

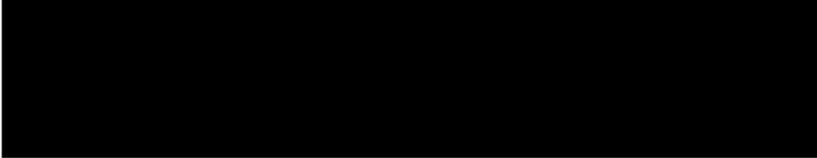
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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
and Immigration
Services

36



FILE:



Office: VERMONT SERVICE CENTER

Date: DEC 06 2010

IN RE:

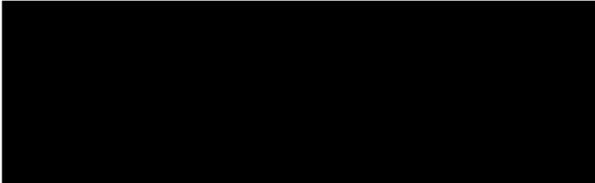
Petitioner:

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:

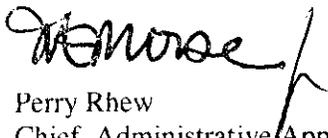


INSTRUCTIONS:

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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. 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 initially approved by the Director, Vermont Service Center. Based on an investigative report from the U.S. Embassy in Dhaka, Bangladesh and the widespread scope of the fraud perpetrated by former counsel in this case,¹ the director consequently served the petitioner with notices of intent to revoke the approval of the petition (NOIR) and a request for evidence (RFE). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigration Petition for Alien Worker (Form I-140). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the approval of the petition will remain revoked.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the Department of Labor (DOL), accompanied the petition. The petition was initially approved; however, the director served the petitioner with two NOIRs and a RFE after finding that the petition was approved in error. The director determined that the petitioner had not submitted sufficient evidence in rebuttal to the September 20, 2007 NOIR and had not overcome the grounds for revocation. The director revoked the approval of the petition accordingly. The AAO dismissed the subsequent appeal based on its findings that the director had good cause to revoke the approval of the petition because the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present and also failed to establish the beneficiary's qualifying experience. The AAO also entered a formal finding of fraud and misrepresentation into the record upon the finding that false documents and willful misrepresentation of a material fact were provided regarding the beneficiary's requisite experience in this matter.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A Form I-290B, Notice of Appeal or Motion, was timely filed by the petitioner's counsel with a brief. On the Form I-290B and in the brief, the petitioner through its counsel requests that the AAO reconsider its decision with regard to the finding of fraud and misrepresentation on the part of the beneficiary. Counsel claims that the beneficiary was previously represented by [REDACTED] and the beneficiary had nothing to do with submitting the initial documents in this case. Counsel asserts that the beneficiary not only addressed the issues raised after the U.S. Embassy investigation, but made a good faith attempt to procure and submit documentation to show that he did, in fact, have the experience that was mentioned in the labor certification, and that he was not responsible for [REDACTED] submissions. The instant motion qualifies for consideration as a motion to reconsider

¹ On April 23, 2004, [REDACTED] former counsel in the instant case, pled guilty in United States District Court for the District of Columbia to a one count of conspiracy, four counts of money laundering, and one hundred and sixty-four counts of labor and immigration fraud.

under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law, policy or evidence of record. However, we note the motion is missing a specific statement required by 8 C.F.R. § 103.5(a)(1)(iii)(c) and could have been rejected for that reason.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion.²

As indicated in the brief, the primary issue on this motion is whether the AAO's finding of fraud and misrepresentation regarding the beneficiary's requisite two years of experience in the job offered or related occupation as set forth on the Form ETA 750 was proper.

The record shows that as evidence to establish the beneficiary's qualifications, the petitioner through its former counsel, [REDACTED] initially submitted a letter dated December 28, 1999 from [REDACTED] [REDACTED], certifying the beneficiary's work experience as a manager from February 1996 to February 1999 (December 28, 1999 letter). The investigative report dated January 3, 2005 from U.S. Embassy in Dhaka, Bangladesh reveals that this letter is a forgery because the administrative officer of the company verifies that nobody named [REDACTED] (alleged worker) or [REDACTED] (alleged owner) served for that company ever. It is clear and convincing evidence that the petitioner provided a falsified document to support its immigrant visa petition for the beneficiary.

