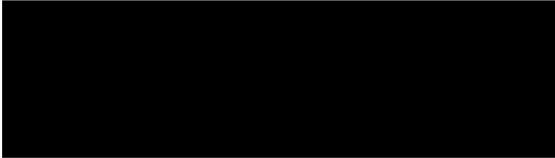


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

BE



DATE: **DEC 13 2012** OFFICE: NEBRASKA 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.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative (Form I-130), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, 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 record shows that the appeal is properly filed, timely 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 petitioner is a gas station with a food mart. It seeks to employ the beneficiary permanently in the United States as a general manager for the gas station. The petition was filed for classification of the beneficiary under section 203(b)(3) of the Immigration and Nationality Act (the Act). As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL).

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.¹

The petitioner's Form ETA 750 was filed with DOL on April 26, 2001 and certified by DOL on October 12, 2005. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on December 23, 2005, which was approved on February 8, 2006. The merits of the Form I-140 have never been in question.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130 was filed on the beneficiary's behalf on April 16, 1997. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a marriage certificate between the beneficiary and [REDACTED]

In connection with the Form I-130, a decision was issued by the district director of the USCIS office located in New York on April 6, 2000. The decision denied the Form I-130 for failure to appear for a scheduled interview.

¹ 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). 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).

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)² no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On June 29, 2009, the director sent a NOIR to the petitioner stating the following:

On March 18, 2009, the beneficiary gave sworn testimony during his adjustment of status interview that he entered into a marriage with [REDACTED] for the sole purpose of procuring an immigration benefit. The beneficiary also testifie[d] that he compensated [REDACTED] \$650 [per] month for marrying him and to procure immigration benefits.

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 his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out that both the beneficiary and his attorney signed a statement on March 18, 2009 stating that his statement was “freely and voluntarily given.” and thus was properly issued for good and sufficient cause.

In response to the NOIR, the petitioner stated, through counsel, that the beneficiary entered the stated marriage in good faith. Counsel states that there is sufficient evidence that the beneficiary was coerced into signing the statement and that prior counsel’s signature on the same statement raises a question as to prior counsel’s competence. Finally, counsel states that the payments in the amount of \$650 mentioned by the beneficiary in his statement were for household expenses.

On January 27, 2010, the director issued a second NOIR addressing the petitioner’s statement in reponse to the June 29, 2009 NOIR. The director noted a pattern of inconsistencies in the beneficiary’s various petitions and applications. The director also questioned whether the I-140 petition was based on a bona fide job offer in light of the familial relationship between the petitioner

² Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

and the beneficiary. Finally, the director noted that the beneficiary appears to have willfully misrepresented a material fact on the Form ETA 750B.

On March 30, 2010, the director revoked the approval of the I-140 visa petition for the reasons noted in his January 27, 2010 NOIR.

On appeal, counsel asserts that the beneficiary was coerced into signing the March 18, 2009 statement. Counsel states that the record contains a statement from a former landlord indicating that the beneficiary and [REDACTED] lived together. Counsel also states that the \$650 mentioned by beneficiary in his March 18, 2009 refers to the money that he paid for household expenses. Counsel argues that the beneficiary did not receive adequate representation from prior counsel. Finally, counsel states that the Form ETA 750 does not require disclosure of a familial relationship and that the petitioner would have voluntarily provided this information.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. See also *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary.

In his March 18, 2009 statement, the beneficiary stated that he “entered into a marriage with [REDACTED] [REDACTED] for the sole purpose of procuring an immigration benefit. [He] compensated [REDACTED] [REDACTED] about \$650 month for marrying [him] to help procure immigration benefits.” The statement was signed by the beneficiary and his counsel. Although the petitioner states that the beneficiary was coerced into signing the statement, the petitioner has provided no objective evidence of such coercion. The statement in the record from the beneficiary’s wife, [REDACTED] states that the immigration officer repeatedly asked the beneficiary and his counsel to sign the statement until they both signed it. This statement does not establish that the officer coerced the beneficiary and the former wife into signing the statement. There is nothing in the record to indicate that the statement was coerced and the petitioner has not submitted independent and objective evidence of coercion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted by the director in his decision, the statement from the beneficiary’s previous landlord lacks details or independent and objective evidence in support of his statement that the beneficiary lived with [REDACTED] in 1997. The statement fails to provide concrete information, specific to the

beneficiary and generated by his asserted associations with the beneficiary and [REDACTED] which would reflect and corroborate the extent of those associations, and demonstrate that the landlord has a sufficient basis for reliable knowledge about the beneficiary and [REDACTED] life together. For example, the statement does not indicate the rent amount that was paid by the beneficiary, does not provide details of their lives in the building, and does not state how he remembers the beneficiary and [REDACTED]. Given this, the statement provides little probative value and shall be afforded minimal weight as evidence in support of the petition.

Counsel states that the \$650 monthly payments mentioned in the beneficiary's statement were for household expenses, but again, the record contains no independent and objective evidence supporting counsel's statement. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Further, as noted by the director, neither the petitioner nor the beneficiary in the Form I-130 adjudication submitted the requested documentary evidence to establish that their marriage together was bona fide, such as documents showing joint ownership of property, comingling of financial resources, jointly held bank accounts, credit cards or insurance policies, joint income tax returns or birth certificates of children born to the marriage.

Although the petitioner claims that the beneficiary's prior counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

In view of the above, the AAO finds that the record establishes that the beneficiary has entered into a marriage for the purpose of obtaining immigration benefits, and as such, is ineligible for benefits under section 204(c) of the Act.

The director also found that the petition was not approvable because the petitioner did not establish bona fides of the job offer. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be

“financial, by marriage, or through friendship.” *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS 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 a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor’s Office of Inspector General.³

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). “The intent to deceive is no longer required before the willful misrepresentation charge comes into play.” *Id.* at p. 290.⁴ The term “willfully” means knowing and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. *See*

³ The current regulation provides: provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 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. 20 C.F.R. § 656.30 (2010).

⁴ In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

Matter of Healy and Goodchild, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be 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 Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

In the circumstances set forth in this case, failure to disclose the beneficiary’s relationship to the petitioning company amounts to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), (materiality is a legal question of whether “misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect the official decision.”) In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any “alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. An alien may be found inadmissible 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). 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, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut 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.

The failure to disclose the fact that the beneficiary was the petitioner’s brother was a material misrepresentation that was willful. On appeal, the petitioner states that he did not know that he needed to disclose his familial relationship with the beneficiary and that he would have done so if asked. However, failure to disclose the relationship cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment.

The petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship interest of the beneficiary to the petitioner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact. In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis. The labor certification is invalid.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary’s prior marriage was entered into for the purpose of evading the immigration laws. Thus, the director’s determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.

FURTHER ORDER: The AAO finds that the petitioner’s job offer was not *bona fide* based on the beneficiary’s undisclosed relationship interest to the petitioner, which constituted willful misrepresentation of a material fact underlying 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. § 656.30(d) based on the petitioner’s willful misrepresentation.