

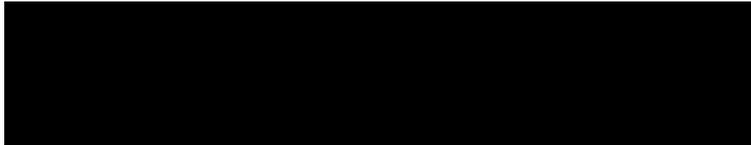
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**



B6

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 petitioner filed an immigrant petition for alien worker, Form I-140, on December 9, 2002. The employment-based immigrant visa petition was initially approved by the Vermont Service Center director on December 4, 2003. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on June 2, 2009, and the petitioner subsequently appealed the director's decision to revoke the approval of the visa petition. The appeal will be dismissed. The Administrative Appeals Office (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 Dunkin' Donuts' franchisee. It seeks to employ the beneficiary permanently in the United States as a baker 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).<sup>1</sup> 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 Department of Labor (DOL) procedures in obtaining the approval of the labor certification.

On appeal, counsel for the petitioner contends that the director's decision to revoke the previously approved petition was not based on good and sufficient cause, against 8 U.S.C. § 1155.<sup>2</sup> The record shows that the appeal is timely and makes a specific allegation of error in law or fact.

On December 10, 2010, the AAO issued a request for evidence and notice of derogatory information (RFE/NDI) to both the petitioner and the beneficiary. The AAO in the RFE/NDI, among other things, notified both the petitioner and the beneficiary of several inconsistencies in the record concerning the beneficiary's work experience prior to the filing date of the labor certification. 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal to the AAO, counsel for the petitioner asserts that the director did not have good and sufficient cause to issue the notice of intent to revoke (NOIR) and that the NOIR contained vague information relating to the petitioner in the instant case. Counsel also states that the director did not have jurisdiction to determine whether or not the petitioner met all of the DOL regulations and stipulations relating to the underlying labor certification. The director's decision to revoke

---

<sup>1</sup> 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.

<sup>2</sup> Title 8 of the U.S. Code section 1155, Section 205 of the Immigration and Nationality Act (the Act), states, "The Secretary of Homeland Security may revoke the approval of the petition for what he deems to be good and sufficient cause."

the previously approved petition, according to counsel, is therefore, not based on good and sufficient cause and not in accordance with 8 U.S.C. § 1155.

In adjudicating the appeal, the AAO found several inconsistencies in the record pertaining to the beneficiary's past work experience as a baker in Brazil. On December 10, 2010, the AAO outlined these inconsistencies in the record and advised both the petitioner and the beneficiary to respond. The AAO sent both the petitioner and the beneficiary an RFE/NDI in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the RFE/NDI, the AAO specifically indicated that the beneficiary claimed that she worked as a baker in Goiania, Brazil, at a place called [REDACTED] from January 1991 to June 1993 on the Form ETA 750, part B. However, the record contains no letter of employment from [REDACTED]. Submitted along with the Form I-140 petition was a letter dated October 8, 2002 from a company called [REDACTED], which claimed that the beneficiary worked as a "baker from 6:00 am to 4:00 pm, Monday to Friday for two years and seven months from June 1994 to January 1997." The beneficiary did not list her employment with [REDACTED] on the Form ETA 750B, where she was asked to list all relevant work experience.

In addition, the AAO observes that the beneficiary did not list her last occupation abroad on her Biographic Information (Form G-325) and that she listed Nagoya, Japan, as the last place of residence for more than one year before coming to the United States in May 1999.<sup>3</sup> In the December 10, 2010 RFE/NDI, the AAO advised the beneficiary to explain why she did not list any of her employment in Brazil on her Biographic Information and Form ETA 750B, and to produce independent objective evidence to demonstrate that she worked and lived in Brazil from 1991 to 1997.<sup>4</sup> Neither the petitioner nor the beneficiary submitted any response to the AAO's RFE/NDI. Nor has either the petitioner or the beneficiary provided any explanation as to why such evidence cannot be submitted.

