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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

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: **JAN 31 2011**

IN RE:

Petitioner:

[Redacted]

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:

[Redacted]

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

cc:

[Redacted]

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on July 16, 2003. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on March 2, 2009, and the petitioner subsequently appealed the director's decision to revoke the approval of the petition. On May 5, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to both the petitioner and beneficiary, noting several inconsistencies in the record concerning the beneficiary's work experience prior to the filing date of the labor certification and requesting both the petitioner and beneficiary to produce independent objective additional evidence to resolve those inconsistencies in the record. On June 8, 2010, the petitioner through its counsel requested that the appeal be withdrawn. The appeal will be dismissed based on its withdrawal. The withdrawal may not be retracted. See 8 C.F.R. § 103.2(b)(6). The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary.

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).¹ On appeal to the AAO, counsel for the petitioner maintained that the petitioner had submitted sufficient evidence to demonstrate that the beneficiary had the prerequisite work experience to qualify for the position advertised in the Form ETA 750 labor certification application. Counsel also indicated that the director's decision to revoke the approval of the petition was arbitrary and capricious.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On September 8, 2008, before revoking the petition, the director sent the petitioner a notice of intent to revoke (NOIR), stating that the petitioner had willfully misrepresented the beneficiary's prior work experience as a cook in order to obtain an immigration benefit. The record shows that the petitioner previously filed the labor certification application (Form ETA 750, Application for Alien Employment Certification) for the beneficiary with the Department of Labor (DOL) on April 30, 2001. On part A of the Form ETA 750, the petitioner set forth the minimum education, training, and experience that an applicant must have for the position as a cook; it indicated on item number 14 that the beneficiary must have, at least, two years of experience in the job offered to qualify for the position. To show that he qualified for the proffered position, the beneficiary on part B of the Form ETA 750 claimed that he worked as a full-time cook in Brazil at a place called [REDACTED] from January 1992 to December 1995. The record contains a letter from [REDACTED] stating that the beneficiary worked full-time at [REDACTED] as a chief cook from January 1992 to December 1995. The labor certification application was approved by the DOL on April 30, 2002. In his NOIR,

¹ 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.

the director notified the petitioner that the beneficiary's prior employer, [REDACTED] was not registered with the Brazilian government and did not exist until October 1998.

Confronted with this finding, the petitioner submitted the following evidence in response to the director's NOIR:

- A signed statement from the beneficiary confirming his prior work experience at [REDACTED] as a chief cook from January 1992 to December 1995;
- A letter from [REDACTED] Partner-Administrator of [REDACTED] stating, [REDACTED] started business in January of 1992, but for out of control reasons, was correctly registered with the right office only on October 28, 1998," and claiming that the beneficiary was the chief cook for [REDACTED] from January 1992 to December 1995; and
- Various articles about the Brazilian economy in the 1990s.

The director revoked the approval of the immigrant petition, noting that the evidence submitted was not sufficient to show that the beneficiary had the prerequisite two years experience in the job offered before April 30, 2001. In his notice of revocation, the director indicated that the petitioner failed to provide any tangible, documentary evidence establishing the existence of [REDACTED] since 1992.

On appeal to the AAO, counsel for the petitioner asserted that instead of applying the preponderance of the evidence standard, United States Citizenship and Immigration Services (USCIS) inappropriately applied the clear and convincing or beyond a reasonable doubt standard to this case. Counsel stated that the letter of employment from [REDACTED] contains the name, address, and title of the writer and a sufficient description of the duties performed by the beneficiary in compliance with the regulation at 8 C.F.R. § 204.5(1)(3)(ii).

On May 5, 2010, the AAO sent both the petitioner and the beneficiary a notice of derogatory information and request for evidence (NDI/RFE) in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). We indicated in the NDI/RFE that the work experience letters provided with the petition and in response to the director's NOIR were inconsistent with other information in the record.² On June 8, 2010, the petitioner through its counsel of record requested the withdrawal of the appeal.

² We noted in the NDI/RFE that the beneficiary failed to list his employment in Brazil with [REDACTED] on his Form G-325, Biographic Information. He also failed to list his employment in the United States with Coltt Manufacturing on the Form ETA 750B. We noted that the company Self Service [REDACTED] did not register as a business with the Brazilian authorities until October 28, 1998, calling into question the beneficiary's claim to have worked there as a cook from January 1992 to December 1995. The AAO requested the beneficiary and the petitioner to provide pay stubs, tax documents, or other evidence of payments made to him by the claimed Brazilian employer. Neither the beneficiary nor the petitioner submitted a response to this request.

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 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.³

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

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 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.

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:

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 May 5, 2010 RFE/NDI.

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 petitioner certified, upon filing the Form ETA 750 labor certification application with the DOL, that the position stated on the labor certification application required a minimum of two years of prior work experience in the job offered. The only documents submitted to

support that the beneficiary qualified for the proffered position are the two identical letters from [REDACTED] and the beneficiary's own statement.

When the director requested the petitioner to explain how the beneficiary worked for [REDACTED] from January 1992 to December 1995 when it did not exist until October 1998, the response from [REDACTED] was vague. The author of the letter states, "His company [referring to [REDACTED]] started business in January of 1992, but for out of control reasons, was correctly registered with the right office only on October 28, 1998." We take this statement to mean that [REDACTED] was initially established in January 1992, although not registered with the Brazilian government until October 1998. The author, however, did not elaborate on what those "out of control reasons" were. Further, no other evidence is provided to support the truthfulness of that statement. The record includes no pay stubs, payroll records, financial statements, pictures, or other tangible documents to corroborate the statement that the beneficiary was employed at [REDACTED]. 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)).

As noted earlier, the AAO, before issuing this decision, specifically requested the beneficiary to provide independent objective evidence to show that he worked as a cook in Brazil from January 1992 to December 1995; to explain why he failed to list his last employment abroad on the Form G-325 at Self Service [REDACTED] and why he failed to list his employment with [REDACTED] Manufacturing on the Form ETA 750B; and to explain the inconsistencies between when [REDACTED] began operating as a business (1998) and the dates of the beneficiary's employment (January 1992 to December 1995). The beneficiary failed to respond or to submit such evidence. Such evidence is material because, if it were provided, it would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The beneficiary's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 1992 to 1995.

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 does not possess two years' work experience as a cook. On the true facts, the beneficiary is not admissible as a third preference employment-

based immigrant, and as such the misrepresentation of his educational credentials 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 DOL, 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, the 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 Department of Labor 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 RFE/NDI 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 material misrepresentation finding. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue. While the petitioner has chosen to withdraw his appeal, this does not negate our finding that the beneficiary has sought to procure immigration benefits through material misrepresentation.

ORDER: The appeal is dismissed based on its withdrawal by the petitioner 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.