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

[redacted]

DATE: NOV 0 1 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On January 24, 2003, the Form I-140, Immigrant Petition for Alien Worker, filed by the petitioner was approved by the Vermont Service Center (VSC). The Director, Texas Service Center (the director) however, revoked the approval of the petition on July 26, 2010, with a finding of fraud. On August 11, 2010, the petitioner filed a Motion to Reopen, which was dismissed by the director on August 30, 2010. The petitioner appealed the August 30, 2010 decision to the Administrative Appeals Office (AAO). On February 12, 2013, the AAO withdrew the director's decision and remanded the matter for further action, including the entry of a new decision. The director has now issued that decision and certified it to the AAO. The AAO will affirm the director's decision in part and withdraw it in part.

The petitioner describes itself as a retail store. It seeks to employ the beneficiary permanently in the United States as an assistant retail store manager pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).[1] As required by statute, the petition is submitted with an approved Form ETA 750 labor certification.

In his April 10, 2013 decision, the director found that the record failed to establish that the beneficiary had the qualifying experience required by the labor certification and that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage. He also determined that the record did not establish that individual who had signed the Form I-140 petition and Form ETA 750 on the petitioner's behalf was authorized to do so. The director further found the evidence of record to indicate that the petitioner had willfully misrepresented the offered position in its print advertisements for the offered position, thereby precluding the employment opportunity from being open to all qualified U.S. workers. Accordingly, he revoked the approval of the petition and, based on his finding of misrepresentation, invalidated the labor certification.

In its February 12, 2013 remand of the present matter, the AAO indicated that should the director issue a new decision that was contrary to its findings, he should certify that decision to the AAO.[2] While the director's April 10, 2013 decision reflects the AAO's determination that the beneficiary

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[1] 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.

[2] The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the U.S. Department of Homeland Security (DHS). *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.). The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation provides: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

did not have the experience for the position offered and that the petitioner had failed to establish its ability to pay, it also includes a finding of fraud, a determination that led the director to invalidate the labor certification. As the AAO's previous consideration of the record did not find the petitioner to have engaged in misrepresentation with regard to the labor certification, the director has submitted his decision for AAO review.

Procedural History

Pursuant to the AAO's February 12, 2013 remand, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner on March 7, 2013. In the NOIR, the director informed the petitioner not only that the evidence of record failed to establish the beneficiary's qualifications for the offered position and its ability to pay the proffered wage, but that the signature on the Form I-140 and Form ETA 750, was not the person listed as its sole officer in records maintained by the Massachusetts Secretary of the Commonwealth, The director also found that the print advertisements submitted by the petitioner as proof of its recruitment efforts to hire a qualified U.S. worker for the offered position did not conform to DOL requirements at 20 C.F.R. § 656.21(g) and that, as a result, the petitioner had willfully misrepresented its job opening in order to avoid opening it up to all qualified U.S. workers. He indicated that, based on this willful misrepresentation of a material fact in the labor certification process, he would invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). The petitioner was provided with 30 days in which to submit evidence to rebut the director's findings.

The record before the AAO does not indicate that the petitioner responded to the director's NOIR. Accordingly, on April 10, 2013, the director revoked the Form I-140 petition, with a finding of fraud. Based on his determination that the petitioner had willfully misrepresented a material fact in the labor certification process, the director also invalidated the Form ETA 750.

Validity of Labor Certification

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 DHS 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 DHS 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 United States Citizenship and Immigration Services (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:

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [s]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."

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. 446, 447 (BIA 1960). 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

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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.

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. § 656.30(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, the evidence of record does not support the director's finding that the petitioner engaged in fraud or the willful misrepresentation of a material fact in the labor certification process.

