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



U.S. Citizenship
and Immigration
Services



B6

DATE: **AUG 23 2012** Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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 with the field office or service center that originally decided your case by filing a 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 Director, Texas Service Center, initially approved the preference visa petition. Upon review of the record, the director subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director 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.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican Specialty Cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.² Upon reviewing the petition after issuance of the NOIR, the director determined that the beneficiary did not satisfy the minimum requirements for work experience stated on the labor certification as the evidence submitted to establish the beneficiary's qualifications conflicted. The director revoked the petition's approval with a finding of fraud based on "false evidence" that the beneficiary submitted related to his experience.

On appeal, the petitioner,³ through counsel, submitted additional evidence relating to the beneficiary's date of entry into the United States and maintains that the petition should be approved.⁴

¹Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

²DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). USCIS evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable includes a review of whether the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i). USCIS has authority to evaluate whether the alien is eligible for the classification sought and has authority to evaluate whether the alien is qualified for the job offered.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, *Mandany 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).

³It is noted that "Ramon Ornelas," the petitioner's owner and manager, pleaded guilty on February 24, 2010 in federal court, to eight counts of harboring and concealing illegal aliens, three counts of mail fraud, and seven counts of subscribing to a false tax return. He was sentenced in Cleveland,

Ohio on June 28, 2010, to serve 12 months and a day in prison, followed by two years of supervised release, and ordered to pay a \$1,800 special assessment. According to court records, Mr. [REDACTED] the [REDACTED] Mexican restaurants, routinely employed illegal aliens, paid them in cash without withholding of FICA and Medicare taxes for the Internal Revenue Service (IRS), and submitted false documents to the Ohio Department of Job and Family Services, which did not report the names of undocumented workers. [REDACTED] filed false Forms 941(s), Employer's Quarterly Federal Tax Return(s), which did not name undocumented workers and underreported taxes due and owing. See <http://www.irs.gov/compliance/enforcement/article/0,,id=213769,00.html> (accessed August 8, 2012); also <http://www.sanduskyregister.com//norwalk/2010/feb/25/casa-fiesta-owner-pleads-guilty> (accessed January 9, 2012).

Given the above information, the AAO finds that the petitioner's ability to pay the proffered wage of \$1,980 per month (annualized to \$23,760) pursuant to 8 C.F.R. § 204.5(g)(2) is at issue in any further filings. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The reliability of the 2004 and 2005 corporate federal income tax returns submitted in support of the petition is in question based on Ornelas' falsification of other tax documents. Additionally, the AAO notes that United States Citizenship and Immigration Services (USCIS) electronic records indicates that the petitioner has filed at least four other Form I-140(s), Immigrant Petition for Alien Worker(s). In any further filings, these issues should be addressed. Relevant to the ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Where multiple beneficiaries are sponsored, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

⁴The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well

Section 205 of 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).

As noted herein, the petitioner must establish that its Form ETA 750 job offer to the beneficiary is realistic. The petitioner must show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL’s employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing’s Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case the priority date is December 27, 2004, as stated on the Form ETA 750 filed on behalf of the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on September 23, 2006, it is indicated that the petitioner was established on May 10, 2000 and employs 10 workers.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petition was approved on November 27, 2006. On June 23, 2010, the director issued a NOIR. With reference to the beneficiary’s qualifying employment experience stated to have been gained in Mexico, the director stated that:

recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

In the labor certificate ETA 750, part 15, section b, it was indicated that the beneficiary was employed with Mi Pueblito Restaurant from July 1996 to December 1998.

The petitioner submitted an employment letter verifying the beneficiary two years experience. The letter from Mi Pueblito indicated that the beneficiary worked as a Mexican Cuisine Chef from July 1, 1996 until December 31, 1998. On July 15, 2009 the beneficiary was interviewed by USCIS.⁵ In the course of the interview [the beneficiary] testified that he entered the United States in the earlier part of 1998 and remained in the U.S. for a year and a half before departing in November or December 1999. As per the beneficiary he stated that he entered the U.S. in the earlier part of 1998, this statement raises questions on the date of employment provided in the letter from Mi Pueblito.

The employment verification letter referred to by the director is dated July 14, 2006 and signed by the [REDACTED]. It is noted that this letter does not state whether the employment claimed was part-time or full-time.

The petitioner was afforded 30 days to respond to the director's NOIR. In response, the petitioner submitted an affidavit from the beneficiary. The beneficiary states that in the adjustment interview, "I may have mis-stated my date of entry. I entered the United States in April 1999." He continues to state that he worked at Mi Pueblito in "1996," and that he stopped working there in December of 1998. The beneficiary claimed that he was nervous in the interview and blamed his former lawyer for failing to prepare him for the interview.⁶ The beneficiary ends by stating that he would be submitting supplemental information for this appeal that is currently arriving from Mexico.

⁵This interview was conducted pursuant to the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status.

⁶ It is noted that an appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this case, there is no evidence that any of the three requirements have been fulfilled.

