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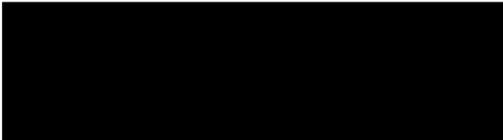
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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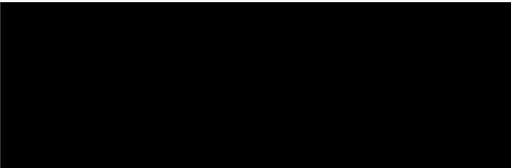
Petitioner:



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

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[REDACTED]

DISCUSSION: On December 31, 2001, the petitioner filed an immigrant petition for alien worker, Form I-140. The employment-based immigrant visa petition was approved by the Director of the Vermont Service Center (VSC) on February 12, 2002. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on March 27, 2009, and the petitioner subsequently appealed the director's decision to revoke the approval of the petition. On December 30, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to both the petitioner and the 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 the beneficiary to produce independent objective additional evidence to resolve those inconsistencies in the record. The AAO gave both the petitioner and the beneficiary 30 days to respond. No response has been received from either the petitioner or the beneficiary. 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).¹ On January 26, 2009, before revoking the previously approved petition, the director sent the petitioner a notice of intent to revoke (NOIR), revealing the existence of fraudulent information in numerous other I-140 petitions and labor certification applications that the petitioner's former attorney, [REDACTED], filed. In the NOIR, the director also notified the petitioner that United States Citizenship and Immigration Services (USCIS) could not verify the existence of the Cadastro Nacional da Pessoa Juridica (CNPJ) number under which the beneficiary's former employer in Brazil was registered.² The director further advised the petitioner to provide evidence to show that the beneficiary had the requisite work experience in the job offered as of the filing date of the labor certification (April 4, 2001).

In response to the director's NOIR, current counsel of record stated that the issuance of the NOIR more than six years after the petition was approved violated due process. Counsel stated that the fact that the DOL had approved the labor certification showed that the petitioner and the beneficiary had conformed to and met all of the DOL's requirements.

The director, pursuant to 8 C.F.R. §205.2(c), revoked the approval of the petition, noting that counsel's response did not resolve the concerns that the petitioner and/or beneficiary might have willfully misrepresented a material fact to obtain an immigrant benefit.

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.

² CNPJ is a database which shows all businesses in Brazil, with each company having a unique CNPJ number.

On appeal to this office, counsel maintains that the request for evidence of the beneficiary's prior work experience in Brazil more than six years after the petition had already been approved violated due process. Counsel also indicates that the director's NOIR contains vague information relating to the petitioner in the instant case, and that the director in his NOIR fails to provide clear explanation as to how to resolve the problem with the petition and that he does not request the petitioner to produce specific evidence to overcome the grounds of revocation. Counsel claims that the director's decision to revoke the approval of the petition is not based on good and sufficient cause, and is not in accordance with 8 U.S.C. § 1155. In the alternative, counsel states that the director has no authority to revoke the petition that has already been approved before the year 2004, since Section 205 of the Act, enacted on December 17, 2004, cannot be applied retroactively to this case.³

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.

The record shows that the petitioner filed the labor certification application (Form ETA 750, Application for Alien Employment Certification) with the DOL on April 4, 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 restaurant in Sao Paulo, Brazil, called [REDACTED] from April 1994 to June 1997. Under the job description, the beneficiary stated, "I made all different kinds of dishes." The labor certification application was approved by the DOL on September 18, 2001.

In adjudicating the appeal, the AAO finds that the beneficiary's claimed employment at [REDACTED] between April 1994 and June 1997 conflicts with information of record about the beneficiary's residence during the same time period. On the Form G-325, Biographic Information, which the beneficiary signed under penalty of perjury and submitted in connection with the application to adjust to lawful permanent resident status (Form I-485), the beneficiary stated he lived in the city of Tarumirim, Minas Gerais, Brazil, from 1979 to March

³ Section 205 of the Act states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

1999. It is not likely that the beneficiary lived in Tarumirim, Minas Gerais, and worked in Sao Paulo, Brazil between April 1994 and June 1997.⁴

In addition, the AAO observes that the beneficiary was only 16 years old in April 1994. The beneficiary was likely in school full-time at that time. He did not, however, list on the Form ETA 750, part B, item number 11, that he attended school. Furthermore, the beneficiary did not list any employment under a section eliciting information about his last occupation abroad on the Form G-325. On December 30, 2010, in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i), the AAO requested the beneficiary and the petitioner to provide independent objective evidence such as pay stubs, tax documents, or other evidence to demonstrate that the beneficiary was employed as a cook in Brazil between April 1994 and June 1997 and gave both the petitioner and the beneficiary 30 days to respond. Neither the beneficiary nor the petitioner submitted a response to this request, however. If provided, such evidence would have shed more light on the existence of the company in Brazil and the beneficiary's employment there.

In the NDI/RFE, the AAO specifically alerted the petitioner that failure to respond to the NDI/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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). Because the petitioner failed to respond to the 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 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).

⁴ The distance between the city of Tarumirim, Minas Gerais, and Sao Paulo, Brazil, is about 674 km (roughly 419 miles).

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.⁵

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:

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

⁵ 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.

beneficiary's qualifications has been falsified, a finding that neither the petitioner nor the beneficiary challenges in that neither responded to the AAO's December 30, 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 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 document submitted to support that the beneficiary worked as a cook from April 1994 to June 1997 in Brazil and qualified for the proffered position was a single letter from [REDACTED] a dated December 26, 2001 and nothing else. When the AAO requested the petitioner and the beneficiary to explain how it was possible that the beneficiary worked for a restaurant in Sao Paulo, Brazil, from April 1994 to June 1997 when he lived in Tarumirim, Minas Gerais during the same time period, neither the beneficiary nor the petitioner responded. Because the beneficiary was only 16 years old when he claimed he began to work in Brazil, the AAO also requested the petitioner and the beneficiary to produce the beneficiary's school transcripts. Again, neither the petitioner nor the beneficiary responded or submitted such evidence.

The record does not contain any pay stub, payroll record, financial statement, picture, or other tangible document to corroborate the assertions that the beneficiary was employed in Brazil as a cook. Such evidence and/or explanation are material because, if they were provided, they would

demonstrate whether the beneficiary had the requisite 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). Further, 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)).

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 1994 to 1997.

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 document shuts 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, 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 a fraudulent document 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 document submitted in support of the labor certification was fraudulent. The beneficiary does not offer any testimony, or documentation to dispute that the document submitted to USCIS was 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 a seemingly forged or fraudulent work experience letter, 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 a falsified document, 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.

As to the retroactivity of section 205 of the Act, the AAO finds that section 205 of the Act can be applied retroactively. Pub. L. 108-458, Title V, § 50304(d), Dec. 17, 2004, 118 Stat. 3736 provided that the amendments made by this section (amending this section and 8 U.S.C.A. §§ 1201 and 1227) shall take effect on the date of enactment of this Act (December 17, 2004) and shall apply to revocation under sections 205 and 221 (i) of the Act, 8 U.S.C. §§ 1155, 1201(i) made before, on, or after such date. The director, therefore, had the authority to revoke the approval of the petition filed and approved prior to the enactment of section 205 of the Act.

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 document 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 P2001-MA-01312352, filed by the petitioner is invalidated.