As noted above, the AAO has *de novo* authority to review the matter properly forwarded by the director, see *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and to determine the validity of the visa petition and the beneficiary's qualifications for the position.<sup>5</sup>

---

<sup>3</sup> She indicated that she received her nonimmigrant visa to come to the United States in January 1997 in Brasilia.

<sup>4</sup> Other than the letter from [REDACTED] stating that the beneficiary worked and lived in Brazil as a baker from 1994 to 1997, there is no independent objective evidence in the record verifying the truthfulness of that statement.

<sup>5</sup> At the outset, the DOL's certification of the Form ETA 750 does not supersede United States Citizenship and Immigration Services' (USCIS) review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of the whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by § 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(i)(3).

In the RFE/NDI, the AAO specifically alerted the petitioner 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. 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 without further discussion.

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 her qualifications to obtain an immigration benefit.

In the RFE/NDI, the AAO specifically warned the beneficiary:

Unless you can resolve the problems as noted above, the AAO intends to dismiss the appeal and may find fraud or willful misrepresentation against you. The AAO may also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).<sup>6</sup>

...

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).

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of July 31, 2001 (the priority date) is material in this case, as the petition may not be approved if the beneficiary is not qualified for the position.

---

<sup>6</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

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 by willfully misrepresenting a 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.<sup>7</sup>

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, or after the petition is automatically revoked, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having "sought to procure" an

---

<sup>7</sup> 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 an opportunity to respond to the same.

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 December 10, 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 on part A of the Form ETA 750 set forth the minimum education, training, and experience that an applicant must have for the position as a baker; it indicated on item number 14 that the applicant must have, at least, two years of experience in the job offered to qualify for the position. To show that the beneficiary qualified for the proffered position, she claimed on part B of the Form ETA 750 that she worked as a full-time baker in Brazil at [REDACTED] from January 1991 to June 1993. The beneficiary certified, upon signing the Form ETA 750, part B, with the DOL that she qualified for the position as stated on the labor certification application. The labor certification application was approved by the DOL on July 23, 2002.

As noted earlier, the AAO found several inconsistencies in the record regarding where the beneficiary worked and lived between 1991 and 1999. Before issuing this decision, the AAO specifically requested the beneficiary to provide independent objective evidence to resolve the inconsistencies in the record. The beneficiary did not submit any independent objective 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 appeal and revoking the approval of the petition. *See* 8 C.F.R. § 103.2(b)(14).

The only document submitted to support that the beneficiary qualified for the proffered position is the signed statement from [REDACTED]. She failed, however, to list this qualifying employment on either her Form G-325 or Form ETA 750B. The record contains no independent objective evidence such as payroll records, accounting records, pay vouchers, or a copy of a government issued identification document to overcome the inconsistencies and to demonstrate where the beneficiary lived and worked between 1991 and 1999 and whether she worked as a baker from 1991 to 1997.

Based on the noted inconsistencies and the beneficiary's failure to submit independent objective evidence, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about her prior work experience from 1991 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 DOL 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 DOL 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 she met the petitioner's minimum work experience requirements. *Compare* 8 C.F.R. § 204.5(g) with § 204.5(1)(3)(ii)(B). The beneficiary did not establish the necessary qualifications in this case, as she does not possess two years' work experience as a baker before the priority date. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of her credentials was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, she fails the second and third parts of the materiality test. The beneficiary's use of forged or falsified work experience documents 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, 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 DOL had known the true facts, it would have denied the employer's labor certification application, 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 her 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 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 she does have the required work experience.

As noted above, it is proper for the AAO to make a finding of fraud or willful misrepresentation pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to the beneficiary to afford her an opportunity to respond or submit independent objective evidence to overcome the alleged misrepresentation. As noted, no such evidence has been submitted.

By signing the Form ETA 750 and submitting forged or fraudulent work experience documents, 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 she 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.

**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.