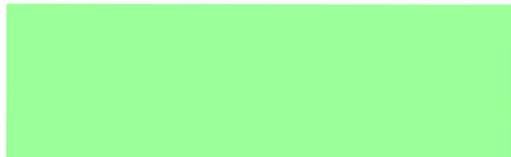


(b)(6)

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

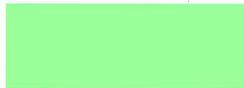


U.S. Citizenship
and Immigration
Services

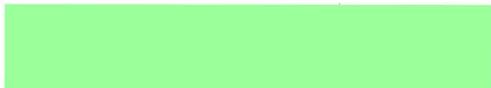


Date: JUL 12 2012

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 immigrant visa petition was denied by the Director, Texas Service Center. The petitioner filed two motions to reopen and reconsider the director's decision. The director dismissed both motions. The director's dismissal of the second motion also invalidated the underlying labor certification based on a finding that the beneficiary had misrepresented a material fact. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a convenience store. It seeks to permanently employ the beneficiary in the United States as a store manager. The petition 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).¹

The record contains a copy of a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).² The priority date of the petition is April 27, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

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.³

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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 director permitted the requested substitution.

³ 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).

The issues in this case are whether the petitioner demonstrated that the beneficiary possessed the experience required to perform the duties of the offered position as set forth on the labor certification, and whether the beneficiary made a willful misrepresentation of a material fact in these proceedings.

Whether the Beneficiary Possesses the Required Experience for the Offered Position

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor 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).

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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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.

In the instant case, the labor certification states that the offered position of store manager has the following minimum requirements:

EDUCATION

- Grade School: None.
- High School: None.
- College: None.
- College Degree Required: None.
- Major Field of Study: None.

TRAINING: None Required.

EXPERIENCE: Two years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

Item 15 of Form ETA 750B states that the beneficiary qualifies for the offered position based on experience as a manager at [redacted] from March 2001 until

September 2004; and as a manager at [REDACTED] from June 1999 to December 2000. The beneficiary signed the form on October 19, 2006 under a declaration that the contents are true and correct under the penalty of perjury. No other experience is listed on the labor certification.

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

(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.

The record contains the following experience letters as evidence of the beneficiary's claimed employment:

- Letter from [REDACTED] owner, on what purports to be [REDACTED] letterhead (at [REDACTED] stating that the company employed the beneficiary as a manager from June 1999 until December 2000;
- Letter from [REDACTED] owner and payroll director, on what purports to be [REDACTED] letterhead (at [REDACTED] stating that the company employed the beneficiary as a sales associate from January 2001 until December 2002. This letter was submitted after the denial of the petition on motion; and
- Letter from an unidentified individual, on what purports to be [REDACTED] letterhead (in [REDACTED], stating that the company employed the beneficiary as an assistant manager from January 1995 until July 1998. This letter was also submitted after the denial of the petition on motion.

The record does not contain an experience letter for the beneficiary's claimed employment at [REDACTED] as stated on the ETA 750B. None of the experience letters are on professionally generated letterhead.

The letter from [REDACTED] is on letterhead even though the author claims that she had previously sold the business. The experience claimed in the letter from [REDACTED] is not listed on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). However, the record contains copies of the beneficiary's Forms W-2 from [REDACTED] for the years 2000, 2001 and 2002, and the address stated on the Forms W-2 is consistent with the address on [REDACTED] letter. Nonetheless, since the priority date of the instant petition is April 27, 2001, only the beneficiary's employment from January 2001 through April 2001 can be considered towards qualifying for the offered position. The experience letter from [REDACTED] fails to state the beneficiary's duties and whether he was employed full-time. The letter also states that the beneficiary was employed as a sales associate,

rather than as a store manager. Therefore, the petitioner failed to establish that any of the beneficiary's claimed employment at [REDACTED] constitutes experience in the job offered by the priority date.

Counsel claims that "[REDACTED] are the same employer. The experience letter from [REDACTED] describes the beneficiary's employment as a manager from June 1999 to December 2000. Counsel claims that the beneficiary worked as a manager at [REDACTED] from June 1999 to December 2000 and then stepped down to work as a sales associate. Nonetheless, the claimed period of managerial employment is for less than two years. The letter also fails to state whether the beneficiary was employed on a full-time basis. As is noted above, the letterhead contains misspellings of the name and address of the employer. Unlike with [REDACTED] letter, there are no Forms W-2 in the record to corroborate this claimed period of employment. In addition, the letter from [REDACTED] does not refer to this claimed period of managerial employment.

