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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**



B6

DATE: **AUG 08 2012**

OFFICE: TEXAS SERVICE CENTER

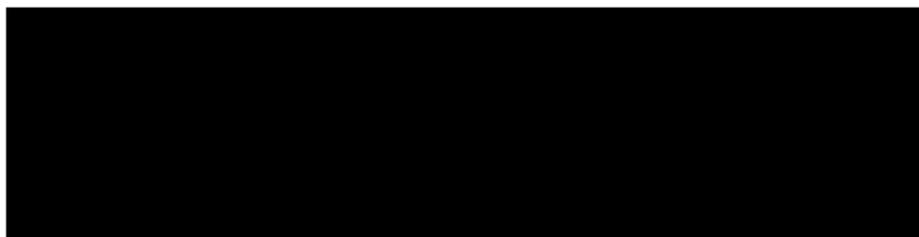
FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. On July 14, 2011, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR).<sup>1</sup> In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a supervisor/manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). United States Citizenship and Immigration Services (USCIS) approved the petition on July 17, 2008. The director subsequently determined that the petition had been approved in error as the petitioner had not credibly established that the beneficiary possessed the required two years of experience as a supervisor/manager as of the priority date. The director revoked the approval accordingly.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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<sup>1</sup> The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet its burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out such evidence was not credible in light of derogatory information relating to the beneficiary’s claimed employment that had emerged subsequent to the approval of the petition and did not establish that the beneficiary possessed the required two years of experience as a supervisor/manager as of the priority date of January 10, 2006, and thus was properly issued for good and sufficient cause.

<sup>2</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 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).

As a threshold matter, the petition must be denied because it is not accompanied by a valid labor certification. The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. The DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the DOL's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

As the filing of the instant case was after July 16, 2007, the petitioner is not able to substitute the beneficiary. The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). The petition will be denied for this additional reason.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The priority date in this matter is January 10, 2006.

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a supervisor/manager provides:

Manage gas station and convenient store. Implement work schedules, job duties, prices of products and train workers. Responsible for accounts receivable, reconcile cash with food purchases, gas pump meter readings, sales slip and credit card charges. Order and receive inventory, gasoline, auto accessories and food supplies.

The labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Not Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the substitute beneficiary qualifies for the offered position based on experience as a manager at [REDACTED] in Baltimore, Maryland from January of 2006 to July 13, 2007, the date the beneficiary signed the ETA Form 9089. The labor certification also lists the beneficiary's employment as a manager at [REDACTED] from June 2003 to December 2005. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter written on company letterhead from [REDACTED] owner of [REDACTED] who stated that his company employed the beneficiary as a manager from June 2003 to December 2005. However, [REDACTED] only noted that the beneficiary's "...responsibilities included, managing gas station, hire train and supervise," without providing a specific and detailed description of the beneficiary's duties as a manager at [REDACTED]. For this reason, the letter of [REDACTED] cannot be considered as sufficient evidence demonstrating the beneficiary's two years of experience in the proffered job.

In addition, the record contains a separate Form I-140, Immigrant Petition for Alien Worker, [REDACTED], that was previously filed by [REDACTED] for the petitioner, [REDACTED] on March 16, 2004 on behalf of the substitute beneficiary.<sup>4</sup> On the Form ETA 750,

<sup>3</sup> The website at [http://sdatcert3.resiusa.org/UCC-Charter/searchByName\\_a.aspx?mode=name](http://sdatcert3.resiusa.org/UCC-Charter/searchByName_a.aspx?mode=name) revealed that the name of the business entity that was located at this address was [REDACTED]

<sup>4</sup> USCIS administrative procedure requires the creation of a permanent A-file to house the appellate record of any denied immigrant visa petition. USCIS Adj. Field Manual 22.2(l)(2) ("If the grounds

Application for Alien Employment Certification, which accompanied the Form I-140 petition, the beneficiary claimed employment as a manager for [REDACTED] from June 1995 to August 1998. A review of both the Form I-140 petition and Form ETA 750 reveals that both of these documents were prepared by attorney [REDACTED]

In support of his claimed employment as a manager for [REDACTED] in Hapur, India from June 1995 to August 1998, the beneficiary submitted a letter on corresponding letterhead from [REDACTED] that is dated March 17, 2002. The letter is signed by [REDACTED] who listed his position as general manager and stated that the beneficiary had been employed as a manager at this enterprise from June 17, 1995 to August 21, 1998.