On motion, counsel claims that the forged letter was submitted by former counsel and the beneficiary was not responsible for it. Counsel here appears to claim ineffective assistance of prior counsel. Although counsel claims that prior counsel for the petitioner was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant motion does not address these requirements. Further, counsel does not establish that the fraudulent experience letter was forged by prior counsel without the knowledge, involvement, and acquiescence of the petitioner and beneficiary.

² The submission of additional evidence on appeal or motion 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 or motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, counsel did not submit any new or additional evidence on motion. It is also noted that the same counsel filed the appeal without any supporting evidence and did not submit a brief and/or additional evidence to the AAO within 30 days as indicated on the Form I-290B.

In response to the director's September 13, 2005 NOIR, the petitioner through its current counsel submitted another letter dated October 25, 2004 from the beneficiary's alleged co-worker regarding the beneficiary's qualifying experience. The letter from the co-worker contains the same content as the forged experience letter. Therefore, the petitioner and current counsel also submitted a letter with the same falsified information as the one provided by prior counsel.

In addition, the beneficiary set forth his credentials on Form ETA-750B and signed his name on April 17, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, the beneficiary represented that he worked 40 hours per week as a manager for [REDACTED] from February 1996 to February 1999. The beneficiary also stated on the Form G-325A, signed on January 27, 2003, with a warning that severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact immediately beneath his signature, that he worked as a manager for [REDACTED] from February 1996 to February 1999. The beneficiary misrepresented his prior employment experience on two difference forms submitted to USCIS to obtain immigration benefits. While current counsel admonishes prior counsel for submitting a letter with falsified information, current counsel and the beneficiary also perpetuated that misrepresentation through another letter containing falsified information and are silent about that on motion.

In response to the director's December 19, 2005 RFE, the petitioner through its current counsel submitted another letter to establish the beneficiary's qualifications. This letter verifies that the beneficiary worked as a [REDACTED] from February 1996 to February 1999. Current counsel tried to support the content of this letter with the beneficiary's affidavit. In response to the director's September 13, 2005 NOIR, the petitioner's current counsel submitted an affidavit from the beneficiary dated October 7, 2005 (the beneficiary's October 7, 2005 affidavit). In the affidavit, the beneficiary stated that he worked at one of [REDACTED], however, he stated that he worked as an assistant manager and he never mentioned his former employer's name, [REDACTED] Ltd, in this affidavit dated just four months before the letter from [REDACTED] in [REDACTED] (February 16, 2006 letter). While the statement in the [REDACTED] February 16, 2006 letter cannot be verified and supported with evidence in the record and the beneficiary's affidavit, it is clear that the beneficiary provided at least one false statement regarding his employment history. It is impossible for him to work for both companies at the same time. If USCIS fails to believe that a fact stated in the petition is true, it may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In fact, the record shows that the beneficiary made another statement regarding his employment for the same period. The beneficiary stated in his application for asylum filed on March 25, 2002 that he worked in road construction in Bangladesh from 1980 to June 2000. Although this statement was in connection with a since withdrawn application for asylum, the beneficiary still made a false statement before the United States government under penalty of perjury and in connection with an application for immigration benefits.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

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 Homeland Security 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).

As an issue of fact that is material to eligibility for the requested immigration benefit, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. 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. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security 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 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

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

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 has the authority to enter a fraud finding, if during the course of adjudication, it discovers fraud or a material misrepresentation. In this case, the petitioner has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if 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 and additionally conclude regarding the beneficiary's misrepresented experience and the petitioner's complicity by submitting falsified evidence. In the present matter, we find that the petitioner misrepresented that the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law on the labor certification application as required by certification Item 26(e) of Form ETA 750 part A.

A Form ETA 750 is subject to invalidation by USCIS if it is determined that a willful misrepresentation of a material fact was made in the labor certification application. See 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . 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."

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." A willful misrepresentation of a material fact occurs 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).

In this matter, the "president" of the petitioner, [REDACTED] signed the Form ETA 750 on April 17, 2001. [REDACTED] signed the Form ETA 750 under penalty of perjury pursuant to 28 U.S.C. § 1746 and declared that the representations made therein were true and correct. One of the conditions of employment that [REDACTED] declared was true and correct was that the "job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law." However, the employer's corporate status was forfeited by the State of Maryland. Due to this forfeiture, the employer was a legal non-entity, dissolved by operation of law. See e.g., *Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d at 1101.

