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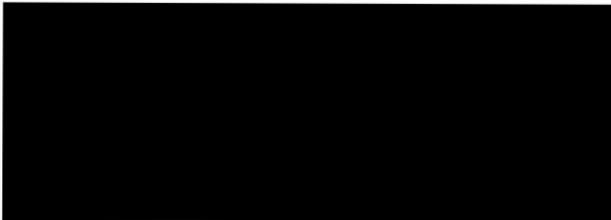
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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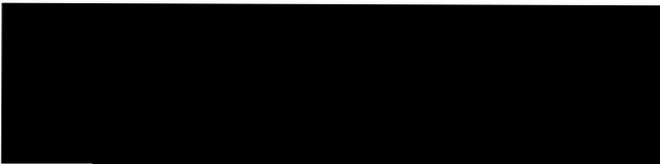


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 09 2009
LIN 07 062 51233

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. On February 25, 2009, the petitioner requested that the appeal be withdrawn.

The petitioner provides health care support and testing services. It seeks to employ the beneficiary permanently in the United States as a computer programmer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also raised concerns regarding inconsistencies relating to when the beneficiary received his degree.

On February 19, 2009, the AAO issued a notice to the petitioner advising the petitioner of serious discrepancies between two of the beneficiary's transcripts and questioned how the beneficiary could have completed his foreign degree after arriving in the United States.

The ETA Form 9089 requires the inclusion of information about the alien's education that is material to the overall evaluation of the form by DOL and U.S. Citizenship and Immigration Services (USCIS). Specifically, Section H of the ETA Form 9089 indicates that the title of the proffered job is Computer Programmer. Section H, line 4, indicates that a Master's degree in Computer Science or Mathematics is required. We acknowledge that DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market and that it is the role of USCIS to determine if the alien is qualified for the job. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). That said, DOL does review the alien's actual education in considering whether the job qualifications specified on the alien employment certification are the actual job requirements. *Hong Video Technology*, 1998 INA 202 (BALCA 2001). Thus, the information about the alien's education is material information on the ETA Form 9089. Moreover, that form, once certified by DOL, is reviewed by USCIS. The classification sought in this matter requires an advanced degree, defined as a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level or, in the alternative, a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

In this matter, on the ETA Form 9089, Section J, signed by the beneficiary under penalty of perjury, the beneficiary's highest education level is listed as a Master's degree in computer science and mathematics completed in 2002. The petitioner submitted an October 3, 2003 evaluation from [REDACTED] of the Trustforte Corporation. [REDACTED] asserts that the beneficiary earned a three-year Bachelor of Science from the National University of Bangladesh in 1994 and a one-year Master of Science Degree from the same institute in 1995, both in the field of mathematics. [REDACTED] further indicates that the beneficiary completed "Studies Toward Master of Computer Applications Degree" at the University

of Comilla. ██████████ concluded that the beneficiary's education from the National University of Bangladesh was equivalent to a U.S. baccalaureate in Mathematics and that the beneficiary's studies at the University of Comilla toward a Master of Computer Applications were equivalent to a U.S. baccalaureate in computer Science. The petitioner submitted a transcript from the University of Comilla reflecting three semesters of studies prepared September 15, 2003. On the Form I-140 petition, the petitioner lists the beneficiary's date of entry into the United States as March 27, 2004.

On January 3, 2007, the director issued a request for additional evidence noting that the record did not establish that the beneficiary has the equivalent of a U.S. Master's degree. In response, the petitioner submitted a February 26, 2007 evaluation from ██████████ asserting that the beneficiary completed his Master of Computer Applications at the University of Comilla on August 17, 2004, five months after the beneficiary last entered the United States. The petitioner also submitted a new transcript from the University of Comilla prepared August 17, 2004 listing four semesters of studies.

