to consider the contention that [the beneficiary] signed immigration forms in blank, as detailed in his affidavit. (A.19). The Service incorrectly stated that [the beneficiary] signed the I-130 form. (A. 19, *see also* A. 20-24). The Service improperly and incorrectly considered the presence of [the beneficiary's] signature on the documents to be dispositive of his intent to obtain a benefit through a fraudulent marriage certificate. (A. 19).
>
> The Service's failure to consider this contention was arbitrary, capricious, and an abuse of discretion. Moreover, the Service did not have any substantial, probative information that would rebut [the beneficiary's] contentions.
>
> Since this matter can be resolved solely upon a determination of credibility, the Service should have given him an opportunity to be heard in person, wherein his statements could be considered by the finder of fact by observing his demeanor and subjecting him to direct and cross-examination. The lack of such an opportunity violates the requirement that he be permitted to "offer evidence in support of the petition or self petition and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. § 205.2(b). It also violates his rights under the Fifth Amendment, Due Process Clause of the United States Constitution.

Although counsel does not specifically request oral argument, it appears from her statements that it is/was her wish to do so. However, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Although counsel argues that the petitioner's due process rights were violated, the petitioner has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). The petitioner has provided no evidence in support of its claims on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner's claim is without merit. In addition, the court in *De Zavala v.*

[4] 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).

Ashcroft, 385 F.3d 879, 883 (5th Cir. 2004) held that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge. The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director revoked the petition. The petitioner has not met its burden of proof and the revocation was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

The director determined that the evidence submitted by the petitioner in response to the notice of intent to revoke the approval was not sufficient to establish that the beneficiary did not attempt to obtain an immigration benefit through marriage to a United States citizen and revoked the approval accordingly.

On appeal, counsel states:

> [The beneficiary] is a native and citizen of Brazil. (A. 12-18). He arrived in the United States as a visitor via Miami, Florida on June 11, 1990. (A. 8, 17). In 1995, [the beneficiary] engaged the services of one [redacted] a Brazilian, in order to obtain legal status in the United States. (A. 8). [The beneficiary] believed that [redacted] and the services he would render were legitimate. *Id.* For his services, [the beneficiary] paid [redacted] the sum of $3,000.00, $500.00 to be paid initially, the remainder to be paid when they "arrived at the Immigration Department," where [redacted] service would be concluded. *Id.*
>
> [The beneficiary] spoke with [redacted] and answered honestly the questions he posed. *Id.* Due to the fact that his native language was Portuguese, and that he was unsophisticated in legal matters, he was unable to fill these forms out himself. (*See* A. 8). At [redacted] direction, he signed several immigration forms in blank, with the belief that [redacted] would subsequently fill in the accurate information on the forms. *Id.*
>
> Days later, [the beneficiary] met [redacted] to travel to New York. *Id.* His friend, one [redacted] also was obtaining assistance from [redacted] along with approximately 9-12 others. *Id.* Most of the individuals traveled to New York in a van rented by [redacted] (though [the beneficiary] traveled separately in a vehicle owned by his friend, [redacted]). *Id.*
>
> Upon their arrival in New York, they met with an associate of [redacted] described as "a Haitian man, who works for the immigration service" (discovered to be [redacted]). (A. 5, 9). At the time, each of the individuals in [redacted]'s group paid this man the remaining $2,500.00 in cash and were told that "everything had been arranged." (A. 9). [The beneficiary] asked a number of questions regarding the process, but was also given that vague answer. *Id.* One of the individuals in the group had asked if their cases would involve a marriage, and the response was in the negative. *Id.*
>
> [The beneficiary] and the others entered the Immigration Building and met with a federal officer. *Id.* He was asked such questions as his name, address, and place of birth. *Id.* He answered the officer's questions honestly. *Id.* The officer then took his picture and gave him a work permit. *Id.* [The beneficiary] was informed that "processing information" for his case would be mailed to him at his home address. *Id.*
>
> He never did receive the "processing information." *Id.* This is because the information was mailed to the false address on the fraudulent documents, an address in New York. (A. 9, 26-28).

In or about November of 1995, he contacted to inquire as to the status of his information, and he was told to wait. (A.9). Later, [the beneficiary] learned through the local newspaper that [redacted] had been arrested for, *inter alia,* filing false papers. *Id.*

Subsequently, [the beneficiary] engaged the services of attorney Linda A. Cristello, who obtained his information pursuant to a Freedom of Information Act request. (A. 5). For the first time, [the beneficiary] learned that fraudulent papers, including a false marriage certificate to one "[redacted]" had been filed in order to secure his work authorization. (A. 5-6). He also learned that the information had been mailed to an address in New York, which information had been returned as undeliverable, and his application denied. (A. 25-28).

* * *

Had the Service given [the beneficiary] an opportunity to appear and testify in support of his contention, the Service would have been able to observe his demeanor and render a credibility finding, thus giving proper attention to his evidence. [The beneficiary] would testify that he was the victim of [redacted], signed immigration documents in blank, believing that Mr. [redacted] would honestly complete them, and that [the beneficiary] was completely unaware that a fraudulent marriage certificate had been submitted on his behalf.

Instead, [the beneficiary] was relegated to a lifeless affidavit to give his side of the story. This is a violation of his right to "offer evidence" pursuant to 8 C.F.R. § 205.2(b). It is also a violation to his rights to Due Process under the Fifth Amendment to the United States Constitution.

