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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**



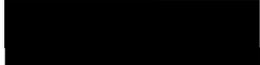
**U.S. Citizenship  
and Immigration  
Services**

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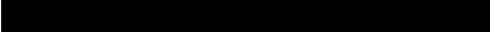


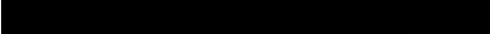
Date: SEP 14 2011

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

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**DISCUSSION:** On April 27, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), 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 Vermont Service Center (VSC) on August 29, 2002. The approval of the immigrant petition, however, was revoked by the Director of the Texas Service Center ("the director") on May 14, 2009. The petitioner subsequently appealed the director's decision to revoke the approval of the petition. On appeal to the Administrative Appeals Office (AAO), counsel for the petitioner contended that the petitioner had submitted sufficient credible evidence to show that the beneficiary possessed the requisite work experience in the job offered before the priority date. On June 8, 2011, the AAO issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) to both the petitioner and the beneficiary, indicating that the record lacks sufficient evidence of the beneficiary's qualifications for the position. The AAO also identified deficiencies in the record pertaining to the petitioner's ability to pay the proffered wage. Both the petitioner and the beneficiary were given 30 days to respond to the RFE/ 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 will invalidate the Application for Alien Employment Certification, Form ETA 750.

The petitioner is a painting company, seeking to permanently employ the beneficiary in the United States as a painter 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. As indicated above, the petition was initially approved in August 2002, but the approval was revoked in May 2009. The director determined that the beneficiary did not have the requisite work experience in the job offered before the priority date and that the documentation submitted to show that the beneficiary qualified for the position was false.<sup>2</sup> Specifically, the director stated that the beneficiary could not have worked as a painter at [REDACTED] in June 1996, since the business was not registered with the Brazilian government until January 22, 1998.<sup>3</sup>

<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> In support of the beneficiary's claim that he worked as a painter for at least two years prior to the priority date, the petitioner submitted a letter dated January 8, 2001 from [REDACTED] stating that the beneficiary worked as a painter at [REDACTED] from June 2, 1996 to December 31, 1998.

<sup>3</sup> The director found this information by searching the CNPJ database (The CNPJ database can be accessed online 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 authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with

In reaching that conclusion, the director declined to accept the sworn statement dated March 9, 2009 from the beneficiary's prior employer in Brazil as credible. The author of the sworn statement above indicated that before the business was registered in January 1998, he was self-employed from January 15, 1996 to January 21, 1998 and that the beneficiary worked for his business from June 2, 1996 to December 31, 1998. The director also declined to accept the sworn statement of the beneficiary which he submitted in response to the director's Notice of Intent to Revoke (NOIR). In his sworn statement, the beneficiary confirmed that he worked as a painter in Brazil at [REDACTED] during the period stated above and further stated that it is not unusual for businesses in Brazil to start the business without registration.

On appeal, counsel for the petitioner asserted that the petitioner had submitted sufficient credible evidence to demonstrate that the beneficiary possessed the requisite work experience to qualify for the position offered.

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 found that the record lacks conclusive evidence as to whether the petitioner consented to be represented by [REDACTED] during the labor certification process and during the adjudication of the Form I-140 petition.<sup>4</sup> The AAO also found multiple inconsistencies in the record regarding the beneficiary's claimed employment in Brazil. In addition, the AAO also noticed that the petitioner had filed two other immigrant visa petitions since 2001.

With respect to the beneficiary's work experience in Brazil, the beneficiary claimed in part B of the Form ETA 750 that he worked as a painter at [REDACTED] in the city of Cariacica, ES, Brazil, from June 1996 to December 1998. However, the beneficiary's Biographical Information (Form G-325), which the beneficiary submitted in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485) does not contain any information regarding his employment abroad. Further, the beneficiary stated in the Form G-325 that he lived in Rio de Janeiro, Brazil, from 1997 to May 1999. It is very unlikely that the

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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.

<sup>4</sup> [REDACTED] by submitting a Notice of Entry of Appearance as Attorney or Representative (Form G-28), claimed to have represented the petitioner in April 2002. The AAO observed, however, that the signatures of [REDACTED] on the Form I-140 petition dated April 22, 2002 and on the Form G-28 dated April 11, 2002 do not match his signature on the Form G-28 dated May 18, 2009 (submitted on appeal).

beneficiary worked in the city of Cariacica, ES, and lived in Rio de Janeiro between 1997 and 1998.<sup>5</sup>

In the NDI/RFE, the AAO specifically requested the petitioner to produce independent objective evidence such as copies of paystubs, tax documents, financial statements, or other evidence to demonstrate that the beneficiary worked as a painter at [REDACTED] in the city of Cariacica, ES, Brazil, from June 1996 to December 1998. The AAO specifically stated that unless the petitioner and/or the beneficiary could resolve the inconsistent information relating to the beneficiary's work experience in Brazil with independent objective evidence, the AAO would dismiss the appeal and confirm the director's finding of fraud or willful misrepresentation.

In the NDI/RFE, the AAO also advised the petitioner to issue an affidavit confirming its consent to have a legal representative to represent the petitioner in filing the labor certification and the petition and to submit evidence such as copies of its tax returns, annual reports, and/or audited financial statements for the relevant years between 2001 and 2009, and Forms W-2, 1099-MISC, or other documents indicating payments to all of the beneficiaries during the qualifying period to demonstrate its ability to pay the proffered wage from the priority date.

On June 8, 2011 the AAO issued an RFE/NDI to both the petitioner and the beneficiary alerting them of the issues pertaining to these issues as noted above. The AAO alerted both the petitioner and the beneficiary 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. *See* 8 C.F.R. § 103.2(b)(14).

Because neither the petitioner nor the beneficiary responded to the NDI/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 here, 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 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

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<sup>5</sup> The distance between Rio de Janeiro (city), Rio de Janeiro (province), and Cariacica (city), ES (province), is about 411 km (roughly 255 miles).

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>6</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:

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 . . . .

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<sup>6</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.

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 June 29, 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 beneficiary certified, upon completing and signing the Form ETA 750 part B labor certification application that he qualified for the position (that he had, at least two years of work experience in the job offered) before the priority date. The beneficiary maintained that he was employed by [REDACTED] from June 2, 1996 to December 31, 1998, even after the director discovered that the company in Brazil was not registered with the Brazilian government until January 22, 1998. In adjudicating the appeal, the AAO found that, based on the beneficiary's Biographical Information, the beneficiary lived in Rio de Janeiro, Brazil, from 1997 to 1999. The AAO also noticed, based on the evidence submitted, that the beneficiary's former employer in Brazil was located in the city of Cariacica, ES, roughly 411 km (255 miles) from Rio de Janeiro. Based on this information, the AAO concludes that it is unlikely that the beneficiary worked in Cariacica, ES, and lived in Rio de Janeiro from January 1997 to December 1998.

Further, the record does not contain any pay stub, payroll record, financial statement, or other tangible document to corroborate the assertions that the beneficiary was employed as a painter by [REDACTED]. Such evidence is material because, if it were provided, it might demonstrate whether the beneficiary had the requisite qualification as specified on the labor certification.

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 June 2, 1996 to December 31, 1998.

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 painter 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] is invalidated.