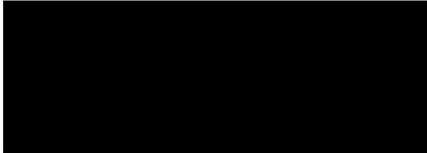


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **JUL 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. On May 11, 2012, the AAO issued a Notice of Derogatory Information (NDI) and Notice of Intent to Deny (NOID) to the petitioner and the beneficiary¹ detailing the indices of misrepresentation and fraud contained in the record relevant to the beneficiary's claimed employment experience. Thirty (30) days was allotted to the petitioner or the beneficiary to respond. In response, the petitioner's president has requested that its appeal be withdrawn and he disclaims any knowledge of fraud or misrepresentation. The appeal will be dismissed based on its withdrawal by the petitioner with a separate finding of fraud against the beneficiary. The labor certification application will also be invalidated based on the fraudulent misrepresentation contained in the record relevant to the beneficiary's experiential qualifications represented on the Form ETA 750 and the fraudulent employment verification letters submitted to the record.

The petitioner seeks the beneficiary's classification as a Restaurant Cook, Indian Cuisine, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The director denied the petition on May 2, 2007. He determined that the petitioner had not established that it had the continuing financial ability to pay the proffered wage and that the employment verification letters failed to sufficiently establish the requisite two years in the job offered or two years in a related occupation defined as "Catering Cook, Indian Cuisine."

On May 11, 2012, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), this office issued a notice advising the petitioner and the beneficiary of derogatory information indicating that falsified material had been submitted in support of the petition.

The AAO's notice stated:

The petitioner's representative signed the Form ETA 750 under penalty of perjury on April 8, 2005. The date of February 24, 2004 also appears by his signature. The beneficiary signed Part B of the ETA 750 under penalty of perjury on April 12,

¹Alien 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."). However, since a fraud finding affects an alien's admissibility, the AAO permitted the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I&N Dec. 533, 536 (BIA 1988). The AAO sent both the petitioner and beneficiary a NDI and allowed the beneficiary an opportunity to respond.

2005. The date of February 9, 2004 also appears by his signature. The instructions directed the applicant to list all jobs held during the last three years and to list any other job related to the occupation for which certification is sought. The beneficiary listed two prior jobs:

1. From April 1992 to September 1999, it is claimed that the beneficiary worked full-time as an Indian cuisine restaurant cook for [REDACTED]
2. From January 2000 to the present (date of signing), it is stated that the beneficiary worked full-time for [REDACTED] giving no address, as an Indian cuisine cook.

In support of the beneficiary's claimed experience, the petitioner, through counsel has submitted copies of two employment verification letters to the underlying record and two original employment verification letters on appeal:

1. A copy of a letter, dated February 2, 2006, from [REDACTED] which is on the [REDACTED] letterhead. The signature is unclear, but it states "authorized signatory" in parentheses. The letter states that the beneficiary is working with that restaurant as a cook since January 2001 until the present (date of signing). It is noted that the spelling of the restaurant and the date of the commencement of the beneficiary's employment is not consistent with the information contained in Part B of the Form ETA 750, listed as January 2000.
2. A copy of an undated letter (but notarized on April 24, 2006) from [REDACTED] which is on the letterhead. The signature is unclear but "authorized signatory" is in parentheses. The letter states:

This is to let you know that [the beneficiary] was employed with [REDACTED] Since April 1992 to September 1999 as cook.

Our new name is [REDACTED]

3. An original letter, dated May 18, 2007, from [REDACTED] which is on [REDACTED] The letter is signed by [REDACTED] as "Owner." It is notarized by the same notary as all the other letters, with a notary date of May 25, 2007. The letter describes the beneficiary's duties and states that he worked for this employer as a cook from April 20, 1992 to September 1999.
4. An original letter, dated May 18, 2007, from [REDACTED] on the same color ink letterhead as the letter from [REDACTED] The spelling of [REDACTED] now agrees with the spelling on Part B of the Form ETA 750, but differs from the initial letter submitted to the record spelled as "Alpha." The letter is signed by

[REDACTED] as "Proprietor." It is notarized on May 25, 2007. The letter states that the beneficiary worked for the company from January 15, 2000 to the present (date of signing) as a full-time cook. This letter lists a different start date than the first letter.