On January 11, 2012, the director issued the NOR. The director discounts the beneficiary's claim of nervousness and reiterated that the beneficiary testified at his adjustment interview that he entered the United States in the earlier part of 1998 and remained for a year and a half before departing in November or December 1999. The director concludes that the beneficiary could not have been employed by Mi Pueblito restaurant during the final eight months of the time frame stated on the employment verification letter and on Part B of the Form ETA 750. He notes that both the beneficiary and his brother (A 88 872 960), who is sponsored by the petitioner on another Form I-140, both testified during their adjustment interviews (which were held on the same date, July 15, 2009) to entering the U.S. in 1998. The instant beneficiary stated that he entered in April 1998 and his brother characterized his entry as occurring in the earlier part of 1998 (approximately spring). The beneficiary's brother stated that he returned to Mexico in either November or December 1999.⁷

The director concluded that the beneficiary's qualifying employment experience had been falsely claimed and that fraudulent documents in the form of false experience letters had been submitted to support that claim. Additionally, the director noted in his revocation that:

The record shows that a previous Form I-140 for the same beneficiary was filed July 8, 2002; the petitioner submitted as evidence of beneficiary's job experience letters from Mi. Pueblito Restaurant. The letters stated the beneficiary worked as a cook from August 1995 through January 1998. The letters were from the same restaurant, and signed by the same person as the letter submitted with the instant Form I-140. However, the dates of employment do not match. It is also noted that the same restaurant, with the same signer, submitted identical employment letters (word-for-word except for the names of the employees) for the two I-140 petitions filed on behalf of both the beneficiary and his brother. Both he and his brother testified during interview that they were in the United States when, according to the letters, they were working in Mexico.

The director revoked the petition's approval with a finding that an immigration benefit had been sought through fraud and misrepresentation of a material fact and cited Section 212 of the Act that the "finding of fraud shall be considered in any future proceeding where admissibility is an issue."⁸

On appeal, counsel submits additional evidence in the form of letters from friends, acquaintances and family in the United States. The letters are from friends, [REDACTED] acquaintances [REDACTED] the beneficiary's sister and brother-in-law [REDACTED] [REDACTED] and a customer of the restaurant where the beneficiary works, [REDACTED]. The letters all

⁷ It is noted that the beneficiary's date of last arrival in the United States is claimed as April 9, 2000 on his Form I-485 and March 2000 on the Form I-140. Although additional notes on the Form I-485 made during the I-485 interview state that the beneficiary previously arrived in 1998 (entry without inspection) and stayed until 1999 for approximately one and one-half years.

⁸ The director's revocation states that the petitioner signed and certified the I-140 petition attesting to its contents and took "legal responsibility for its truth . . . However, you [the petitioner] have submitted fraudulent evidence."

generally describe the nature of their acquaintance with the beneficiary and recount their belief when the beneficiary entered the United States. Counsel asserts that the petition's approval should not have been revoked based on the beneficiary's nervousness and faulty recollection of dates at the adjustment interview and that together with the letters submitted on appeal and "the original dates contained in all previously filed documentary evidence" are sufficient to establish the beneficiary's physical date of entry without inspection as approximately April 1999. Counsel does not specifically address the two discrepant employment verification letters that the petitioner submitted to the record and submits no further corroborating evidence of the beneficiary's employment at Mi Pueblito.

It is noted that the Form ETA 750 in this case requires that the applicant for the certified job offer of Mexican Specialty Cook requires only that the applicant have two years of work experience in the job offered.

Additionally, it is noted that counsel has never submitted any supplemental information from Mexico that the beneficiary referenced in his beneficiary's affidavit. The AAO finds that the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). It is further noted that the letters submitted on appeal from friends, family and acquaintances of the beneficiary who anecdotally relate what date they believe the beneficiary entered the United States do not provide first-hand evidence of either the beneficiary's date of entry without inspection or his qualifying employment experience in Mexico. *See Matter of Soffici*, 22 I&N Dec. 158 at 165. Finally, the AAO finds it notable that both brothers attested in virtually identical affidavits as to their individual nervousness during separate adjustment interviews, but managed to recollect the same approximate dates of entry to the United States as either the earlier part of 1998 (the instant beneficiary) or April 1998 (his brother).

Additionally, it is noted that both the instant beneficiary and his brother submitted identical employment letters from Mr. [REDACTED] claiming the same employment in the same job of Mexican Cuisine Chef except for the change of names. Further, in support of a previously filed Form(s) I-140(s) for both brothers, additional identical employment verification letters from [REDACTED] have also been submitted for the brothers but claiming different employment dates of August 1995 to January 1998 for each brother.

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).⁹

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, the AAO finds, in accordance with the director’s NOR, that the petitioner’s documentation and representation that the beneficiary acquired two years of employment experience as a Mexican Specialty Cook was false.

A material issue in this case is whether the beneficiary has the required employment experience for the position offered. Submitting a false employment verification letter and falsely representing the beneficiary’s qualifying experience on the Form ETA 750 amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that

⁹ 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. 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, the record discloses fraud or a material misrepresentation.

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.¹⁰

The AAO therefore makes a finding of willful misrepresentation.¹¹ This finding shall be considered in any future proceeding where admissibility is an issue. The AAO will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's and the beneficiary's willful misrepresentation regarding the beneficiary's qualifying experience for the proffered position.

In view of the foregoing, the AAO finds that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Esteime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the

¹⁰ See *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.

¹¹ See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

As the director stated that the petition was revoked with a finding of fraud, that the petitioner had attested to the "truth and accuracy of any and all information submitted in support of . . . [the] petition," and that the "beneficiary has clearly submitted false evidence in the form of the experience letters," the labor certification is considered to be invalidated.

time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial for good and sufficient cause.

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.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary willfully mislead DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the misrepresentation.