While the director denied the petition in part based on the 2002 date of completion listed on the ETA Form 9089, the AAO noted the following inconsistencies for the third semester between the two transcripts submitted:

September 15, 2003 Transcript

Course Code	Course Title	Credits	Grade	Grade Point
MCA211T	Business Solutions	3	Course not offered	0.00
MCA 212T	Relational Database and Oracle	3	C	2.50
MCA212L	Rel. Database /Oracle Lab	2	B	3.25
MCA213T	Software Engineering	2	B	3.25
MCA214T	Object Oriented Programming	3	C+	3.00
MCA214L	Object Oriented Prog. Lab	2	B	3.25

Semester GPA 2.40
Cumulative GPA 3.37

August 17, 2004 Transcript

Course Code	Course Title	Credits	Grade	Grade Point
MCA211T	Business Solutions	3	C+	3.00
MCA 212T	Relational Database and Oracle	3	C	2.50
MCA212L	Rel. Database /Oracle Lab	2	B+	3.50
MCA213T	Software Engineering	2	B+	3.50
MCA214T	Object Oriented Programming	3	B	3.25
MCA214L	Object Oriented Prog. Lab	2	B	3.25

Semester GPA 3.12
Cumulative GPA 3.61

As can be seen from the above information taken from the two transcripts, they differ as to whether the beneficiary completed Business Solutions and his grades for subsequent courses in his third semester. In addition, the September 15, 2003 transcript reflects 15 total credits earned even though Business Solutions was not offered and no grade or grade point is indicated. Moreover, the record is unclear as to when the beneficiary completed his fourth semester if he entered the United States in March 2004. The transcripts do not provide attendance dates for each semester.

Thus, the AAO concluded that the beneficiary's education was misrepresented on the alien employment certification filed with the DOL.

In response, the petitioner submitted a February 25, 2009 letter requesting that the appeal be withdrawn. The petitioner states that the beneficiary left the employ of the petitioner in September 2008, before the AAO issued its notice.

In addition, counsel submitted a response from the beneficiary. The response included a March 16, 2009 article in a Bangladeshi newspaper regarding universities in the country being shut down and the beneficiary's personal statement. In his statement, the beneficiary asserts that Bangladeshi universities grant degrees before issuing a certificate of degree and that the difference can be up to two years. According to the beneficiary, political instability and floods result in the delay of examinations, which does not preclude the granting of certificates. The petitioner explains that he had a corrupt professor for Business Solutions and had to retake the course "in 2004."

In our February 19, 2009 notice, we advised the petitioner that the withdrawal of the appeal would not prevent a finding of willful misrepresentation. 8 C.F.R. § 103.2(b)(15) provides: "Withdrawal or denial due to abandonment shall not itself affect the new proceeding; *but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition.*" (Emphasis added.)

The beneficiary's response does not explain the change in the other third semester grades between the two transcripts or why the beneficiary indicated he had received his Master's degree in computer science in 2002 when he acknowledges that he was still taking classes in 2004. Moreover, as stated above, the Form I-140 petition indicates that the beneficiary entered the United States on March 27, 2004. Thus, he has not explained how he completed a semester's worth of education in Bangladesh in 2004.

As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. In this case, we find substantial and probative evidence that the beneficiary affirmed false information before DOL. The beneficiary signed the ETA Form 9089 under penalty of perjury.

Section 212(a)(6)(C) of the Act 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.

Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is 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 S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). As stated above, both the DOL and USCIS consider the beneficiary’s education as provided on the ETA Form 9089; DOL in evaluating whether the job requirements listed are the actual job requirements and USCIS in evaluating whether the alien is qualified for the job and the classification sought.

Because the beneficiary signed the ETA Form 9089 with a false date for receiving his Master’s degree in computer science and has not resolved how he received this degree based upon a semester of coursework in 2004 if he arrived in the United States in March 2004, we will enter a formal finding of fraud. This finding of fraud shall be considered in any future proceeding where the beneficiary’s admissibility is an issue.

Finally, based on this misrepresentation of the beneficiary’s level of education on the alien employment certification, we will invalidate the alien employment certification pursuant to 20 C.F.R. § 656.30(d) as in effect when the alien employment certification was filed. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm’r. 1986) (invalidation of an alien employment certification at the appellate stage).

ORDER: The appeal is dismissed based on its withdrawal by the petitioner with a further order invalidating the alien employment certification and a further finding of fraud.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented his education on the alien employment certification, which he signed, in an effort to mislead DOL. The alien employment certification, therefore, is invalidated.

FURTHER ORDER: The AAO finds that the beneficiary, [REDACTED], knowingly signed forms containing false statements and provided false transcripts in an effort to mislead DOL, USCIS and the AAO on an element material to the beneficiary’s eligibility for a benefit sought under the immigration laws of the United States.