The inconsistencies as noted above raise a question as to the credibility of the experience claimed. 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. It is incumbent on 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)

Evidence has also come to light that the experience letters submitted to this record to establish the beneficiary's qualifying experience are determined to be fraudulent based on an overseas investigation. The AAO is sending you this notice of intent to deny and notice of derogatory information advising you of this. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Based on an investigation conducted January 11, 2012 by overseas fraud investigators who conducted interviews and showed employment letters to the subjects, the investigator determined as follows:

1. Investigators met with the owner of [REDACTED] who informed them that: a) none of the employees have been employed more than eight months; b) he has never issued any employment experience letters; [REDACTED] does not have any letterhead; and c) the signature is forged.

The investigators noted that the purported letter stating the owner's name as [REDACTED] whereas the owner states that his name is simply [REDACTED]. The investigators also questioned [REDACTED] about the business [REDACTED] informed them that [REDACTED] is his friend and that he has known [REDACTED] for the last fifteen years and that the business closed in 2006. [REDACTED] stated that the beneficiary was never employed by [REDACTED].

2. Investigators met with the manager of [REDACTED]. He also affirmed that a) [REDACTED] never used any letterhead; b) no employee has remained in position for more than four months; c) they have never issued employment experience letter to any of the workers;

d) the owner of the business [REDACTED] always signs in Gujarati language. [REDACTED] written statement also states that he is fully aware of all aspects of the operation.

It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). *See* 8 C.F.R. § 204.5(c).

The AAO issued this Notice of Intent to Deny and Notice of Derogatory Information pursuant to 8 C.F.R. § 103.2(b)(16), which provides in relevant part:

(i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [U.S. Citizenship and Immigration Services (USCIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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); [REDACTED] (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." [REDACTED]

As an issue of fact that is material to eligibility for the requested immigration benefit, 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).

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 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.²

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

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.

A labor certification is subject to invalidation by USCIS if it is determined that fraud or a willful misrepresentation of a material fact was made in the labor certification application. *See* 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court,

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, it discovers fraud or a material misrepresentation. In this case, the petitioner and the beneficiary are being given notice of the proposed findings and are being presented with opportunity to respond to the same.

of fraud or willful misrepresentation of a material fact involving the labor certification application."³

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – 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."⁴

By filing the instant petition and submitting falsified documents, which no evidence was submitted to independently overcome the fraud set forth in the AAO's NDI, the beneficiary sought a benefit to be provided under the Act through fraud and willful misrepresentation of a material fact. The AAO finds that the discrepant and inconsistent information on the ETA 750, the findings of the overseas investigation and clear statements from the represented employers that the beneficiary was never employed constitutes fraud and willful misrepresentation on the beneficiary's part. Because no

³The underlying labor certification supporting this application may be invalidated pursuant to 20 C.F.R. § 656.30, which provides in pertinent part:

(d) 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. . . ." Further, it is noted that section 212(a)(6)(C)(i) of the Act 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.

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).

additional independent and objective evidence has been submitted to overcome, fully and persuasively, our finding that that falsified documents have been submitted, we affirm our finding of administrative fraud as against the beneficiary. This finding of administrative fraud shall be considered in any future proceeding where admissibility of the beneficiary is an issue. While the petitioner has chosen to withdraw its appeal, this does not negate our finding. Further, we will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the fraudulent misrepresentation.

ORDER: The appeal is dismissed based on its withdrawal by the petitioner with a finding of administrative fraud against the beneficiary.

FURTHER ORDER: The AAO finds that the beneficiary knowingly submitted fraudulent documents in an effort to mislead USCIS on elements material to the beneficiary's 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 beneficiary's fraudulent misrepresentation.