As noted in a publicly available press release dated September 22, 2005, from the United States Attorney Office for the District of Maryland [REDACTED] regarding the sentencing of attorney [REDACTED] in the United States District Court for the District of Maryland. This sentencing resulted from [REDACTED] April 14, 2005 criminal conviction at trial by a jury for immigration fraud related to the filing of false immigration documents that allowed illegal aliens to enter and/or remain in the United States.<sup>5</sup> The press release notes the following in pertinent part:

The jury determined that [REDACTED] his law firm, [REDACTED] a businessman and sponsoring employer; and [REDACTED] construction company, [REDACTED] were guilty of filing false labor certifications. [REDACTED] Law Associates, [REDACTED] and [REDACTED] were also convicted of conspiracy to submit false labor certifications and substantive immigration fraud counts.

As a result of [REDACTED] conviction for immigration fraud, an investigation into the origin and authenticity of the employment letter submitted in support of the beneficiary's claimed employment as a manager for [REDACTED] in Hapur, India from June 1995 to August 1998 was initiated. The field investigation attempted to verify the beneficiary's claimed employment as a manager for [REDACTED] in Hapur, India from June 1995 to August 1998. The investigators visited all the [REDACTED] in the vicinity where the beneficiary claimed to have worked because the employment letter signed by [REDACTED] did not

of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with 8 CFR 103.3."). If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

<sup>5</sup> A review of the website at [REDACTED] reveals that [REDACTED] appealed his criminal conviction but that his appeal was dismissed by the United States Court of Appeals for the Fourth Circuit with the previous judgment of the United States District Court District of Maryland being affirmed in all respects.

contain a complete address or contact number for the employer. The investigators visited four different [REDACTED] in the vicinity of Hapur, India, and the managers and owners of these businesses confirmed that no one with the beneficiary's name was ever employed at any of the four [REDACTED]. The fact that the beneficiary's claimed employment as a manager for [REDACTED] in Hapur, India from June 1995 to August 1998 could not be confirmed seriously diminishes the credibility of the employment letter signed by [REDACTED]. Furthermore, the fact that both the Form I-140 submitted on behalf of the beneficiary and the Form ETA 750 listing the beneficiary's claimed employment for HP Gas Station were prepared by [REDACTED] an individual convicted of multiple criminal counts relating to immigration fraud, brings into question the origin and authenticity of the employment letter signed by [REDACTED].

The beneficiary also claimed employment as a manager at [REDACTED] from January of 2006 to July 13, 2007 on the ETA Form 9089. The record contains a Wage and Income Transcript from the Internal Revenue Service (IRS) dated June 30, 2010, which purports to reflect that [REDACTED], paid the beneficiary \$13,495.00 in wages in 2006. However, the record is absent any additional evidence reflecting the beneficiary's employment for this enterprise. Furthermore, it must be noted that there is a publicly available press release dated October 7, 2010, from the Baltimore, Maryland office of the Federal Bureau of Investigation [REDACTED] regarding the sentencing of [REDACTED] the [REDACTED], in the United States District Court for the District of Maryland based upon his criminal conviction for conspiracy to commit labor certification fraud in a scheme in which [REDACTED] charged immigrants thousands of dollars to fraudulently obtain work visas for them. The press release notes the following in pertinent part:

According to [REDACTED] guilty plea, he was a naturalized United States citizen born in Pakistan and was the [REDACTED] located in Baltimore. [REDACTED] submitted numerous applications to the Department of Labor (DOL) seeking certification to employ alien workers at [REDACTED] providing false information regarding jobs he alleged were to be filled by alien workers at [REDACTED] [REDACTED]. In fact, those jobs did not exist.

Once [REDACTED] received certification from DOL to fill the positions at [REDACTED] [REDACTED] he filed petitions seeking to fraudulently sponsor immigrant or non-immigrant aliens on work-related visas. In some instances, those visas would enable the affected alien to apply for lawful permanent resident status. In exchange for his fraudulent sponsorship, [REDACTED] charged each alien a fee of anywhere from \$8,000 to \$10,000. He charged a similar amount to file renewal applications and petitions with the DOL and INS/USCIS to extend the aliens' work-related visas based upon their alleged employment at Super Technologies.

In most instances, the aliens obtained legitimate employment with other employers after obtaining their fraudulent visas through [REDACTED]. In order to make it appear that the aliens were actually working at [REDACTED] required that each alien pay his "salary" to [REDACTED] [REDACTED] through monthly checks or wire transfers

into [REDACTED] bank account. Once monies were received, [REDACTED] would use those funds to cut a "paycheck" to the alien for his alleged wages at [REDACTED] in order to conceal the fact that the [REDACTED] employment alleged in the fraudulent forms filed with the DOL and INS/USCIS did not exist. These alleged "paychecks" also documented certain "miscellaneous deductions" which were kept by [REDACTED] from monies provided to him by each alien. These "deductions" constituted ongoing payments by each alien of [REDACTED] fees for the fraudulent sponsorship, as well as payment for employer-related expenses and taxes such as Social Security and Medicare.

