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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 06 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

[redacted]

cc: [redacted]

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on April 6, 2009 on the basis that the petitioner failed to credibly establish that the beneficiary had the experience required for the position, and additionally failed to establish its continuing financial ability to pay the proffered wage. On February 3, 2010, the AAO *sua sponte* reopened the matter on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The AAO issued a notice of derogatory information to both the petitioner and the beneficiary individually, as well.[1] Through counsel, the beneficiary responded. The matter is now before the AAO. The AAO affirms its previous decision and the petition will remain denied based on the deficiencies of the evidence which were already addressed in our preceding April 6, 2009, decision. The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary.

The employer was identified as [redacted] The employment-based petition (Form I-140) purportedly sought to employ the beneficiary permanently in the United States as a glazier pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, a labor certification, certified by the Department of Labor (DOL) accompanied the petition.[2]

The notice of derogatory information informed the petitioner (and the beneficiary by notice to both the beneficiary and beneficiary's former attorney of record) of doubts concerning the *bona fide* nature of the job offer and of its intent to enter a finding of misrepresentation or fraud[3] against the beneficiary and invalidate the labor certification as the petitioner had confirmed that it had never employed or filed any petition on the beneficiary's behalf.

Specifically, the AAO advised:

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[1] The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides that if a decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and which the applicant or petitioner is unaware, they shall be advised and offered an opportunity to rebut the information and present information on his/her own behalf except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section.

[2] The procedural history of this case is documented in the record and incorporated herein. Further references to the procedural history will only be made as necessary. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004).

[3] A willful misrepresentation requires a knowingly made material misstatement to a government official for the purpose of obtaining an immigration benefit. *See Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (B.I.A. 1975). To constitute a fraud, an alien must have made a false representation of a material fact, with knowledge of its falsity and with an intent to deceive a government official, and the misrepresentation must have been believed and acted upon by the official. *See Matter of GG-,* 7 I&N De. 161, 164 (B.I.A. 1975).

> The record contained an unsigned and undated letter from the petitioner stating that it did not sponsor the beneficiary, which was submitted subsequent to the receipt of the director's decision. Specifically, the letter stated, 'our company has never petitioned to classify this beneficiary as stated in your letter.' Additionally, the letter stated, 'We have no knowledge of who this person is.' As the letter is unsigned and undated, on October 1, 2009, the AAO contacted the petitioner and spoke with [redacted] who had prepared the letter on behalf of the company's president, [redacted] She stated that there was no record that the petitioner ever employed the beneficiary and no record that the company ever filed a petition on the beneficiary's behalf. By faxed letter dated October 8, 2009, [redacted] sent a letter signed by its president, [redacted] which confirmed that it never employed the beneficiary.

For this reason, the AAO advised that the beneficiary was subject to misrepresentation provisions and that the underlying labor certification supporting the petition would be invalidated pursuant to 20 C.F.R. § 656.30. This regulation states:

> (d) *Invalidation of labor certifications:*
>
> After issuance, a labor certification may be revoked by ETA using the procedures described in §656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The AAO advised in the notice that a material issue is whether the petitioner actually sponsored the beneficiary. Submission of a fraudulent application would amount to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), (materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.")

In response to the notice of derogatory information, the beneficiary has submitted a declaration in which she disclaims all knowledge of fraud or misrepresentation, but states that she paid $8,000 to obtain permanent residence and was referred by a friend of a friend to [redacted] in April 2005. She states that she signed a number of forms and initialed certain pages, but did not read anything and claimed no knowledge that any paperwork provided to the Department of Labor or the United States Citizenship and Immigration Services (USCIS) related to working for [redacted], had

been submitted. The beneficiary states that she met with [redacted] once in late 2006 at an office at [redacted]

Given the appearance of a signature identified as the beneficiary's on Part B of the ETA 750 in which she states that she is the alien sponsored by the prospective employer, [redacted], and which she had signed under penalty of perjury that the information is true and correct, her disclaimer of involvement is not persuasively rebutted. The regulation at 8 C.F.R. § 102.2(a)(2) provides that "[b]y signing the application or petition, the applicant or petitioner...certifies under penalty of perjury that the application or petition, *and all evidence submitted with, either at the time of filing or thereafter,* is true and correct." The beneficiary is held responsible for such material misrepresentations submitted on her behalf in the record of proceedings. If the beneficiary was unaware of the documents and information submitted in support of her own petition, then this failure to apprise herself constitutes deliberate avoidance and does not absolve her of the responsibility of her petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005)(unpublished)(an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente,* 982 F.2d 156, 159 (5th Cir. 1993). To find otherwise would have serious negative consequences for USCIS and the administration of the nation's immigration laws.

In addition, the Department of Justice and USCIS frequently prosecute employment-based fraud based on a petitioner's forged signature on the employment-based petition. We note prior examples where attorneys have been convicted of various charges, including money laundering and immigration fraud after signing immigration forms for which the alien or employer had no knowledge. *United States v. O'Connor,* 158 F.Supp. 2d 697, 710 (E.D. Va. 2001); *United States v. Kooritsky,* Case No. 1:02CR00502 (E.D. Va. December 11, 2002).

Based on the foregoing, the AAO finds that the petition was filed based on the willful misrepresentation that the petitioner was a prospective U.S. employer making a valid job offer to the alien. Because the supporting documentation, including the ETA 750B indicates that the sole recipient of the immigration benefit was the alien, we find the alien's participation as the beneficiary of such petition constitutes a willful material misrepresentation that a *bona fide* job offer was extended or accepted. Further, the labor certification will be invalidated pursuant to the provisions of 20 C.F.R. 656.30(d) based on this willful material misrepresentation of a material fact.

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 AAO's April 6, 2009, decision dismissing the appeal is affirmed. The petition will remain denied and the AAO will enter a separate fining of willful misrepresentation of a material fact against the beneficiary.

FURTHER ORDER: The AAO finds that the petition filed was based on the willful misrepresentation by the beneficiary that the job offer was valid and that she knowingly submitted documents containing a false claim that she intended to be sponsored as a prospective foreign worker by the petitioner in order to secure eligibility for a benefit sought under the immigration laws of the United States. The AAO additionally invalidates the labor certification pursuant to 20 C.F. R. § 656.30(d).