Furthermore, the transaction of business in the name of a forfeited Maryland corporation is a criminal act. As will note below, the Maryland Corporations and Associations Code Annotated §3-514, makes the transaction of business by a forfeited corporation a misdemeanor subject to a fine of not more than \$500. Employing a worker is clearly the transaction of business. There is also a presumption that an officer of the corporation, such as [REDACTED], has knowledge of his corporation's forfeiture. See *id.* Accordingly, as the employment of the beneficiary in this matter

would have been contrary to the laws of the State of Maryland due to the employer's forfeiture, and because [REDACTED] is presumed under Maryland law to have had knowledge of the corporation's forfeiture, his representation on the Form ETA 750 that the employment opportunity would not violate state law was a material and willful misrepresentation.

By misrepresenting the petitioner's business status to USCIS and making misrepresentations to the DOL, the petitioner sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592. Accordingly, the labor certification will be invalidated.

Counsel's assertions on motion cannot overcome the AAO's finding of fraud regarding the beneficiary's qualifying experience. Therefore, the portion of the AAO's decision entering a formal finding of fraud regarding the beneficiary's experience into the record must be affirmed.

Beyond the director's NOR, the AAO's March 16, 2010 decision and counsel's assertions on motion, the AAO has identified an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

During the adjudication of the motion, evidence has come to light that the petitioning business in this matter: [REDACTED] has been forfeited in the State of Maryland. *See* attached print-outs from Maryland Department of Assessments and Taxation official website. If the petitioning business no longer exists, the petition, its appeal and motion to this office have become moot.⁴ In which case, the motion shall be dismissed as moot.

The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(D) indicates that a petition approved under section 203(b)(2) of the Act shall be automatically revoked upon "termination of the employer's business." The Maryland Corporations and Associations Code Annotated §3-514, prohibits an entity from doing business after forfeiture:

- (a) *Prohibition.* Any person who transacts business in the name or for the account of a corporation knowing that its charter has been forfeited and has not been revived is guilty of a misdemeanor and on conviction is subject to a fine of not more than \$500.

⁴ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

(b) *Presumption.* For the purpose of this section, unless there is clear evidence to the contrary, a person who was an officer or director of a corporation at the time its charter was forfeited is presumed to know of the forfeiture.

(c) *Limitation.* A prosecution for violation of the provisions of this section may not be instituted after the date articles of revival of the corporation are filed.

Forfeiture is the process that allows the Maryland State Department of Assessments and Taxation (Department) to remove inactive entities that have not legally terminated their authority to do business or to notify active entities of an existing oversight in meeting legal filing requirements. A Maryland corporation can avoid forfeiture by filing a Form 1 (annual report/personal property return). If the Department declares the corporate charter to be forfeited, as it did in this case, the corporation becomes a non-entity. All powers of the corporation become null and void. Md. Corp. & Assns. Code Ann. §3-503(d). *See, e.g., Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1101 (Md. 2004) ("A corporation, the charter for which is forfeit, is a legal non-entity; all powers granted to Dual, Inc. by law, including the power to sue or be sued, were extinguished generally as of and during the forfeiture period"); *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287 (Md. 1998) ("[w]hen a corporation's charter is forfeited for non-payment of taxes or failure to file an annual report, the corporation is dissolved by operation of law and ceases to exist as a legal entity").

The charter of any corporation which is forfeited may be revived by filing articles of revival; filing all annual reports required to be filed by the corporation or which would have been required if the charter had not been forfeited; and paying all unemployment insurance contributions, or reimbursement payments, all State and local taxes, except taxes on real estate, and all interest and penalties due by the corporation or which would have become due if the charter had not been forfeited. The revival of a corporation's charter has the following effects: all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them; and all the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter. However, corporate action taken during a period when a corporation's charter is forfeited is null and void, and actions taken after its charter has been revived do not relate back to cure the loss of a right divested during the time the charter was forfeited. *Hill Constr. v. Sunrise Beach, LLC*, 952 A.2d 357 (Md. 2008).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 motion is granted. The AAO's decision on March 16, 2010 is affirmed and the approval of the petition remains revoked.

FURTHER ORDER:

The AAO finds that the petitioner knowingly misrepresented a material fact by certifying that the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law on the labor certification application in an effort to procure a benefit under the Act and the implementing regulations. The alien employment certification, Form ETA 750, ETA case number [REDACTED], filed by the petitioner is invalidated.