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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 11 2011

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). On October 15, 2010, the AAO dismissed the appeal. On November 16, 2010, the petitioner filed a motion to reconsider the AAO's decision. On January 26, 2011, the AAO granted the motion and requested additional evidence (RFE). On February 22, 2011, the petitioner responded to the AAO's RFE. The decisions of the AAO and the Nebraska Service Center are withdrawn, and the matter is remanded to the director for further consideration and a new decision, which shall be certified to the AAO.

The petitioner operates a healthcare facility, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i), an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Permanent Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional

nursing in the [s]tate of intended employment, or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, the petitioner submitted the ETA Form 9089 with the Form I-140 Immigrant Petition on July 3, 2007, which is the priority date. The proffered wage as stated on Form ETA 9089 for the position of a nurse is $25.00 per hour ($52,000 per year).

On May 8, 2009, the director denied the petition because the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1). Additionally, the director noted that the petitioner failed to provide an attestation that the employer posted the position in any in house media, as required by 20 CFR § 656.10(d)(1)(ii), and failed to establish that it had the continuing ability to pay the proffered wage. The petitioner appealed to the AAO.

On October 15, 2010, the AAO dismissed the appeal concluding that the petitioner failed to properly post the position in accordance with 20 C.F.R. § 656.10(d)(1), which requires employers to post notice of the filing of the labor certification at the facility or location of the employment for at least "10 consecutive business days." The posting notice submitted with the petition indicated that it was posted from May 15, 2007 to May 28, 2007. However, as May 19, 20, 26, and 27 were weekend days, and May 28 was a federal holiday, the AAO concluded that the notice was not posted for 10 consecutive business days as that term was defined by the DOL in its "Frequently Asked Questions (FAQs)" section. *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#timeframes5 (accessed October 6, 2010). Under that definition, holidays and weekend days could not be counted in the calculation of whether an employer posted its notice for 10 consecutive business days.

The AAO further denied the petition because the petitioner had not established that it obtained a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40 from the relevant State Workforce Agency (SWA) prior to filing. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). However, the AAO withdrew the director's determination that the petitioner failed to provide an attestation that the employer posted the position in any in house media, as required by 20 CFR § 656.10(d)(1)(ii), and that the petitioner failed to establish that it had the continuing ability to pay the proffered wage.

8 C.F.R. § 204.5(g)(2). The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On November 16, 2010, the petitioner filed a motion to reconsider the decision of the AAO dismissing the appeal. In support of the motion, the petitioner cited to a recent decision of the Board of Alien Labor Certification Appeals (BALCA), *In the Matter of Il Cortile Restaurant*, 2010-PER-00683 (BALCA October 12, 2010). In that decision, BALCA concluded that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when a Notice of Filing is posted for 10 consecutive days "when employees are on the worksite and [are] able to see the Notice of Filing." *Id* at 4. BALCA also stated that "[a]s long as an employer has employees working on the premises on a Saturday, Sunday, or holiday, those days are business days for the purposes of complying with the Notice of Filing posting." *Id.*

The petitioner also provided a copy of a PWD from the SWA dated June 29, 2007 showing a prevailing wage of $22.25 per hour. The proffered wage is $25.00 per hour.

On January 26, 2011, the AAO granted the motion and requested additional evidence (RFE). The AAO requested evidence that, at the time the notice was posted in May 2007, the petitioner was open for business on a Saturday and/or a Sunday within the posting period, or on Memorial Day, as well as on any of the weekdays falling within the posting period, so that it is established that the notice was posted for 10 business days between May 15, 2007 to May 28, 2007. The AAO indicated that the petitioner's response must include evidence that it is more likely than not that employees were working on the premises at [redacted] for each of those 10 days; that the worksite at [redacted] was open and available to patients and employees on each of those 10 days; and that the employees had access to the area where the Notice of Filing was posted. The AAO also requested evidence indicating where the notice was posted in the building and that your employees had access to this area on all days that your business was open, including any Saturdays, Sundays, or holidays.

On February 22, 2011, the petitioner responded to the AAO's RFE. The petitioner submitted patient logs for 12 days of operation between May 15, 2007 and May 28, 2007; financial data showing dates of service; an affidavit from the medical director indicating when and where the notice was posted; and a map of the facility showing the location of the posting notice. [1]

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

> (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Sheepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the

[1] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

. . .

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

. . .

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

(i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

. . .

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

In the past, the DOL, and USCIS, interpreted the requirement that the petitioner post the notice required by 20 C.F.R. § 656.10(d) for 10 consecutive business days to exclude Saturdays, Sundays, and federal holidays. However, as explained above, BALCA recently concluded in its decision in

Matter of Il Cortile Restaurant that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when a notice is posted for 10 consecutive days "when employees are on the worksite and [are] able to see the Notice of Filing." *Id.* at 4. BALCA also stated that "[a]s long as an employer has employees working on the premises on a Saturday, Sunday, or holiday, those days are business days for the purposes of complying with the Notice of Filing posting." *Id.* Although BALCA decisions are not binding on USCIS, the AAO has in the past followed the DOL's definition of "business day" as used in 20 C.F.R. § 656.10(d)(1)(ii) for purposes of considering whether a posting notice complies with that regulation.