Clearly, this derogatory information seriously impaired the credibility of any claim by the beneficiary of actual, bonafide employment for [REDACTED] at [REDACTED] Maryland. In addition, any purported "salary" paid by [REDACTED] during the beneficiary's alleged employment with this enterprise cannot be considered to be the payment of legitimate wages to the beneficiary as compensation for work he allegedly performed for [REDACTED]. Consequently, the information in the Wage and Income Transcript from the IRS dated June 30, 2010 purportedly reflecting the "salary" paid to the beneficiary by [REDACTED] in 2006 cannot be considered to be an accurate and credible record of a valid commercially-viable employer-employee relationship.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

The employment letter signed by [REDACTED] cannot be considered as sufficient evidence demonstrating the beneficiary's two years of experience in the proffered job because it lacks a specific and detailed description of the beneficiary's duties as a manager at [REDACTED]. The fact that [REDACTED] an attorney convicted of multiple criminal counts for immigration fraud, prepared a separate Form I-140 petition and supporting documents on the beneficiary's behalf raised doubts regarding the origin and authenticity of the employment letter reflecting the beneficiary's claimed employment as a manager at the [REDACTED] in Hapur, India. Investigators visited four different [REDACTED] in the vicinity of Hapur, India, and reported that managers and owners of these businesses confirmed that no one with the beneficiary's name was ever employed at any of the four HP Gas Stations. Finally, the fact that [REDACTED] was convicted for immigration fraud as result of his actions as the [REDACTED], in creating jobs for aliens that did not exist negated the beneficiary's claim of employment as a manager for this enterprise. Consequently, the substitute beneficiary cannot be considered to possess the twenty-four months of experience in the proffered job of supervisor/manager as required by the labor certification.

In response to a NOIR issued by the director and dated July 14, 2011, counsel submitted a statement in which she asserted that the beneficiary had worked as claimed for both [redacted] in India and [redacted] Baltimore, Maryland. Counsel contended that the criminal convictions of both [redacted] and [redacted] for immigration fraud did not necessarily eliminate the possibility that the beneficiary had worked as claimed for these enterprises. Counsel noted that the Wage and Income Transcript from the IRS reflected wages earned by the beneficiary as an employee of [redacted]. Counsel submitted a statement from the beneficiary who claimed that the [redacted] where he had worked was now named [redacted]. Counsel also submitted an affidavit containing an illegible signature which stated the following in pertinent part:

I [redacted] Certify that [redacted] [the beneficiary] Was Employed with us as Manager for Automobile Service Station Soince [sic] June 17<sup>th</sup> of 1995 untill [sic] Aug 21<sup>st</sup> of 1998.

The director determined that the derogatory information relating to the beneficiary's claims of employment for [redacted] and [redacted] in Baltimore, Maryland had not been overcome. Therefore, the director revoked the previously approved petition, made a finding of fraud based upon the beneficiary's misrepresentations relating to his work experience, and invalidated the labor certification on January 24, 2012.

On appeal, counsel reiterates the arguments she put forth in response to the NOIR. However, the fact that both [redacted] and [redacted] were convicted for immigration fraud raised doubts regarding the beneficiary's claimed employment for [redacted] India and [redacted] Maryland. Attempts by investigators in India to confirm the beneficiary's claimed employment at [redacted] were unsuccessful and [redacted] was convicted for immigration fraud because he created jobs for aliens that did not exist at [redacted]. The detail and scope of [redacted] criminal activities was so involved that information in the beneficiary's Wage and Income Transcript from the IRS cannot be considered as accurate and reliable since the fraud report notes that employees paid their own wages. Finally, the beneficiary's claim that [redacted] where he had worked was now named [redacted] directly contradicted information in the affidavit noted above which specified that the name of the [redacted] had been changed to [redacted].

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* In the instant case, neither counsel nor the petitioner has submitted sufficient independent objective evidence to resolve either the inconsistencies related to the beneficiary's purported work history or the lack of reliability attached to the beneficiary's Wage and Income Transcript from the IRS.

The director's determination that the petition was incorrectly approved because the beneficiary was not qualified for the position as of the priority date is good and sufficient cause for the revocation of the approval of the immigrant petition.

