

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 (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date : **JUN 07 2011** Office: NEBRASKA SERVICE CENTER FILE: 

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,

Kelian S. Poulos for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On September 29, 2010, this office provided the petitioner with a Notice of Derogatory Information (NDI) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The petitioner failed to respond to the NDI. Thus, the appeal will be dismissed with a separate finding of willful misrepresentation.

The petitioner is a Japanese specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese specialty cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a labor certification approved by the Department of Labor (DOL) accompanied the petition. On April 18, 2009, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and had not established that the beneficiary is qualified to perform the duties of the proffered position with one year of qualifying experience. Therefore, the director denied the petition.

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 upon appeal.

On September 29, 2010, this office notified the petitioner that a review of United States Citizenship and Immigration Services (USCIS) records indicated that the petitioner may have sought to procure a benefit under the Act through willful misrepresentation of material facts. This office allowed the petitioner 30 days in which to respond to the NDI. More than 30 days have passed and the petitioner has failed to respond. Thus, the appeal will be dismissed as abandoned.

The AAO noted the following in its NDI:

During the adjudication of the appeal, it has come to the attention of the AAO that you may have misrepresented material facts in connection with this petition. Pursuant to United States Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.2(b)(16)(i), you are hereby notified of this derogatory information and provided with an opportunity to respond prior to issuance of the AAO's decision.¹ Unless you submit independent objective evidence to overcome the

¹ The regulation at 8 C.F.R. § 103.2(b)(16)(i) states:

Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation,

inconsistencies in the record, the AAO intends to discuss the appeal, enter a finding of material representation and invalidate the Form ETA 9089, Application for Alien Labor Certification, filed by you on behalf of the beneficiary.

On February 26, 2009, the director issued a Request for Evidence (RFE) in which he requested that you submit a list of all I-140 petitions you had filed with United States Citizenship and Immigration Services (USCIS), formerly the Immigration and Naturalization Service (INS), and that for each filing you specifically provide (a) the receipt number; (b) the name of the beneficiary; (c) the priority date as listed on the labor certification; (d) the proffered wage; (e) evidence of wages paid to each beneficiary (e.g. Forms W-2, Forms 1099, etc.); and, (f) the disposition of each filing (e.g. whether it was approved, denied, withdrawn, etc.).

In response, through counsel, you stated you had filed only one I-140 on behalf of [REDACTED] receipt number [REDACTED], with a priority date of March 25, 2005 and a proffered wage of \$2,400 per month, which had been denied on December 5, 2007, and that an appeal from that decision had been filed with the AAO on October 14, 2006.²

A review of USCIS records, however, indicates that you have filed as many as 13 additional Forms I-140 on behalf of other beneficiaries, dating from 1998 through 2007. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, or course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Please be informed that a finding of misrepresentation or fraud may lead to invalidation of the Form 9089. *See* 20 C.F.R. § 656.30(d) *Invalidation of labor certifications*:

After issuance, a labor certification may be revoked by using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief

rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

² USCIS records indicate that the appeal was dismissed on August 3, 2010.

of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

USCIS looks to the administrative case law and standards developed under section 212(a)(6)(C) of the Act in determining whether an employer makes a material misrepresentation for purposes of invalidating a labor certification. *See* USCIS ADJUDICATOR'S FIELD MANUAL § 22.2(b)(11).

By misrepresenting the number of Forms I-140 you have filed, it appears that you have sought to procure a benefit provided under the Act through a willful misrepresentation of material facts. Materiality is determined based on the substantive law under which the purported misrepresentation is made.³ A material issue in this case is whether the petitioner has the continuing ability to pay the proffered wages to each of the beneficiaries of its pending petitions.⁴ A misrepresentation is material where the application involving misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec.436,447 (AG 1961). As a result, you may be culpable of committing a material misrepresentation. The burden of proof remains with you to show by a preponderance of the evidence that a proposed invalidation is not appropriate and that a material misrepresentation was not committed in these proceedings. *See Matter of Ho*, 19 I&N Dec. at 589.

The petitioner failed to respond to the NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). We

³ *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

⁴ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

therefore make a finding of willful misrepresentation.⁵ This finding of willful misrepresentation shall be considered in any future proceeding where admissibility is an issue.

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 appeal is dismissed with a finding of willful misrepresentation.

⁵ 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.