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U.S. Citizenship
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Services

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FILE:



LIN-05-088-50945

Office: NEBRASKA SERVICE CENTER

Date: OCT 28 2008

IN RE:

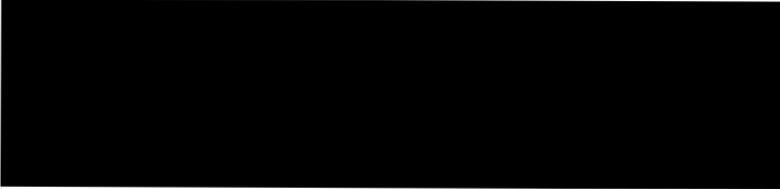
Petitioner:

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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Acting Director (Director), Nebraska Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on February 5, 2008. Now the AAO reopens this matter on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision based on new information obtained after the AAO's dismissal. The AAO's February 5, 2008 decision will be affirmed and the appeal will remain dismissed. We will also invalidate the labor certification and make a finding of fraud.

The petitioner is a circuit board manufacturer. It seeks to employ the beneficiary permanently in the United States as an accountant (system accountant). As required by statute, a Form ETA 750,² Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification, that the petitioner did not demonstrate that the beneficiary possessed the requisite experience with regulatory-prescribed evidence, and that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the director denied the petition on December 4, 2005.

On appeal counsel asserted that the beneficiary's two-year studies at Sydenham College of Commerce and Economics is equivalent to an Associate's Degree in Accounting from an accredited university in the United States, that without additional supporting documentation the experience from the beneficiary's former employer has demonstrated that the beneficiary possessed the requisite two years of experience, and that the letter from the petitioner established its ability to pay the proffered wage since the petitioner employs more than 100 workers.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³ Upon a careful and complete review of the record, the AAO affirmed the director's December 4, 2005 denial and dismissed the appeal based on the grounds that the petitioner had failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date; that the petitioner had

¹ The instant petition was re-filed by the petitioner on behalf of the same beneficiary based on the same certified labor certification. A previous petition (LIN-03-164-51434) was filed on April 17, 2003 and denied by the director of the Nebraska Service Center on May 26, 2004 because the petitioner did not establish that the beneficiary met the minimum education requirement set forth on the Form ETA 750. No further action was taken on the previous petition.

On February 16, 2007, the petitioner filed another immigrant petition (SRC-07-105-51263) through premium processing on behalf of the instant beneficiary with the Texas Service Center based on another certified labor certification while the instant appeal was pending with the AAO, and the new petition was approved on February 27, 2007.

² After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

³ 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).

not established with regulatory-prescribed evidence the beneficiary's two years of experience as a system accountant, and further had failed to establish that the beneficiary was qualified for the proffered position; that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets. Beyond the director's decision, the AAO identified an additional ground of ineligibility that the beneficiary provided inconsistent information about his employment history for which the record failed to contain any independent objective evidence to resolve the inconsistencies.⁴

During the adjudication of the appeal, the AAO initiated an investigation of the beneficiary's employment history and educational background. Because the information from the investigation seriously compromises the credibility of the instant petition and appeal in addition to the grounds of ineligibility discussed in the decisions of the director and the AAO, on August 11, 2008, the AAO reopened the matter on its own motion and issued a notice of derogatory information (NDI) granting the petitioner 30 days to respond before rendering a new decision pursuant to Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 103.2(b)(16)(i). This office received a response to the NDI on September 3, 2008.

The petitioner submitted the following as evidence to establish the beneficiary's qualifications for the proffered position: Higher Secondary Certificate (HSC) issued by Maharashtra State Board to the beneficiary in March 1992, the statements of marks from the University of Bombay Sydenham College of Commerce and Economics for the academic years of 1992-1993 and 1993-1994, and an experience letter dated July 25, 1996 from Wintech in India. The investigation report from the American Consulate General, Mumbai, India reveals that the M.S. Board of Secondary & Higher Education Mumbai Divisional Board officially verifies that the Statement of Marks/Passing Certificate of S.C./H.S.C. Examination, March 1992 in respect of the beneficiary Seat No. [REDACTED] is fake and forged.

In response counsel submits a letter dated August 22, 2008 from the beneficiary to Maharashtra State Board Secondary and Higher Secondary Education, affidavits from [REDACTED] and the beneficiary himself, and a copy of the statement of marks from Maharashtra State Board of Secondary and Higher Secondary Education. All these items are notarized by [REDACTED], Notary Public in the State of Illinois, on August 25, 2008. In his letter to the Maharashtra State Board, the beneficiary claims that his statement of marks could not be validated maybe because his last name was misspelled. However, the beneficiary's assertion is misplaced. The board correctly identified the beneficiary by his first and middle names, and the seat number [REDACTED]. Further, the record does not contain any evidence showing that the beneficiary's request was sent to the board and cannot prove that the statement of marks he provided is not fake and forged. Therefore, the beneficiary's request letter cannot rebut the board's official verification.

