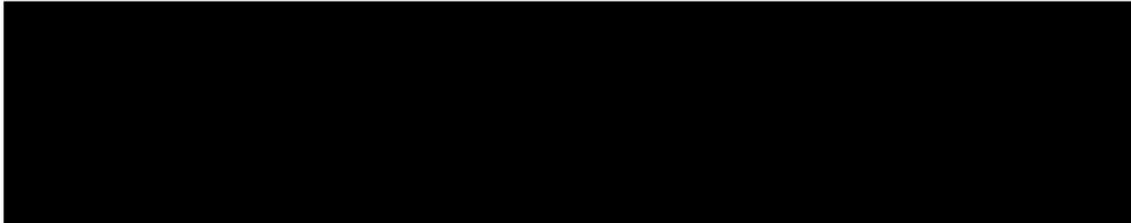


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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



BE

Date: **OCT 20 2011**

Office: TEXAS 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On September 18, 2002, 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 June 16, 2003. The Director of the Texas Service Center (“the director”), 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. 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).<sup>1</sup> As indicated above, the petition was initially approved in June 2003, but the approval was revoked in March 2009. The director determined that the beneficiary, based on the documentation in the record, did not have the requisite work experience in the job offered before the priority date. Specifically, the director stated that the beneficiary could not have worked as a cook for [REDACTED] in April, 1989 since the company, according to the CNPJ database, was not registered with the Brazilian authorities until September 13, 1993.<sup>2</sup>

On appeal to the AAO, counsel for the petitioner maintained that the beneficiary worked as a cook in Brazil, that he had the requisite work experience in the job offered before the priority date, and that the additional evidence submitted in response to the director’s Notice of Intent to Revoke (NOIR) was sufficient to clarify the inconsistencies in the record concerning the beneficiary’s employment in Brazil. Counsel further asserted that the revocation of the approval of the petition was in error, since U.S. Citizenship and Immigration Services (USCIS) lacked good or sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381

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<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> The CNPJ database is found at <http://www.receita.fazenda.gov.br/>. CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authorities. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual’s stated hire and working dates with a Brazilian-based company to that Brazilian company’s registered creation date.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

In adjudicating the appeal, the AAO found that the beneficiary's claimed employment for A.M. [REDACTED] in the city of Taubate, Sao Paulo, Brazil, between April 1989 and November 1994 conflicted 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 Curitiba, Parana, Brazil, from 1985 to 2000. It is not likely that the beneficiary lived in Curitiba, Parana, and worked in Taubate, Sao Paulo, Brazil between April 1989 and November 1994.<sup>4</sup>

On October 13, 2010, the Administrative Appeals Office (AAO) issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) 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.

In the RFE/NDI to the petitioner, the AAO specifically alerted the petitioner that failure to respond to the RFE/NDI 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 analysis does not stop there; however. 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

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<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>4</sup> The distance between the city of Curitiba, Parana and Taubate, Sao Paulo, Brazil, is about 500 km (roughly 311 miles).

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.<sup>5</sup>

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:

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<sup>5</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 opportunity to respond to the same.

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 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. In support of its position that the beneficiary worked as a cook from April 1989 to November 1994, the petitioner at the time of filing the Form I-140 submitted an affidavit dated March 19, 2001 from [REDACTED] stating that the company [REDACTED]

CNPJ number [REDACTED], employed the beneficiary as a cook from April 15, 1989 to November 5, 1994.

The AAO notes that the evidence submitted above does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), in that it does not have a description of the training or the experience received by the beneficiary. Merely stating that the beneficiary was a cook without further explaining his job duties and responsibilities is not sufficient in this proceeding.

The AAO further notes that the company [REDACTED] Restaurant, as previously noted by the director in the Notice of Intent to Revoke (NOIR) and Notice of Revocation, did not exist until September 1993. In response to the director's NOIR, the petitioner submitted a joint-affidavit dated September 19, 2008 from [REDACTED] stating that the beneficiary was first employed by [REDACTED] at her restaurant called [REDACTED] CNPJ number [REDACTED] before [REDACTED] Restaurant was opened in September 1993. The petitioner also submitted a copy of the marriage certificate of [REDACTED]. The beneficiary in his sworn statement dated September 19, 2008 stated that he did not know that the restaurant he worked for in 1989 was owned by [REDACTED].

The AAO agrees with the director that the evidence submitted above is inconsistent and does not establish that the beneficiary worked as a cook for [REDACTED] in 1989. Further, in adjudicating the appeal, the AAO found that information regarding where the beneficiary worked between 1989 and 1994 conflicts with information of record about the beneficiary's residence during the same time period. When the AAO requested the petitioner and the beneficiary to explain how it was possible that the beneficiary worked for a restaurant in Taubate, Sao Paulo, Brazil, from April 1989 to November 1994 when he lived in Curitiba, Parana during the same time period, neither the beneficiary nor the petitioner responded.

The record does not contain any independent objective evidence such as pay stub, payroll record, financial statement, 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 1989 to 1994.

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.

**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 [REDACTED] filed by the petitioner is invalidated.