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 petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Given the irregularities described above, it is concluded that the employment letter of [REDACTED] is fraudulent, and that the beneficiary falsely claimed on the ETA 750B to have been employed as a manager with [REDACTED] from June 1999 until December 2000. The misspellings of the employer's name and address on the letterhead, the lack of corroborating evidence of the claimed employment, and the fact that [REDACTED] letter only mentioned the beneficiary's employment as a sales associate and not as a manager, all lead to the conclusion that the beneficiary manufactured this managerial employment experience in order to attempt to qualify for a labor certification which was originally filed on behalf of another beneficiary.

Finally, the letter from [REDACTED] fails to state the name and title of the author, and whether the beneficiary worked on a full-time basis. The claimed employment was not listed on the labor certification, making it less credible. *See Matter of Leung*, 16 I&N Dec. at 2530. *See also, Matter of Ho*, 19 I&N Dec. at 591-92.

In addition, the dates of employment provided on the letter, January 1995 to July 1998, conflict with other evidence in the record. Specifically, the evidence in the record of proceeding shows that the beneficiary initially entered the United States on August 11, 1993. The record contains a decision from the Executive Office for Immigration Review dated May 17, 1996. In the decision, Immigration Judge William J. Martin ordered the beneficiary to be deported to Pakistan, and the record shows the beneficiary was deported on October 16, 1997. The evidence in the record also indicates that the beneficiary unlawfully obtained a nonimmigrant visa using another name and reentered the United

States on February 14, 1999. Therefore, the dates the beneficiary was physically present in the United States for part of the time he claims to have been working in Pakistan at [REDACTED] 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. at 591-92. Moreover, the beneficiary did not list the claimed employment with [REDACTED] on the ETA 750B. Therefore, it is also concluded that the letter submitted for the beneficiary's claimed employment at [REDACTED] in Pakistan is fraudulent.

The AAO cannot conclude that the beneficiary possesses the required experience for the offered position because there are unresolved inconsistencies in the record and because two of the letters submitted to establish the claimed experience are fraudulent. The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

The director also invalidated the labor certification because he determined the information stated regarding the beneficiary's employment was not correct. Additionally, the director cited information regarding the beneficiary's education listed on a separate Form I-129 petition which was not disclosed on the labor certification. The director viewed these discrepancies and omissions related to the beneficiary's employment and education as material misrepresentations of fact.

An alien is inadmissible to the United States where he or she "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." See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).⁴ If USCIS determines that there was fraud or

⁴ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary").

Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. See 8 C.F.R. §§

willful misrepresentation involving a labor certification application, the application shall also be invalidated. *See* 20 C.F.R. § 656.31(d)(2004).⁵

In order for the petition to be approved, the petitioner was required to establish that the beneficiary possessed two years of experience as a store manager by the priority date. The petitioner and the beneficiary submitted fraudulent experience letters and incorrectly claimed managerial experience on the labor certification in order to establish that the beneficiary possessed the necessary managerial experience. Therefore, the misrepresented work experience was material to the instant proceedings. Even if the beneficiary were not inadmissible on the true facts, the beneficiary's use of forged and/or falsified work experience documents shut off a line of relevant inquiry in these proceedings. Accordingly, the beneficiary's misrepresentation was material. *See Matter of S-- and B--C--*, 9 I&N Dec. at 447. By misrepresenting his work experience and submitting fraudulent documents to USCIS, the beneficiary sought to procure a benefit provided under the Act through willful misrepresentation of a material fact.

In summary, the AAO concludes that the petitioner and 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. The beneficiary provided the documentation, and the petitioning company transmitted these documents to USCIS in support of its I-140 petition. As a result, the petitioner and the beneficiary are both culpable. These letters were submitted with the knowledge of their falsity, and the letters were material to the beneficiary's immigration proceedings as they were

204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.17(i), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

⁵ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 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. § 656.31(d)(2004) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

necessary to establish that he possessed the required experience for the offered position set forth on the labor certification.

Further, in addition to making a determination that the petitioner and the beneficiary made a willful misrepresentation of a material fact involving the petition and the labor certification, the AAO is also invalidating the labor certification pursuant to 20 C.F.R. § 656.31(d)(2004).

Finally, regarding the beneficiary's education, on the ETA 750B, the beneficiary listed "n/a" in the section for education. The director concluded that this was a misrepresentation of a material fact because a separate Form I-129 filed on behalf of the beneficiary states that he possessed computer-related education. The omission on Form ETA 750B of education stated on a separate nonimmigrant petition is not, by itself, a misrepresentation of a material fact. There were no educational requirements for the offered position. Therefore, in the instant case, stating "not applicable" in response to the education section of ETA 750B is not a material misrepresentation, regardless of the level education the beneficiary may or may not possess. Therefore, the director's conclusion regarding the misrepresentation of the beneficiary's education is withdrawn.

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 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 AAO invalidates the labor certification based on a determination of willful misrepresentation of a material fact involving the labor certification pursuant to 20 C.F.R. § 656.30(d).