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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

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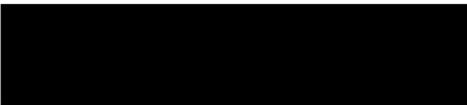
Date: Office: TEXAS SERVICE CENTER
MAY 04 2011

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,

Perry Rhew
Chief, Administrative Appeals Office

[REDACTED]

Page 2

cc:

[REDACTED]

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center (VSC) on June 29, 2003. The Director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on March 3, 2009, and the petitioner subsequently appealed the director's decision to revoke the approval of the petition. On May 20, 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 after 30 days. The appeal will be dismissed.¹ 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 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 even if the beneficiary did not work as a cook in Brazil as indicated on the labor certification application, the beneficiary would still have qualified for the proffered position since he had worked as a cook for the petitioner since 1996. Counsel asserted, "The beneficiary remains qualified for the position on either [his] experience from Brazil or here in the U.S."

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 August 29, 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

¹ The appeal could also be dismissed as moot since a search of the Massachusetts Secretary of State's website reveals that the petitioner is dissolved as of February 23, 2011. Dissolution or termination of the petitioner's business would have automatically revoked the petition pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(D).

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.

filed the labor certification application (Form ETA 750, Application for Alien Employment Certification) with the DOL on July 16, 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 1993 to March 1995. The record contains a letter from [REDACTED] stating that the beneficiary worked at [REDACTED] as a cook from January 1993 to March 1995. The labor certification application was approved by the DOL on July 23, 2002. In his NOIR, the director notified the petitioner that the beneficiary's prior employer in [REDACTED], was not registered with the Brazilian government and did not exist until September 16, 1998.

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

- A sworn statement (affidavit) from the beneficiary confirming his prior work experience at [REDACTED] as a cook from January 1993 to March 1995, even though [REDACTED] was not registered with the Brazilian government;
- A letter from a Brazilian attorney, [REDACTED] stating that [REDACTED] was formerly known as [REDACTED] before it was changed to its current name in September 1998, and that [REDACTED] was established on September 16, 1993; and
- An article about the Brazilian economy in the 1990s.³

The director revoked the approval of the immigrant petition, noting that the evidence submitted was not sufficient to show that the beneficiary worked at [REDACTED] from January 1993 to March 1995. Specifically, the director indicated that there was no evidence in the record establishing that [REDACTED] and [REDACTED] were the same company, and even if [REDACTED] and [REDACTED] were the same company, [REDACTED] was established on September 16, 1993, eight months after the beneficiary claimed he began to work there.

On appeal to the AAO, counsel for the petitioner asserted that the beneficiary remained qualified for the proffered position even if he did not work in Brazil as a cook since the beneficiary had worked for the petitioner as a cook since 1996. On appeal, the petitioner submitted a letter from [REDACTED] who stated that the beneficiary used to work at [REDACTED] from January 1993 to March

³ The petitioner's counsel, responding to the director's NOID, stated that there were many informal businesses in Brazil that did not register with the Brazilian government throughout the 1990s. The article was submitted to establish by inference that the company where the beneficiary used to work in Brazil was one of these informal companies.

1995. At that time, according to [REDACTED], the business was not registered with the Brazilian government because he was not certain if the business would survive.

On appeal, the petitioner also produced a letter from its owner, [REDACTED], who stated that the beneficiary worked as a cook at [his business] [REDACTED] from 1996 to present. Counsel indicated that the director's decision to revoke the approval of the petition was arbitrary and capricious.

As noted above, the AAO, on May 20, 2010, 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.⁴ The AAO requested the beneficiary and the petitioner to provide independent objective evidence such as pay stubs, tax documents, or other evidence of payments made to him by either the claimed Brazilian employer or the petitioner and gave both the petitioner and the beneficiary 30 days to respond. Neither the beneficiary nor the petitioner submitted a response to this request.

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).

⁴ 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 since 1996 with the petitioner [REDACTED] on the Form ETA 750B. We noted that the company [REDACTED] did not register as a business with the Brazilian government until September 16, 1998, calling into question the beneficiary's claim to have worked there as a cook from January 1993 to March 1995.

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.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

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.

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 20, 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 January 1993 to March 1995 in Brazil and qualified for the proffered position was the letter from [REDACTED]

When the director requested the petitioner to explain how the beneficiary worked for [REDACTED] from January 1993 to March 1995 when the company did not exist until September 16, 1998, the petitioner submitted a letter from a Brazilian attorney and an affidavit from the beneficiary. The Brazilian attorney stated that [REDACTED]

█ was formerly known as █ and that █ initially registered with the Brazilian authority on September 16, 1993. The Brazilian attorney also claimed that when █ changed its name to █ in 1998, the Brazilian authority gave █ a new registration number.

In his affidavit, the beneficiary states that he worked as a cook for █ from January 1993 to March 1995 and that he did not know that the company was not registered with the Brazilian authority in January 1993.

On appeal, counsel also contends that the beneficiary's work experience in Brazil is not critical to the outcome of this proceeding. According to counsel, even if the beneficiary did not work as a cook in Brazil, he would still qualify for the position as advertised in the Form ETA 750 labor certification since he has gained his qualifications by working with the petitioner since 1996.

The AAO noted counsel's contention, and before issuing this decision, specifically requested the beneficiary to provide independent objective evidence to demonstrate that he worked as a cook either in Brazil from January 1993 to March 1995 or in the U.S. since 1996 and to explain why he failed to list his employment with the petitioner since 1996 on the Form ETA 750B. The beneficiary failed to respond or submit 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 either employed at █ between January 1993 and March 1995 or by the petitioner since 1996. Such evidence and/or explanation are material because, if they were provided, they 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). 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 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)(l)(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 [REDACTED] filed by the petitioner is invalidated.