The Service compounded this problem with its utter disregard of his contention. Despite [the beneficiary's] statement that he had signed documents in blank, believing that they would be completed honestly, the Service rejected his argument on the sole basis that he signed the documents in question. The Service also relied upon an incorrect fact – that [the beneficiary] had signed the I-130. That form is signed by the petitioner, however, and not the beneficiary, and has no space for [the beneficiary's] signature. Thus, the Service's conclusion was incorrect, arbitrary, capricious, and an abuse of discretion.

Further, the Service lacked substantial and probative evidence that [the beneficiary] had the intent to submit the fraudulent marriage certificate, as there is absolutely no evidence to rebut his contention.

Accordingly, [the beneficiary's] appeal should be sustained, the decision to revoke his approved visa application should be reversed, and the approval of the visa petition should be reinstated.

Counsel has submitted an affidavit from the beneficiary which relates his version of the events regarding the fraudulent filing of a Form I-130 and Form I-485. Counsel has not, however, provided any evidence which corroborates the beneficiary's claim. There are no newspaper clippings, no police reports, and no affidavits from other victims[5] or friends or neighbors who remember or can vouch for the beneficiary's claims.

[5] Counsel claims that "fellow-victims of [redacted] are extremely difficult to find, if they are still in the United States at all, and certainly would not be willing to sign a document that brings them to the attention of the Department of Homeland Security." The AAO finds that this is strictly counsel's belief. There is no evidence in

Counsel also points to the attorney, [redacted], as being involved in the scam and states that his "name is known amongst immigration practitioners and the Department of Homeland Security in the Boston area as being corrupt." Again, counsel has submitted no evidence of these claims. In fact, a review of public records shows [redacted] listed as an attorney in New York. While [redacted] has tendered his resignation to the bar, he did not do so until 2007, and his resignation does not appear to relate to immigration matters. *See* the website at https://iapps.courts.state.ny.us/attorney/AttorneyDetails?attorneyID=5493202 (accessed on March 14, 2008).

Counsel also states that the beneficiary's answer during his interview in New York relating to his address should have raised a red flag, and counsel submits several articles relating to corrupt immigration officials. If counsel is suggesting that the official who interviewed the beneficiary was corrupt or in on the "scam," she has not provided any evidence of this contention. Merely hinting at corruption is not proof, and the AAO will not consider such a statement as viable without that proof.

It is noted that counsel refers to several decisions in support of her contentions. However, the majority of these decisions relate to cases where the defendant is under proceedings. In the instant case, the beneficiary is not under proceedings, and therefore, those cases do not relate to the current situation.

Counsel makes an issue of the director's mistake in stating that the beneficiary signed the Form I-130. Counsel is correct, but the fact remains that the beneficiary did sign other documents that were submitted to obtain an immigration benefit, including Form I-485 and Form G-325A. Even if the beneficiary did sign those documents in blank, how those documents are used to obtain immigration benefits are the sole responsibility of the beneficiary. In the instant case, there is no registry of a marriage for the beneficiary in New York. Therefore, there is no proof that the beneficiary entered into a marriage for the purpose of evading the immigration laws of the United States. There is also no evidence in the record that the beneficiary conspired to enter into a marriage with [redacted], or anyone else, for the purpose of evading the immigration laws of the United States.

Visa petitions cannot be approved on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws, regardless whether any actual benefit was received. *See* section 204(c) of the Act, 8 U.S.C. § 1154(c); 8 C.F.R. § 204.2(a)(i)(ii) (2004). Visa petitions will be denied or revoked where there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether any actual benefit was received. *See* 8 C.F.R. § 204(a)(1)(ii); *Matter of Tawfik,* 20 I&N Dec. 166 (BIA 1990). Evidence of the attempt or conspiracy must be contained in the alien's file. *See* 8 C.F.R. §§ 103.2(b)(16)(i), 204.2(a)(1)(ii) (2004); *Matter of Tawfik*[6], 20 I&N Dec. at 166. In the instant case, even though a fraudulent marriage certificate is in the record of proceeding, there is no evidence that a marriage for the beneficiary and [redacted] was ever registered in the state of New York and there is no evidence in the record that establishes that the beneficiary ever lived in the state of New York. Therefore, without a valid marriage certificate that has been registered in the state of New York for the beneficiary and [redacted], there is no proof that the beneficiary entered into a marriage for the

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the record that additional victims would not come forward. It would make all of their stories more believable if a number of victims reported this "scam."

[6] *Matter of Tawfik* states that "in making a determination that a beneficiary's prior marriage comes within the purview of section 204(c) of the Act as a marriage entered into for the purpose of evading the immigration laws, the director should not give conclusive effect to determinations made in prior proceedings, but, rather, should reach an independent conclusion based on the evidence of record, although any relevant evidence may be relied upon, including evidence having its origin in prior Service proceedings involving the beneficiary or in court proceedings involving a prior marriage."

purpose of evading the immigration laws. The simple fact that the beneficiary signed several forms in blank does not equate to marriage fraud and does not subject the beneficiary to the provisions of section 204(c) of the Act, 8 U.S.C. § 1154(c).[7]

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. Here, that burden has been met.

ORDER: The appeal is sustained. The visa petition is approved.

[7] The beneficiary may, however, be inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresentation by obtaining a benefit (work authorization) based on the filing of the fraudulent documents.