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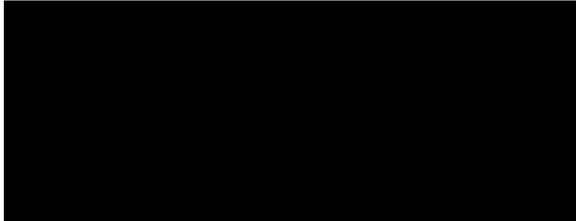
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U.S. Citizenship
and Immigration
Services

Be



FILE: [REDACTED]
SRC-02-234-52523

Office: TEXAS SERVICE CENTER Date:

JAN 14 2009

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)

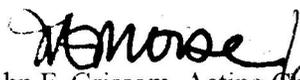
ON BEHALF OF PETITIONER:



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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. On February 2, 2007, the petitioner requested that its appeal be withdrawn. The appeal will be dismissed based on its withdrawal with a separate finding of fraud. The labor certification application will also be invalidated based on the petitioner's fraudulent misrepresentation.

The petitioner seeks classification as a cook specialty, foreign food ("Cook: Specialty: Traditional & Modern Chinese Food") pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The director determined the petitioner had not established that the beneficiary qualifies for the proffered position.

On November 22, 2006, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), this office issued a notice advising the petitioner of derogatory information indicating that it submitted falsified material in support of the petition.

The AAO's notice stated:

In examining the petition on appeal, we find that there is an issue related to the beneficiary's prior experience, and whether he qualifies for the certified Form ETA 750 position.

On the Form ETA 750A, the "job offer" position description provides:

Prepare traditional and modern Chinese style dishes using Chinese preparation or cooking techniques. Prepare traditional and modern Chinese stir-fried, deep-fried, steamed, roasted, boiled or baked dishes: special soups, sauces, seafood, meat and vegetable dishes using wok, stove, oven, grill, and steamer. Plan menu and specials based upon the availability of seasonal supplies & customer demands. Select and order fresh seafood, meat, vegetables and supplies. Make eye-appealing decorative food arrangements. Work Schedule: 11:00 a.m. – 9:00 p.m. with a break from 3:00 p.m. to 5:00 p.m. on Wednesday, Thursday & Sunday, 11:00 a.m. – 9:30 p.m. with a break from 3:00 p.m. to 5:30 p.m. on Friday & Saturday, 40 hours per week.

Further, the job offered listed that the position required:

Education:

Grade school: 6 years

High School: 3 years

Experience: 2 years in the job offered.

The petitioner did not list any other special requirements.

On the Form ETA 750B, signed by the beneficiary under the penalty of perjury on April 15, 2001, the beneficiary listed the following prior experience: (1) for the petitioner, Satellite Beach, Florida, "Job Now Open,"¹ no dates of employment listed, position: Cook, Specialty, Chinese Food; (2) for [REDACTED], Frostburg, MD, from January 1997 to May 1999, position: Cook: Specialty: Chinese Food.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

(ii) *Other documentation*---

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

¹ From the record, it is not clear whether the beneficiary is presently working for the petitioner despite listing the petitioner on Form ETA 750 under the "prior experience" block. The beneficiary lists on Form G-325A filed with his adjustment of status application that he [will] "Wait for EAD [employment authorization document]" before working at the petitioner's restaurant.

The petitioner provided the following letter to document the beneficiary's experience:

Letter from [REDACTED] Manager of [REDACTED],
Frostburg, MD, dated April 2, 2001;

Position title: Chinese Cook;

Dates of employment: January 1997 to May 1999;

Description of duties:

Prepare traditional & modern Chinese dishes using Chinese preparation and cooking techniques. Prepared traditional & modern Chinese stir-fried, deep-fried, steamed, roasted, boiled or baked dishes: special soups, sauces, seafood, meat, and vegetable dishes using wok, stove, oven, grill and steamer. Planed menu & specials based upon the availability of seasonal supplies & customer demands. Selected and ordered fresh seafood, meat and vegetables and supplies. Made eye-appealing decoration food arrangements.

The director provides in her decision that:

This petitioner has filed two petitions for two different persons. As evidence of this beneficiary's experience, the petitioner has submitted a copy of a letter from [REDACTED] in Frostburg, Maryland. As evidence of the other alien's experience, the petition[er] has submitted a copy of a letter from [REDACTED] in New York, NY. The "experience letters" are identical – word for word. The only differences are the letterhead and signature. The attorney explains this by stating: 'the format for the experience letter as determined by the Department of Labor and [United States Citizenship and Immigration Services (USCIS)] does not naturally spring from the pens of former employers, many of whom have little time to commit their thoughts to paper. Consequently, the job description . . . is prepared by the Law Office for the former employer's signature, using the information provided by the former employer/ or former employee as to dates of employment.' So, the alien tells the attorney where he worked and when and the attorney prepares the experience letter.' This explains the verbatim wording on experience letters from different employers. However, it does not explain how the letters appear on different letterheads unless there is an intentional attempt to deceive.

On appeal, counsel asserts that “attorneys routinely prepare legal papers for signature, especially for such matters as those which must meet the criteria of the Department of Labor, and especially where the employers may have limited English.”

