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

[redacted]

B6

DATE: DEC 0 8 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center (director). On Febuary 23, 2009, the director issued a Notice of Intent to Revoke (NOIR). In a Notice of Revocation (NOR) dated March 24, 2010, the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

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).

The petitioner describes itself as a retail convenience store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition was filed with a labor certification approved by the U.S. Department of Labor (DOL) on behalf of another beneficiary.[1] The petitioner properly filed the Form I-140, Immigrant Petition for Alien Worker, on behalf of the instant beneficiary on May 17, 2005. The director revoked the petition, finding that the beneficiary failed to demonstrate the requisite experience for the job.

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.[2]

As set forth in the director's March 24, 2010 Notice of Revocation (NOR), an issue in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position.

Section 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.

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[1] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The priority date is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

In the instant case, the Form ETA 750 was accepted on April 27, 2001. The Form ETA 750 states that the position requires eight years of grade school and three years of experience in the job offered as a manager. The beneficiary signed the Form ETA 750B 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.

On Form ETA 750B, the beneficiary claims to have completed elementary school and two years of high school in Ahmedabad, India from 1969 to 1979, and to have received his high school diploma in 1981 from Vishwabharati High School in Ahmedabad, India. The beneficiary also claims to have worked at Radhe Super Stores in Ahmedabad, India, as a retail store manager from January 1991 to November 1995, and at New Medical Stores in Ahmedabad, India, as a manager from March 2000 to the date of the signed Form ETA 750B (April 28, 2005).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted a copy of the beneficiary's high school certificate, reflecting his attendance from July 1979 to July 1981. The petitioner also provided three employment letters. The letter from Radhe Super Stores states that the beneficiary worked as a store manager from January 1991 to November 1995. The letter from Raj Kamal Pottery Works states that the beneficiary was employed as a partner in charge of operations from June 1996 to December 1999. The letter from New Medical Stores states that the beneficiary was employed as a manager since March 2000, with the exception of a one year absence from June 2004 to May 2005.

In the director's February 23, 2009 NOIR, he cited an interview conducted by a consular officer with the beneficiary. The record reflects that during his July 17, 2008 interview, the beneficiary confessed to submitting fraudulent experience letters to qualify for immigration benefits. The beneficiary revealed that he is a partner, with his mother, of New Medical Stores, but he is not involved in managing or working at the store, and that he had a paid employee sign his experience letter. The beneficiary signed a sworn statement, stating that the New Medical Stores letter was mistakenly signed by and he requested that his application be closed.

The director determined that the beneficiary was a partner of New Medical Stores and the employment letter was signed by an unauthorized signatory, The director further determined that the letter from Raj Kamal Pottery Works was fraudulent because the company went out of business and the letter was signed by the beneficiary's uncle, The director also stated that the beneficiary failed to list Raj Kamal Pottery Works as an employer on his Form ETA 750B.

In response to the NOIR, and again on appeal, counsel provided business documentation from New Medical Stores. The documentation establishes that the beneficiary and his mother are partners, 65% and 35% respectively, in New Medical Stores, and is designated as an authorized signer for the owners of New Medical Stores. This information fails to demonstrate that the beneficiary was employed as a manager with New Medical Stores. Rather, the documents clearly establish that the beneficiary was a partner of New Medical Stores. None of the evidence submitted addresses the job title or job duties assigned to the beneficiary at New Medical Stores.[3] Therefore, none of the evidence submitted supports the information listed by the beneficiary on Form ETA 750B, nor in the original experience letter signed by

Counsel also provided a statement from the beneficiary's uncle, confirming his previously submitted statement and reiterating that the beneficiary was a partner of Raj Kamal Pottery Works in charge of operations and supervised thirty-four employees. The evidence confirms that Raj Kamal Pottery Works was closed in 2003. None of the evidence submitted explains why a defunct company's letterhead was used in support of the immigrant visa petition. Further, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Counsel asserts that even if the beneficiary's experience at Raj Kamal Pottery Works and New Medical Stores were false, the beneficiary would still meet the requirements of the labor certification due to his experience with Radhe Super Stores. The director determined that counsel was misguided and the AAO agrees. Upon review of the record, the inconsistencies between the beneficiary's Form ETA 750B and other documentation in the record casts doubt on the overall credibility of the beneficiary's work experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Further, while counsel provided documentation to clarify the beneficiary's ownership interest, counsel failed to explain the beneficiary's sworn statement requesting to close his application.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to

[3] The affidavit signed by states that the beneficiary has been active in the daily operation of the business, but does not include a job title or job duties.

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 willful misrepresentation of a material fact occurs is one which "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- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). By misrepresenting his ownership interest in companies, the beneficiary shut off a line of inquiry regarding the veracity of his work experience required for the proffered position, which was key to the his eligibility and may have excluded him.

On appeal, counsel contends that the director did not have good and sufficient cause to revoke the approval of the petition. The AAO disagrees. By misrepresenting his work experience, the beneficiary sought to procure a benefit provided under the Act through fraud and 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 the NOR, the director stated that the beneficiary could not conduct his interview in English, let alone write and understand it. The labor certification lists numerous job responsibilities neccessitating the use of the English lanugage. On appeal, counsel asserts that the director raised this issue for the first time in the NOR and the petitioner must be given an opportunity to offer evidence in support of the petition. Counsel provided a statement from the petitioner's owner, [redacted] stating that the beneficiary's knowledge of the English language is more than sufficient to handle the duties. The AAO finds this statement to be sufficient. This portion of the director's decision is withdrawn.

Based on the above, the petitioner has failed to demonstrate that the beneficiary is qualified for the offered position. Accordingly, the petition will be denied.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.