Consequently, the DOL changed its FAQs on December 21, 2010 to state the following:

> **For purposes of posting the Notice of Filing for a permanent labor application, what does the Office of Foreign Labor Certification count as a "business day"?**
>
> OFLC has consistently interpreted "business day" to mean Monday through Friday, except for Federal holidays. However, where an employer is open for business on a Saturday, Sunday, and/or holiday, the employer may include the Saturday, Sunday and/or holiday in its count of the 10 consecutive business day period required for the posting of the Notice of Filing so long as the employer demonstrates that it was open for business on those days. Similarly, where an employer is not open for business any day, Monday through Friday, the employer should not include any such days in its count of the 10 consecutive business day period required for the posting of the Notice of Filing.
>
> **How does an employer demonstrate that it is open for business?**
>
> If an employer is requested on audit or otherwise to demonstrate that it was open for business on a Saturday, Sunday, and/or holiday at the time of posting, the employer must provide documentation which establishes that on those days: 1) its employees were working on the premises and engaged in normal business activity; 2) the worksite was open and available to its clients and/or customers, if applicable, as well as to its employees; and 3) its employees had access to the area where the Notice of Filing was posted.

See http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile1 (accessed March 2, 2011).

Accordingly, the AAO will also conclude that the purpose of the notice requirement of 20 C.F.R. § 656.10(d)(1)(ii) can be fulfilled when a notice is posted for 10 consecutive days when employees are working at the worksite and are able to see the notice, even if those days are Saturdays, Sundays, or holidays. Conversely, if an employer is not open for business any day, including a weekday, these will not be counted as business days for purposes of complying with 20 C.F.R. § 656.10(d)(1)(ii). Finally, the AAO will use the guidance provided in the DOL's FAQs to determine whether a petitioner has established that it was open for business on any particular day for purposes of 20 C.F.R. § 656.10(d)(1)(ii).

In response to the AAO's RFE, the petitioner submitted patient logs for 12 days of operation between May 15, 2007 and May 28, 2007; financial data showing dates of service; an affidavit from the medical director indicating when and where the notice was posted; and a map of the facility showing the location of the posting notice. This evidence establishes that the petitioner was open Monday through Saturday, and on Memorial Day, between May 15, 2007 and May 28, 2007, and that it treated no less than 18 patients on each of those days. Based on the decision in *Matter of Il Cortile Restaurant* and the DOL's FAQs, this amounts to 12 business days during which time the notice was posted at the facility. Furthermore, the medical director indicates in an affidavit and attached map that the notice was posted in a public area in the building and that both patients and employees had access to the notice during each of the 12 business days of posting. In view of the above, the evidence submitted establishes that it is more likely than not that petitioner was normally open for business Monday through Saturday, and on Memorial Day, between the dates May 15, 2007 and May 28, 2007, that employees and patients were present at the facility on those days, and that employees had access to the part of the building in which the notice was posted. The October 15, 2010 decision of the AAO is withdrawn.

Furthermore, as noted above, on motion the petitioner provided a copy of a PWD from the SWA dated June 29, 2007 showing a prevailing wage of $22.25 per hour. The proffered wage is $25.00 per hour. Accordingly, the AAO's decision to deny the petition on this basis is also withdrawn.

However, the petition may not be approved, and the matter is remanded to the director for further consideration and a new decision. It appears more likely than not that the job offer to the beneficiary is not bona fide and that the petitioner committed material misrepresentation in its completion of the petition and the uncertified ETA Form 9089. Part C.9 of the ETA Form 9089 accompanying the petition asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" Signing under penalty of perjury on June 28, 2007, the petitioner's sole stockholder responded "no" to this question.

The petitioner's "no" response to Part C.9 of the ETA Form 9089, however, appears to have been false. According to the record and USCIS electronic records, it appears more likely than not that the sole stockholder of the petitioner, [redacted] M.D., and the beneficiary are related as brother and sister. Therefore, the answer to Part C.9 should have been "yes." Both the sole stockholder of the petitioner and the beneficiary listed the same first names for their respective parents in immigration documentation – [redacted]. Furthermore, in her Form G-325A, Biographic Information, submitted with her Form I-485, the beneficiary listed [redacted] as an alias. [redacted] is the same surname of the sole stockholder of the petitioner and appears to be the beneficiary's maiden name. Finally, the beneficiary listed [redacted] Las Vegas, Nevada, as her residence from March 2003 to June 2006. This is the exact same home address attributed to [redacted] in the Schedule K-1 to the petitioner's 2006 Form 1120S, U.S. Income Tax Return for an S Corporation. Therefore, it appears that the beneficiary and [redacted] lived at the same address for several years.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

> (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been shut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

As noted above, it appears that the ETA Form 9089 contains false information. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991). Here, the submission of the Form ETA 9089 containing false information constitutes a false representation to a government official. It is noted that a failure to apprise oneself of the contents of these documents before signing them is generally not recognized as a defense to misrepresentation. *See, e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)).

Further, the information contained in the ETA Form 9089 is material to the beneficiary's eligibility. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation shuts off a line of

inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

The misrepresentation of the family relationship between the sole stockholder of the petitioner and the beneficiary shut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This fact is directly material to whether the petitioner is an "employer"[2] which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C-*, 9 I&N Dec. at 447.

Accordingly, the appeal may not be sustained, and the matter is remanded to the director for further consideration of this issue and a new decision.

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 decision of October 15, 2010 is withdrawn. The director's decision is also withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision, which shall be certified to the AAO.

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[2] The regulation at 20 C.F.R. § 656.3 states in pertinent part:

> *Employer* means: (1) a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
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> * * *
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> *Employment* means: (1) permanent, full-time work by an employee for an employer other than oneself. For the purposes of this definition, an investor is not an employee.