Finally, whether or not the beneficiary had the prerequisite work experience for the proffered position as of January 10, 2006 (the priority date) is material in this case, and USCIS could not have approved the petition, or sustained the appeal, before determining that the petition in this case is free of fraud or material misrepresentation.

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. at 591-592.

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>5</sup>

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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

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 twenty-four months of experience to be qualified 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 signing the ETA Form 9089, Part L, that he qualified for the position stated on the labor certification application through his employment with [REDACTED] of Baltimore, Maryland. On the certified ETA Form 9089, the beneficiary claimed to have been employed by [REDACTED], as a manager from January 2006 to July 13, 2007. The only document submitted to support that the beneficiary qualified for the

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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 director has the authority to enter a fraud finding, if during the course of adjudication, fraud or a material misrepresentation is disclosed. In this case, the petitioner has been given notice of the proposed findings as stated in the NOIR and has been presented with an opportunity to respond to the same. Alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano*, 19 I&N Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) (“We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.”).

proffered position is a Wage and Income Transcript from the IRS dated June 30, 2010. In addition, the beneficiary also certified, upon signing a separate Form ETA 750, Part B that is contained in the record, with the DOL that he qualified for the position stated on that labor certification application through his employment with as a manager for [REDACTED] from June 1995 to August 1998. In support of his claimed employment, the beneficiary submitted a letter with a corresponding letterhead for [REDACTED] that is dated March 17, 2002 and signed by [REDACTED]

The director, before issuing the decision revoking the petition's approval, specifically informed the petitioner in the NOIR issued on July 14, 2011, of derogatory information relating to the beneficiary's claimed employment for [REDACTED] and [REDACTED]. Based on the noted inconsistencies and the petitioner's failure to overcome such derogatory information, the director found that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience for [REDACTED] in Baltimore, Maryland.

On the true facts, the beneficiary was 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 previous petitioner, [REDACTED] 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 in both the current and former petitions, 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 the evidence in the record does not establish that the beneficiary possesses twenty-four months of work experience as a manager. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his credentials 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 falsified work experience documents shuts off a line of relevant inquiry in these proceedings. Before the DOL in the Form ETA 750 filed by R.U.A. Inc., 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 R.U.A. Inc.'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. at 403. In the current case, the beneficiary is a substituted alien whose work experience claims were never presented to the DOL. Nevertheless, as the substituted alien's fraudulent work experience with [REDACTED] was submitted directly to USCIS in this proceeding and the beneficiary claimed by signing Part L of the ETA Form 9089 that this experience qualifies him for the proffered position, the beneficiary has likewise shut off a line of inquiry relevant to admissibility which might have resulted in a proper determination that the beneficiary be excluded. The DOL delegated responsibility for substituting labor certification beneficiaries to USCIS. See 72 Fed. Reg. 27904 (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 and reflects the DOL's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program.<sup>6</sup> Finally, the fraudulent work experience with [REDACTED] in the previous proceeding was material in the current proceeding, even though this experience was not listed by the substituted alien on Part K of the ETA Form 9089, because it casts doubt on the credibility of all of his work experience. The HP Gas Station experience was what allegedly qualified him for the position with [REDACTED], which experience allegedly qualified him for the current proffered position by [REDACTED]. Accordingly, the beneficiary's misrepresentations were 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

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<sup>6</sup> The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). See also, *Madany v. Smith*, 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 (1<sup>st</sup> Cir. 1981).

considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

The petitioner has not submitted credible evidence to overcome the derogatory information relating to the beneficiary's claimed employment for [REDACTED] and [REDACTED], in Baltimore, Maryland. As noted above, it was proper for the director to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The director specifically issued the NOIR notice to the petitioner to allow the petitioner an opportunity to respond or submit evidence to overcome the alleged misrepresentation.

By signing the Form ETA 750 and ETA Form 9089, and submitting a fraudulent work experience letter and misrepresenting his work experience, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of material facts. Because the petitioner has failed to provide independent and objective evidence to overcome the finding that the beneficiary submitted falsified documents and misrepresented his work experience, we affirm the director's material misrepresentation finding. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 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. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The AAO also affirms the director's invalidation of the ETA Form 9089 in the instant case pursuant to 20 C.F.R. § 656.30(d) based on the beneficiary's misrepresentation regarding his experience for the proffered position. This is a material fact involving the labor certification.

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.

**ORDER:** The appeal is dismissed with an affirmation of the finding of willful misrepresentation of a material fact against the beneficiary.

**FURTHER ORDER:** The AAO affirms the finding 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, ETA Form 9089, ETA case number A-06010-73003, filed by the petitioner will remain invalidated.