We accept that attorneys may draft documents for petitioners as well as experience letters for beneficiaries with respect to prior employment. The specific issue in the instant case is that not only are the words verbatim, but rather it appears from identical stray marks on both letters that both letters were photocopied from a template, which calls into question the authenticity of the letter and the beneficiary’s experience. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In support on appeal, the petitioner submits two affidavits from “co-workers for the period.” Counsel cites to *B & B Residential Facility*, 2001-INA-146 (BALCA July 16, 2002) that to meet its burden of proof, an applicant would need to present corroborating affidavits or witness declarations with personal knowledge in support.

The petitioner provided the following affidavits:

Affidavit from _____ state of Florida, sworn before a notary public on November 10, 2003;

The affidavit provides the affiant’s address and telephone number,² and states “I worked as a chef/cook at the _____ Restaurant [sic], located at _____ Frostburg, MD, 21532 when [the beneficiary] worked there also as a Chinese cook.” He continues, “I am making this affidavit to state that [the beneficiary] worked as a Chinese Cook from January of 1997 until May of 1999.”

² The affidavit also lists the affiant’s alien registration number. However, a review of United States Citizenship and Immigration Services (USCIS) records shows that the number the affiant provided belongs to another individual.

Affidavit from [REDACTED] state of Florida, sworn before a notary public on November 10, 2003;

The affidavit provides the affiant's address and telephone number, and states "I worked as a cashier at the [REDACTED] Restaurant [sic], located at [REDACTED] Frostburg, MD, 21532 when [the beneficiary] worked there also as a Chinese cook." He continues, "I am making this affidavit to further confirm that [the beneficiary] worked as a Chinese Cook from January of 1997 until May of 1999. He was a dependable employee."

We note that both the names [REDACTED] and [REDACTED] appear on the Forms 941 that the petitioner submitted, and are listed as employees of the petitioner in Florida. No Forms W-2 were submitted with the affidavits to prove that the affiants worked at the [REDACTED] in Frostburg, Maryland or that the beneficiary worked at the [REDACTED] in Frostburg, Maryland. The record also lacks evidence that either affiant ever resided in proximity to Frostburg, Maryland during the time period in question. As the affiants appear to work for the petitioner, we would not accept the affidavits, absent other confirmatory documentation, as objective evidence to overcome the basis for the petition's denial.

These factors combined render the affidavits alone insufficient to provide independent, objective proof of the beneficiary's former employment at the [REDACTED] in Frostburg, Maryland. The petitioner must provide independent object evidence to demonstrate that the beneficiary has the required two years of prior experience to meet the requirements of the certified labor certification.

Public records additionally contradict a number of the beneficiary's stated addresses and his presence in Maryland until May 1999, as asserted by the experience letter.

The beneficiary listed on the Form G-325A that he resided at [REDACTED] [REDACTED] Lavale, Maryland from January 1997 to May 1999. The beneficiary signed this form on March 17, 2003 under "severe penalties" for "knowingly and willfully falsifying or concealing a material fact." Public records available at Maryland's Department of Assessments and Taxation, Real Property data search, www.dat.state.md.us, identified that an individual other than the beneficiary purchased that property on April 17, 1998 and sold it in

June 2000. The AAO's Fraud Branch contacted the individual and spoke with him. He stated that no one, other than his family had resided in the house from April 1998 until the 2000 time of sale. Consequently, the beneficiary's claim to residence at [REDACTED] Lavale, Maryland, appears inaccurate, and a misrepresentation.

If the beneficiary misrepresented his prior work experience in order to meet the requirements of the certified Form ETA 750, this would amount to willful misrepresentation.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States, unless the petitioner is able to overcome the findings of the U.S. Consulate investigation. *See* INA Section 212(a)(6)(c), [8 U.S.C. 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires two years of prior experience in the position offered. The beneficiary in listing on Form ETA 750B that he gained this experience with [REDACTED], and signing that form under penalty of perjury, constitutes an act of willful misrepresentation if the beneficiary was not employed in that position. Further, the beneficiary listing an incorrect address on Form G-325A in order to provide an address near the alleged former employer would also constitute a material misrepresentation. If the beneficiary falsely listed such experience, this would result in misrepresenting the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.")

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). *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.

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based in part upon this information, the AAO intends to dismiss your appeal, invalidate the labor certification, and potentially enter a determination of fraud or willful misrepresentation.

The AAO's notice also advised the petitioner that it failed to establish its ability to pay the beneficiary the proffered wage. In response, the petitioner submitted a September 24, 2008, letter from counsel requesting that its "appeal be withdrawn or denied on the basis of the inability of the employer to pay, and of the apparent inability or unwillingness of the beneficiary to report his prior experience and residence accurately."

By filing the instant petition and submitting falsified documents, the petitioner has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the petitioner submitted falsified documents, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. While the petitioner has chosen to withdraw its appeal, this does not negate our finding that the petitioner has sought to procure immigration benefits through fraud. Further, we will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

ORDER: The appeal is dismissed based on its withdrawal by the petitioner with a finding of fraud.

FURTHER ORDER:

The AAO finds that the petitioner knowingly submitted fraudulent documents in an effort to mislead USCIS on elements material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.