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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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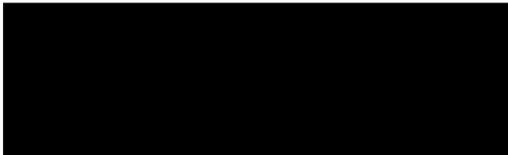
Date: **SEP 02 2011** Office: **TEXAS SERVICE CENTER** FILE: 

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On March 14, 2007, United States Citizenship and Immigration Services (USCIS), Texas Service Center (TSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the Director of the TSC on November 14, 2007. The Director of the TSC, however, reversed his earlier decision, revoked the approval of the immigrant petition, and invalidated the labor certification (ETA Form 9089) on May 27, 2009. The petitioner subsequently appealed the director's decision. On November 26, 2010, the AAO issued a notice of derogatory information (NDI) to the petitioner, indicating that the record lacks sufficient evidence that the beneficiary had the requisite prior work experience in the job offered before the petitioner submitted the application for alien employment certification (Form ETA 750) to the Department of Labor (DOL) for processing. The petitioner was given 30 days to respond to the NDI. Thirty days have passed, and no response has been submitted or received as of the date of this decision. The appeal will be dismissed. The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary and affirm the director's decision to invalidate the labor certification.

The petitioner is an oil and gas field-type drilling machinery and equipment manufacturing company,¹ seeking to permanently employ the beneficiary in the United States as a machine operator 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 As required by statute, the petition is submitted along with an approved ETA Form 9089 labor certification.

As noted above, the petition was initially approved in November 2007, but that approval was revoked in May 2009. The director found that the beneficiary did not have the requisite work experience to qualify for the position offered before the priority date, that the beneficiary had submitted fraudulent documents regarding his qualifications, and that the job offer was not *bona fide* since the beneficiary is the brother-in-law of the owner of the petitioner [REDACTED]. Accordingly, the director invalidated the labor certification and revoked the approval of the petition.

The record shows that the appeal was properly filed and timely and made a specific allegation of error in law or fact. The Administrative Appeals Office (AAO) conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In adjudicating the appeal, the AAO finds that the record does not establish that the beneficiary had the requisite prior work experience in the job offered before the priority date – the date of the

¹ The type of business is based on NAICS (North America Industry Classification System) Code 333132 that the petitioner listed on Form I-140 and ETA Form 9089. The NAICS Code can be accessed online at <http://www.naics.com>.

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.

filing of the Form ETA 750 or ETA Form 9089 with the DOL. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 or the ETA Form 9089 as certified by the DOL and submitted with the petition.

Here, the record shows that the petitioner originally filed an Application for Alien Employment Certification, Form ETA 750, for an alien beneficiary named [REDACTED] on April 30, 2001 with the DOL. It is not clear what happened to this Form ETA 750; however, on January 9, 2007, the petitioner electronically filed an Application for Permanent Employment Certification, ETA Form 9089, for [REDACTED] and that application was certified by the DOL. Subsequently on March 14, 2007, the petitioner filed the Form I-140 petition, naming "[REDACTED]" (the beneficiary in the instant proceeding) as the beneficiary, instead of [REDACTED]. In a letter dated March 9, 2007, counsel requested that [REDACTED] – the named beneficiary on the certified ETA Form 9089 – be replaced by [REDACTED].

The name of the job title or the position for which the petitioner sought to hire the beneficiary is "machine operator." Under the job duties, section H.11 of the ETA Form 9089, the petitioner

³ The record contains no discussion relating to the substitution issues. The director must have accepted the substitution of the beneficiary when he initially approved the petition. The DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). The DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750 or ETA Form 9089. Memo from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3. In this case, the petition along with the certified ETA Form 9089 and the request for substitution was filed and received by USCIS on March 14, 2007, before the DOL's final rule became effective. Accordingly, the substitution for the present petition will be allowed, and the petition for the current beneficiary will retain the same priority date as the original Form ETA 750 (April 30, 2001).

wrote, "Sets up and operates metal fabricating machines, operates custom made machines, repair electro-hydraulic [sic] and cylinder actuators, control valves and triggering devices, machine elements and logic circuits." Under section H.6 of the ETA Form 9089 the petitioner specifically required each applicant for this position to have a minimum of 24 months, or two years, of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the position offered requires the beneficiary to have a minimum of two years of work experience in the job offered. To show that the beneficiary had the requisite work experience in the job offered before April 30, 2001, the petitioner initially submitted the following relevant evidence:

- A letter dated 22/1/2007 (January 22, 2007) from [REDACTED] owner of [REDACTED], stating that the beneficiary was employed by [REDACTED] from April 2003 to August 2006.

The AAO notes that this experience is after the priority date. Before issuing this decision, the AAO issued an NDI to the petitioner in accordance with 8 C.F.R. § 103.2(b)(16)(i), specifically noting this fact. In the NDI, the AAO advised the petitioner to submit additional evidence to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date. The AAO specifically stated that unless the petitioner could resolve the problems relating to the beneficiary's work experience as noted above, the AAO would dismiss the appeal and confirm the director's finding of fraud or willful misrepresentation. The AAO also alerted the petitioner that failure to respond to the NDI would result in dismissal without further discussion since the AAO could not substantively adjudicate the appeal without the information requested. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner did not respond to the NDI, the AAO is dismissing the appeal. For this reason, the AAO will not further discuss whether the job offered is *bona fide* – whether the petitioner and the beneficiary is related by blood or whether they have a familial relationship.

