

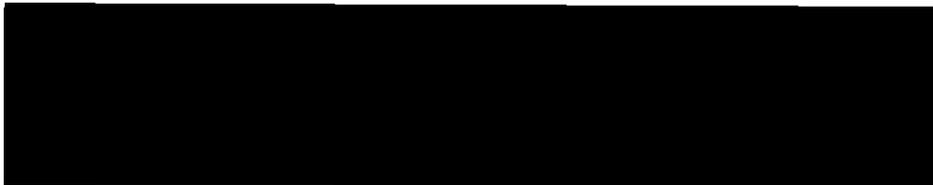
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **APR 07 2011**
EAC 02 233 51152

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

[REDACTED]

Page 2

cc:

[REDACTED]

DISCUSSION: On July 1, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on December 10, 2003. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on May 14, 2009. The petitioner subsequently appealed the director's decision to revoke the approval of the petition. On appeal to the Administrative Appeals Office (AAO), counsel for the petitioner asserts that the director's decision to reopen the matter and revoke the previously approved petition was not based on good and sufficient cause, as required by Section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155.¹ On June 29, 2010, the AAO issued a notice of derogatory information and request for evidence (NDI/RFE) to both the petitioner and the beneficiary, indicating that the record lacks sufficient evidence that the beneficiary had the requisite prior work experience in the job offered before the petitioner submitted the application for alien employment certification (Form ETA 750) to the Department of Labor (DOL) for processing and also lacks evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Both the petitioner and the beneficiary were given 30 days to respond to the NDI/RFE. Thirty days have passed, and no response has been submitted or received as of the date of this decision. The appeal will be dismissed. The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary and will invalidate the alien employment certification, Form ETA 750.

The petitioner is a restaurant, seeking to permanently employ the beneficiary in the United States as a cook 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).² As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. The director revoked the approval of the visa petition based on the petitioner's noncompliance with the DOL procedures in obtaining the approval of the labor certification.

The record shows that the appeal was properly filed and timely and made a specific allegation of error in law or fact. The Administrative Appeals Office (AAO) conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In adjudicating the appeal, the AAO finds that the record does not establish that the beneficiary had the requisite prior work experience in the job offered before the priority date (the date of the filing of the Form ETA 750 labor certification with the DOL) and that the petitioner has the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful

¹ Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary of Homeland Security may revoke the approval of the petition for what he deems to be good and sufficient cause."

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

permanent residence. Before issuing this decision, the AAO issued an NDI/RFE to both the petitioner and beneficiary in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the NDI/RFE, the AAO specifically requested the petitioner to submit evidence such as copies of its tax returns, annual reports, and/or audited financial statements for the relevant years between 2001 and 2009, and Forms W-2, 1099-MISC, or other documents indicating payments to the beneficiary during the qualifying period to demonstrate its ability to pay the proffered wage from the priority date. In the NDI/RFE, the AAO also advised the both the petitioner and the beneficiary to produce independent objective evidence such as copies of paystubs, tax documents, financial statements, or other evidence to demonstrate that the beneficiary worked as a cook in Brazil from May 1996 to January or July 1999.³ The AAO specifically stated that unless the petitioner and/or the beneficiary could resolve the inconsistent information relating to the beneficiary's work experience in Brazil with independent objective evidence, the AAO would dismiss the appeal and confirm the director's finding of fraud or willful misrepresentation.

The AAO alerted both the petitioner and the beneficiary that failure to respond to the RFE/NDI would result in dismissal without further discussion since the AAO could not substantively adjudicate the appeal without the information requested. *See* 8 C.F.R. § 103.2(b)(14).

Because neither the petitioner nor the beneficiary responded to the NDI/RFE, the AAO is dismissing the appeal.

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.

The material issue remaining in this case is whether the beneficiary has willfully misrepresented his qualifications to obtain an immigration benefit.

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

³ The beneficiary stated on the Form ETA 750 part B that she worked at [REDACTED] as a cook from May 1996 to July 1999. A letter from [REDACTED] dated January 29, 2001 was submitted along with the approved Form ETA 750 and the petition, stating that the beneficiary worked as a cook at [REDACTED] from May 3, 1996 to July 31, 1999. The director, however, noted in the notice of intent to revoke (NOIR) that based on a search of the Brazilian's Cadastro Nacional da Pessoa Juridica (CNPJ) or business registration database, [REDACTED] was not registered with the Brazilian government until July 31, 1999. In response to the director's NOIR, the beneficiary submitted an affidavit stating that she first worked as a cook [REDACTED] before she was transferred to another family-owned business called [REDACTED] in July 1999. [REDACTED] according to the beneficiary, had been in business since May 29, 1984. The beneficiary also submitted an affidavit from [REDACTED] stating that the beneficiary initially worked as a cook at an establishment owned by his brother called [REDACTED] from May 3, 1996 to January 31, 1999.

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 an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, 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 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.⁴

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having "sought to procure" an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

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

⁴ 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 discloses fraud or a material misrepresentation. In this case, the beneficiary 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. In the present matter, we find that much of the petitioner's documentation with respect to the beneficiary's qualifications has been falsified, a finding that neither the petitioner nor the beneficiary challenges in that neither responded to the AAO's June 29, 2010 NDI/RFE.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See section 212(a)(6)(c) of the Act, 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 has the required two years of experience for the position offered. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation 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 & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

In this case, the beneficiary certified, upon completing and signing the Form ETA 750 part B labor certification application that he qualified for the position (that he had, at least two years of work experience in the job offered) before the priority date. However, when the director found out that the beneficiary's former employer in Brazil was not registered with the Brazilian authority to conduct business until July 31, 1999, the beneficiary responded by stating that he initially worked for another company owned by his manager's brother. The only documents submitted to support that the beneficiary worked as a cook from May 1996 to January or July

1999 are affidavits from the beneficiary and from [REDACTED]. The record does not contain any pay stub, payroll record, financial statement, or other tangible document to corroborate the assertions that the beneficiary was either employed at [REDACTED] or [REDACTED]. Such evidence and/or explanation are material because, if they were provided, they might demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification.

Based on the noted inconsistencies and the beneficiary's failure to respond, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from 1996 to 1999.

On the true facts, the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the Department of Labor in order for the beneficiary to be admissible to the United States. See section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the Department of Labor issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. Compare 8 C.F.R. § 204.5(g) with § 204.5(1)(1)(3)(ii)(B). The beneficiary did not establish the necessary qualifications in this case, as he did not possess two years' work experience as a cook as of the filing date of the labor certification. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's use of forged or falsified work experience documents shut off a line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. See 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. See *Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. See *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. See *Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. See *Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the DOL had known

the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By misrepresenting his work experience and submitting fraudulent documents to USCIS and making misrepresentations to the DOL, the beneficiary sought to procure a benefit provided under the Act through 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.

In response to the AAO's NDI/RFE neither the petitioner nor the beneficiary dispute that the work experience documents submitted in support of the labor certification were fraudulent. The beneficiary does not offer any testimony, or documentation to dispute that the documents submitted to USCIS were false, and that he does have the required work experience.

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to both the petitioner and the beneficiary to allow the beneficiary an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, neither submitted a response.

By signing the Form ETA 750, and submitting forged or fraudulent work experience letters, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the beneficiary has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that he submitted falsified documents, we affirm our finding that the beneficiary has sought to procure immigration benefits through material misrepresentation. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

ORDER: The appeal is dismissed with a finding of willful misrepresentation of a material fact against the beneficiary.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number P2002-MA-01316228, is invalidated.