[REDACTED] states in his affidavit that he was employed as an examiner by the Maharashtra State Board of Secondary and Higher Secondary Education and that he has personal knowledge that the beneficiary appeared for the HSC exam of the Maharashtra State Board in 1992. However, he does not indicate when he

⁴ Additionally, the record shows that the beneficiary is working for IBM as an advisory I/T Specialist. The beneficiary earned \$97,612.27 from his position with IBM in 2004. His W-2 form issued by IBM for 2001 shows that his annual salary from IBM was \$86,942.72. However, in the same year, the petitioner offered the proffered position and the beneficiary accepted the job offer at an annual salary of \$53,020. It seems doubtful that the petitioner offered a *bona fide*, permanent and full time position to the beneficiary and the beneficiary would perform the duties as a system accountant at almost half of his current compensation after he obtained lawful permanent residence status.

worked as an examiner for the board and whether he as an examiner personally saw the beneficiary sitting for the examination in 1992. Nor does he explain how his personal knowledge of the beneficiary's appearance in the exam can prove that the submitted beneficiary's statement of marks is not fake and forged and how his personal memory can rebut the board's official verification based on their official records.

██████████ as a friend of the beneficiary provides an affidavit based on his/her personally knowledge. Counsel also submits an affidavit from the beneficiary himself. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Letters from people who have interacted with the beneficiary while he lived or studied and the beneficiary's self-serving explanation cannot be used in lieu of a letter from the actual school at which the beneficiary attended. These letters did not come with any documentary evidence to support their contents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." In the instant case, these letters from the beneficiary himself and his friends cannot be considered as independent objective evidence to rebut the board's official verification.

Furthermore, all of these letters are formatted similarly and notarized by the same notary public on the same day although the authors live in different areas in Illinois. This similarity casts doubt on the origin and reliability of the letters. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For the reasons above stated, these letters cannot overcome and rebut the board's official findings.

In response to the AAO's request, counsel also submits another copy of the statement of marks from Maharashtra State Board of Secondary and Higher Secondary Education. Counsel does not explain why this copy is submitted. In fact, this is the statement of marks the investigating officer from the American Consulate General, Mumbai, India sent to Maharashtra State Board of Secondary and Higher Secondary Education for verification upon the AAO's request and the board verified that it is fake and forged. Therefore, another notarized copy of the statement of marks does not and cannot rebut the board's verification that this is fake and forged.

The response to the AAO's NDI does not include sufficient evidence to rebut the fraud findings detailed in the NDI or the grounds of dismissal stated in the AAO's February 5, 2008 decision. Therefore, the appeal will remain dismissed based on the same grounds as in the February 5, 2008 dismissal and the AAO's February 5, 2008 decision will be affirmed.

Furthermore, 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.

By signing the Form ETA 750B under penalty of perjury, the beneficiary sought to procure a benefit provided under the Act using fraudulent documents. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the documentation for the beneficiary's education is faked and forged through verification from the Maharashtra State Board, we are making a finding of fraud and entering it into the record. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." As previously discussed, the beneficiary used fraudulent documents in the labor certification application process. Therefore, the AAO will invalidate the labor certification based on the fraudulent misrepresentation regarding the beneficiary's education history.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. 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 February 5, 2008 decision is affirmed and the appeal remains dismissed.

FURTHER ORDER: The appeal is also dismissed with a finding of fraud and willful misrepresentation of a material fact.

The labor certification is invalidated based on the ground that the petitioner sought to procure a benefit provided under the Act for the beneficiary using fraudulent documents.

Memorandum

To: Texas Service Center
From: Administrative Appeal Office
Date: October 24, 2008
Re: I-140 Immigrant Petition (SRC-07-105-51263)
Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Response
OCT 28 2008

The record shows that the petitioner, [REDACTED] has filed a Form I-140 Immigrant Petitions for Alien Worker on behalf of the beneficiary with your office on February 16, 2007. Your office approved the petition on February 27, 2007.

The record also shows that the petitioner previously filed another I-140 petition (LIN-05-088-50945) for the same beneficiary with Nebraska Service Center on January 31, 2005. The petition (LIN-05-088-50945) was denied by the director of Nebraska Service Center on December 5, 2005. This office dismissed the subsequent appeal on February 5, 2008 because we found that the petitioner failed to demonstrate that the beneficiary met the minimum education requirement; that the beneficiary possessed the requisite two years of experience for the proffered position; and that the petitioner had the continuing ability to pay the beneficiary the proffered wage.

During the adjudication of the appeal, this office also initiated an investigation on the beneficiary's employment history and educational background. On August 11, 2008, this office issued a notice of derogatory information to the petitioner based on the investigation report from the American Consulate General, Mumbai, India which reveals that the M.S. Board of Secondary & Higher Secondary Education Mumbai Divisional Board officially verifies that the submitted statement of marks of S.C./H.S.C. Examination in March 1992 for the beneficiary is fake and forged. The AAO recently reopened the matter and entered a new decision. The new decision affirmed the AAO's February 5, 2008 decision and dismissed the appeal on the same grounds as in its February 5, 2008 decision. The AAO also dismissed the appeal with a finding of fraud and willful misrepresentation of a material fact. The new decision also invalidated the labor certification based on the ground that the petitioner sought to procure a benefit provided under the Act for the beneficiary using fraudulent documents.

Therefore, the AAO suggests that the petition SRC-07-105-51263 approved by your office be reviewed to determine whether the petitioner established its ability to pay, the beneficiary's educational qualification and requisite experience, and whether the petitioner and/or the beneficiary used the fraudulent documents to establish the beneficiary's education, and thus, whether the petition was approved in error.