The director's decision bases the finding of material misrepresentation on the four advertisements submitted by the petitioner in response to a NOIR issued on February 12, 2009. As noted by the director, the advertisements, which reflect only the title of the offered position and the address to which applicants may apply, do not conform to DOL requirements set forth at 20 C.F.R. § 656.21(g), which states:

> In conjunction with the recruitment efforts under paragraph (f) of this section, the employer shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers . . . . The advertisement shall:
>
> (1) Direct applicants to report or send resumes, as appropriate for the occupation to the local office for referral to the employer;
> (2) Include a local office identification number and the complete address or telephone number of the local office, but shall not identify the employer;
> (3) Describe the job opportunity with particularity;
> (4) State the rate of pay, which shall not be below the prevailing wage for the occupation, as calculated pursuant to § 656.40;
> (5) Offer prevailing working conditions;
> (6) State the employer's minimum job requirements;
> (7) Offer training if the job opportunity is the type for which employers normally provide training;
> (8) Offer wages, terms, and conditions of employment which are no less favorable than those offered to the alien; and

> (9) If published in a newspaper of general circulation, be published for at least three consecutive days; or, if published in a professional, trade, or ethnic publication, be published in the next published edition.

However, the multiple deficiencies in the print advertisements submitted by the petitioner are not proof, as asserted by the director, that the petitioner willfully misrepresented the job opportunity in these advertisements in order to preclude qualified U.S. workers from applying. While they may raise questions about the extent to which the petitioner complied with DOL recruitment requirements, there is insufficient development of the facts upon which to base a determination of fraud or willful misrepresentation pursuant to the criteria set forth in *Matter of S & B-C-*. Moreover, other documentation that might shed light on the petitioner's recruitment efforts for the offered position is unavailable. The petitioner has indicated that it no longer has the documents it submitted with the Form ETA 750 to the Massachusetts Department of Employment and Training[4] and the AAO notes that prior to 2005, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by DOL, which in this case occurred on September 10, 2002. The record also establishes that DOL is unable to provide such documentation to the petitioner.[5]

Therefore, based on the evidence of record, the AAO will withdraw the director's finding that the petitioner engaged in the willful misrepresentation of a material fact in the labor certification process. Accordingly, the labor certification will be reinstated.

Validity of Immigrant Visa Petition

The AAO also notes the director's finding that the individual who signed the Form I-140 petition and the Form ETA 750 on behalf of the petitioner, is not established by the record as the petitioner's only officer, and is, therefore, barred from filing the Form I-140 on the beneficiary's behalf. The record, however, appears to indicate that are variations of the name of the petitioner's owner, rather than separate individuals, e.g. the 2001 federal tax return submitted for the record by the petitioner, like the Form I-140 petition and Form ETA 750, bears the signature of who is identified as the petitioner's president. Accordingly, the record does not establish that the Form I-140 petition was improperly filed and the AAO also withdraws the director's finding in this regard.

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[4] In its response to the director's February 12, 2009 NOIR, counsel states that the petitioner is unable to provide documentation establishing its compliance with DOL recruitment requirements in this matter as the petitioner's prior counsel has destroyed these records. He indicates that the submitted advertisements were obtained by the petitioner from copies of the

[5] In an undated letter sent to the petitioner's counsel in response to an April 22, 2009 Freedom of Information Act request, the Administrator, Office of Foreign Labor Certification indicates that DOL is unable to provide the petitioner with a copy of the Form ETA 750 filed by the petitioner on October 2, 2001 since all its records are destroyed five years from the date that a final determination is issued.

Basis for Revocation

The approval of the petition may not, however, be reinstated. The record fails to establish the petitioner's ability to pay the beneficiary the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). As discussed in its February 12, 2013 decision, the AAO found the petitioner to have submitted sufficient evidence to establish its ability to pay the proffered wage only in 2001 and 2006. As of the date of the petition's approval, the record lacked the documentary evidence required by 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the proffered wage in 2002. The record continues to lack such documentary evidence of its ability to pay in 2003, 2004 and 2005. As it has submitted no additional financial evidence in response to the director's NOIR or on certification, the petitioner has not overcome the determination that it has failed to establish its continuing ability to pay the proffered wage. Accordingly, the AAO affirms the director's revocation of the approval of the petition on this ground.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The director's finding regarding the petitioner's failure to establish its ability to pay the proffered wage is affirmed. The approval of the petition remains revoked.

FURTHER ORDER: The director's finding of willful misrepresentation is withdrawn and the labor certification, Form ETA 750, ETA case number P2002-MA-01324437, is reinstated. The director's finding regarding the improper filing of the visa petition is also withdrawn.