

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



B4

DATE: **NOV 13 2012** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 law was inappropriately applied by us in reaching our 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 request 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 that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted an undated statement, which briefly discussed the petitioner's eligibility in terms of its claimed qualifying relationship with the beneficiary's foreign employer and the beneficiary's job descriptions in his foreign and proposed employment. The petitioner also provided supporting evidence in the form of financial and corporate documents pertaining to both entities.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a notice of intent to deny (NOID) dated May 24, 2011 informing the petitioner of various evidentiary deficiencies. The director determined that the information the beneficiary provided in his [REDACTED] application with regard to his time period of employment with the affiliate entity abroad was inconsistent with the information he later provided in the Biographic Information Form G-325A. The director determined that the inconsistency amounts to willful misrepresentation. Additionally, with regard to the petitioner's statutory eligibility, the director determined that the record lacked evidence showing that 1) the beneficiary was employed abroad in a qualifying capacity; 2) the petitioner has a qualifying relationship with the beneficiary's foreign employer; and 3) the beneficiary would be employed in the United States in a qualifying capacity.

The petitioner provided a response, which included a statement from counsel dated June 23, 2011 and a statement from the beneficiary dated June 17, 2011 addressing the director's adverse findings. The beneficiary referred to the above described inconsistency as a minor and unintentional error. He claimed that the [REDACTED] application requested an employment history for only the three years prior to the date of the application, which guided the beneficiary to speak directly to the time period in question.

After reviewing the record, the director concluded that the petitioner failed to overcome the finding of willful misrepresentation and did not establish statutory eligibility based on the three grounds that were previously discussed in the NOID.

On appeal, the only finding that counsel disputes is the director's finding of fraud and willful misrepresentation. Counsel submits a brief in which he concedes to the director's adverse finding regarding the issue of the petitioner's qualifying relationship, which he admits was severed when the beneficiary sold his ownership interest in the foreign entity. Counsel declines to address either of the other two statutory grounds, asserting that the two other issues are now moot based on the petitioner's admission that it no longer has a qualifying relationship with the beneficiary's foreign employer.

The AAO therefore finds that the petitioner, based on its admission on appeal, is statutorily ineligible for the immigration benefit sought, even if there were no other adverse findings present. In light of counsel's failure to address or even to dispute the two other adverse findings, which pertain to the beneficiary's employment capacity in his foreign and proposed positions, the AAO affirms all three adverse findings. Therefore, the petitioner has failed to overcome the three adverse findings concerning its statutory ineligibility and the

appeal will be dismissed based on the petitioner's failure to establish that 1) it has a qualifying relationship with the beneficiary's foreign employer, 2) the beneficiary was employed abroad in a qualifying managerial or executive capacity, or 3) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

Lastly, with regard to the director's finding that various factual discrepancies pertaining to the beneficiary's time period of employment abroad amounted to fraud and willful misrepresentation, the AAO concludes that the record lacks a sufficient basis for the finding of fraud and hereby withdraws that finding.

In reviewing the documents in question, the record is clear in showing that when asked to provide the dates of past employment, the beneficiary's response to No. 10 in his [REDACTED] application was not consistent with the information he provided in Form G-325A. More specifically, when asked to provide dates of prior employment dating back three years from June 3, 2003, the date the beneficiary filed the [REDACTED] application, the beneficiary indicated that he was employed at [REDACTED] from January 2000 to September 2002. However, when asked to provide dates of prior employment dating back five years from May 11, 2005, the date the beneficiary filed the Form G-325A, the beneficiary indicated that his employment with [REDACTED] commenced in April 1994 and ended in March 2003. These two sets of dates are indisputably inconsistent. However, an inconsistency does not necessarily rise to the level of fraud and/or willful misrepresentation unless certain criteria are met.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts.¹ A misrepresentation of material fact may lead to serious consequences, including but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

A misrepresentation may lead USCIS to enter a finding that an individual alien sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the alien is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

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.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration

¹ The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

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.

In addressing this issue on appeal, counsel asserts that the beneficiary was merely responding to the express question posed in the [REDACTED] application, which asked the applicant to address a specific three-year period. Counsel asserts that the beneficiary did not list any of the other years he had been employed with [REDACTED] because this information was not expressly requested in the application. While counsel’s response is plausible, it does not explain why the beneficiary later accounted for a nine-year period of alleged employment with [REDACTED] when the Form G-325A only asked the beneficiary for an employment history covering “the last five years” prior to the date of filing.

Nevertheless, the AAO notes that even if the beneficiary reiterated the shorter period of employment as provided in [REDACTED] he would not be rendered ineligible for the immigration benefit sought herein, provided that sufficient evidence were provided to establish that the claimed period of employment were factually accurate. The fact that the beneficiary has provided two significantly distinct periods of employment abroad with the same entity, without having provided any objective evidence to resolve this inconsistency, gives U.S. Citizenship and Immigration Services a valid reason to doubt the validity of the petitioner’s entire claim regarding the beneficiary’s period of employment abroad. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). That being said, however, the AAO finds that the record lacks sufficient evidence to establish that 1) the misrepresentation pertaining to the beneficiary’s time period of employment abroad was willfully made or 2) that the facts misrepresented were material, as neither period of employment, if proven to be true, would render the beneficiary statutorily ineligible for the benefit being sought.

In light of the above, the AAO hereby withdraws the director’s affirmative finding of fraud and willful misrepresentation. However, as previously discussed, the petitioner is statutorily ineligible to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Act and therefore the petition cannot be approved.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.