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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 20 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On March 7, 2005, United States Citizenship and Immigration Services (USCIS), Nebraska Center (the director), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the director on May 24, 2005. The director, however, revoked the approval of the immigrant petition on January 31, 2008, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] 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).

The petitioner is a hotel/motel company. It seeks to employ the beneficiary permanently in the United States as a motel cleaner pursuant to section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. §1153(b)(3)(A)(iii).[1] As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on May 24, 2005 by the director, but that approval was revoked on January 31, 2008. The director revoked the approval after determining that the petitioner failed to establish the beneficiary's qualification for the proffered position. Specifically, the director determined that a letter of experience provided to establish the beneficiary's qualifications was not credible and the record contained inconsistencies regarding the beneficiary's claimed experience. Therefore, the director concluded that the petitioner had not submitted evidence establishing that the beneficiary met the minimum requirements specified on the ETA 750 at the time the request for labor certification was accepted, and the beneficiary is not eligible to be classified under section 203(b)(3)(A)(iii) of the Act as a skilled worker; the petitioner has not overcome the findings of false evidence through independent and objective evidence. Therefore, the director revoked the approval of the petition.

On appeal, counsel for the petitioner contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director erred in concluding that the beneficiary did not have the requisite one (1) month work experience as a motel cleaner. Counsel contends that the petitioner has provided sufficient evidence to establish the beneficiary's work experience, and that the beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application.

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[1] 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 other 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR dated July 23, 2007, the director wrote:

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[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).

> The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files.

The director advised the petitioner in the NOIR that there were various discrepancies regarding the beneficiary's work experience. Specifically, the director indicated that the evidence submitted with the initial filing contains an employment letter, dated December 15, 2004, from stating that the beneficiary had been employed as an assistant housekeeper in the housekeeping department of the hotel since January 26, 1999; and, that the petition had been approved based on this information on May 24, 2005. The director noted that during an interview on March 8, 2006, the beneficiary submitted an experience letter stating that he was employed as an assistant housekeeper in the housekeeping department at the New Delhi, India. The director also noted that a consular official had contacted the and was informed that the beneficiary was employed as the hotel's purchasing manager. The beneficiary was again interviewed on May 30, 2006 and was unable to provide a credible explanation or evidence to establish that he has worked as a housekeeper. Therefore, the director determined that the evidence of record failed to establish that the beneficiary satisfied the minimum experience requirement specified on the ETA Form ETA 750. The director also requested that the petitioner submit evidence in support the petition and in opposition to the revocation.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and gave the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director advised the petitioner that "the record fails to establish that the beneficiary satisfies the minimum experience requirement specified on the ETA Form 750" which in this case is one month of experience as a motel cleaner. The director's NOIR sufficiently detailed the evidence of the record, pointing out deficiencies in the evidence provided to establish the beneficiary's qualifications that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause. Thus, the AAO finds that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

The director found that the petition's approval must be revoked because the petitioner did not establish the beneficiary's credentials. The AAO agrees and finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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*, *Madany v. Smith*, 696 F.2d, 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).

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "motel cleaner." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Clean room and halls in hotel, including sorts, counts, folds, marks, or carries linens; makes beds, replenishes supplies, such as dirty glasses and write supplies; check wraps and renders personal assistance to patrons." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of one month of work experience in the job offered.

In March 2006, at an interview with the beneficiary at the U.S consulate in New Delhi, India, the beneficiary submitted a letter of employment verification, dated March 10, 2006, from proprietor, of the , New Delhi, India, stating that since January 26, 1999 he had employed the beneficiary as an assistant housekeeper in the housekeeping department. The letter further stated that the beneficiary "is looking after the work of housekeeping, including Laundry, Floor Decoration and is capable of handling Front Office work." As noted above, the director determined that the record revealed various discrepancies regarding the beneficiary's claimed work experience and the petitioner failed to rebut or resolve the inconsistencies with independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Moreover, an investigation conducted by USCIS raised additional concerns. When a USCIS official visited the and questioned , in person, on September 12, 2012, confirmed that the beneficiary was never employed at the hotel and stated that the employment letter was written as a favor.

Thus, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as

of the priority date. Therefore, the beneficiary does not qualify for preference under section 203(b)(3)(A)(iii) of the Act as a qualified immigrant who is 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.

Beyond the decision of the director, the AAO will next address the issue whether the beneficiary engaged in fraud and/or material misrepresentation.

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[3]

Section 204(b) of the Act states, in pertinent part, that:

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[3] It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) 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."

A material issue in this case is whether the beneficiary has the required one month of experience for the position offered. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. 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 cut 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.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Here, as noted above, the evidence of record currently supports a finding of fraud or material misrepresentation on the part the beneficiary in submitting a fraudulent letter of experience in

support of a visa application. Similarly, the record establishes that there has been sufficient development of the facts upon which to make a determination of fraud or willful misrepresentation in connection with the visa application process based on the criteria of Matter of *Matter of S & B-C-*, 9 I&N Dec. 436, 447. In the present matter, the documentation with respect to the beneficiary's qualifications has been falsified. Specifically, to establish the beneficiary's qualification for the proffered position, the petitioner submitted with the initial filing an employment letter from , Proprietor of a purported prior employer, stating that the beneficiary had been employed as an assistant housekeeper in the housekeeping department of the hotel since January 26, 1999. However, after an investigation conducted by a USCIS official who visited the and questioned in person, on September 12, 2012, confirmed that the beneficiary was never employed at the hotel and stated that the employment letter was written as a favor. The beneficiary is imputed with knowledge (as he knew, or should have known) of the falsity of the experience stated in the letter of work experience he provided to establish eligibility for the benefit sought as the beneficiary of the immigrant petition. On the true facts, the beneficiary is inadmissible. Thus, the AAO finds fraud and material misrepresentation against the beneficiary.

For the above stated reasons, the petitioner has not established that the beneficiary is qualified to perform the services of the occupation or that the petitioner has the ability to pay the proffered wage as of the priority date.

Beyond the decision of the director, the record of evidence also reflects that on August 13, 2012, a USCIS official contacted , the purported owner of the petitioning entity, and he revealed that he had sold approximately eight (8) years before. Therefore, the sale of the business would have occurred prior to the filing of the Form I-140 in 2005, and many years before the filing of the Form I-290B, Notice of Appeal or Motion, submitted on February 19, 2008, by the attorney of record,

Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the petitioner has been out of business through the sale of the business which occurred prior to the filing of the Form I-140 in 2005, and many years before the filing of the Form I-290B, Notice of Appeal or Motion, submitted on February 19, 2008. Therefore, even if the approval of the petition would be reinstated the approval of the petition would be automatically revoked.

The petition's approval remains revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 not been met.

ORDER: The appeal is dismissed with a finding of willful misrepresentation of a material fact against the beneficiary by submitting fraudulent documentation, specifically a false letter of work experience in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number is invalidated.