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 petitioner and/or the beneficiary have willfully misrepresented the beneficiary's qualifications to obtain an immigration benefit.

In October 2008, an investigation was initiated into the beneficiary's claimed prior experience. The consular section of the U.S. Embassy in Beirut, Lebanon, interviewed [REDACTED] brother of [REDACTED] and co-owner [REDACTED]. During the course of the interview, [REDACTED] disclosed that the beneficiary had never worked for [REDACTED], and that the experience letter had been provided to the beneficiary in order to assist the beneficiary in securing employment outside of Lebanon.

On April 2, 2009, the director issued a Notice of Intent to Revoke (NOIR) which informed the petitioner that an owner of Farah Mechanical [REDACTED] had admitted to a consular officer that the beneficiary had never worked for Farah Mechanical.

In response to the director's NOIR, the petitioner submitted a second letter signed by [REDACTED]. In the letter, [REDACTED] again stated that the beneficiary was employed by [REDACTED] from April 2003 to August 2006. The letter further stated that [REDACTED] did not have personal knowledge regarding the beneficiary's employment with [REDACTED] and that he felt threatened during the interview. Specifically, the letter stated, in pertinent part:

[REDACTED] does not get involved with our employees, nor does he know about their history more than is written in their files. [REDACTED] position in the company is to oversee specific projects in the field and make sure they running smooth. He does not get involved in the any of the employee issues.

[REDACTED] felt threatened by what and how the interrogator was presenting him, especially since it was information he knew nothing about, and was not given the chance or the time to consult with me. Everything the interrogator was implying had nothing to do with [REDACTED] but rather that if we continued to imply that he worked for us we would be in a lot of trouble. [REDACTED] felt forced to make up a story to satisfy the direction the interrogator was intending and told him [REDACTED] did not work for us and made up a paper stating just that.

The petitioner also submitted signed statements from four individuals. In each statement, the declarant claims to have knowledge that the beneficiary worked for [REDACTED] from 2003 to 2006. All of the statements are identical, and none explains the basis of the declarant's knowledge regarding the beneficiary's employment.

Based on the stated facts and evidence submitted above, the AAO issued an NDI on November 26, 2010, noting that, in addition to the results of the consular investigation discussed above, there is a discrepancy in the record regarding the dates of the beneficiary's alleged employment with [REDACTED]. Specifically, the record contains a Form DS-230, Application for Immigrant Visa and Alien Registration, which was signed by the beneficiary on May 6, 2008. On the Form DS-230, the beneficiary indicated that he had been employed as a Machine Operator with [REDACTED] from August 2004 to October 2006. This is inconsistent with the statements made by [REDACTED] and the statements made by the four

individuals claiming to have knowledge of the beneficiary's employment by

The submission of inconsistent evidence precludes approval unless those inconsistencies are overcome with objective credible evidence. More specifically, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 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.⁴

⁴ 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

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 the petitioner failed to challenge in that it did not respond to the AAO's November 26, 2010 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.

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 petitioner certified, upon completing and signing the Form I-140 petition that the beneficiary qualified for the position offered (that the beneficiary had, at least two years of work experience in the job offered). As evidence of the beneficiary's qualifications for the position offered, the petitioner submitted a letter from [REDACTED] stating that the beneficiary worked from April 2003 to August 2006 at [REDACTED]. However, when the director challenged the veracity of the beneficiary's claim of employment with [REDACTED] from 2003 to 2006, the petitioner responded by submitting another letter from [REDACTED] stating that the beneficiary indeed worked at his firm from April 2003 to August 2006. No independent objective evidence such as pay stubs, payroll records, financial statements, or other tangible document to corroborate the assertions that the beneficiary was employed by [REDACTED]. Such evidence and/or explanation are material because, if they were provided, they might demonstrate the credibility of both the petitioner and the beneficiary.

As stated above, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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; the finding of the U.S. Embassy in Beirut, Lebanon; and the petitioner's failure to respond, the AAO finds that the petitioner and the beneficiary have deliberately concealed and misrepresented facts about the beneficiary's prior work experience.

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 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 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 machine operator 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 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, 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 the petitioner does not 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 the petitioner to allow it an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, no response was submitted.

By signing the petition, and submitting forged or fraudulent work experience letters, both the petitioner and the beneficiary have sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding of the beneficiary's lack of experience in the job offered, we affirm our finding that the petitioner has sought to procure immigration benefits through material misrepresentation. We also affirm the director's finding of willful misrepresentation against the beneficiary. This finding of material

misrepresentation against the beneficiary shall be considered in any future proceeding where admissibility of the beneficiary is an issue.

ORDER: The appeal is dismissed with a finding of willful misrepresentation of a material fact against the petitioner and the beneficiary.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly misrepresented a material fact with respect to the beneficiary's work experience 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], is invalidated.