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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: **JUN 25 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:

SELF-REPRESENTED

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

[REDACTED]

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cc:

[REDACTED]

**DISCUSSION:** On June 16, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), approved an Immigrant Petition for Alien Worker, Form I-140, but the approval of the petition was revoked by the Director of the Texas Service Center (the director) on February 26, 2009. The petitioner subsequently appealed the director's decision to the Administrative Appeals Office (AAO). On April 7, 2011 the AAO dismissed the appeal, entered a finding of willful misrepresentation against the beneficiary, and invalidated the Form ETA 750 Application for Alien Employment Certification. The beneficiary, through his counsel, has filed a motion to reopen/reconsider the AAO's decision. The motion will be dismissed as improperly filed. The AAO's prior decision will not be disturbed.

The petitioner describes itself as a landscaping company. It seeks to permanently employ the beneficiary in the United States as a landscape gardener. 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).

On appeal, the AAO informed both the petitioner and the beneficiary that derogatory information had come to light involving the beneficiary's work experience as a landscape gardener in Brazil for [REDACTED] and for [REDACTED] (also known as [REDACTED]) from March 1, 1997 to May 1999. In the Notice of Derogatory Information and Request for Evidence (NDI/RFE) dated May 5, 2010 the AAO noted discrepancies in the identity of the beneficiary's claimed former employer(s) in Brazil and the nature of the employers' business(es) in retail and/or veterinary services, which appeared to be at odds with the beneficiary's work experience as a landscape gardener.<sup>1</sup> Neither the beneficiary nor the petitioner submitted any response.<sup>2</sup>

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<sup>1</sup> The record contains sworn statements issued by [REDACTED] and [REDACTED] stating that the beneficiary worked for [REDACTED] from March 1, 1997 until April 1998 when the company was sold to [REDACTED] and that [REDACTED] continued to employ the beneficiary until May 30, 1999. The record also contains CNPJ (proof of business registration) printouts of [REDACTED] and [REDACTED]. A review of the CNPJ printouts reveals that [REDACTED] was in a retail business selling veterinary medicine, and that [REDACTED] was in a retail business selling other products.

<sup>2</sup> Alien 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

The AAO determined that the petitioner had failed to establish that the beneficiary qualified for the position offered. The AAO further found that the beneficiary had materially misrepresented his past work experience to gain an immigration benefit and entered a finding of willful misrepresentation against the beneficiary and invalidated the Form ETA 750 labor certification.

On motion, counsel for the beneficiary states that the motion is specifically filed to request the AAO to reconsider its finding of fraud and/or material misrepresentation against the beneficiary.<sup>3</sup> Citing *Hom Sin v. Esperdy*, 239 F. Supp. 903, 905-07 (S.D.N.Y. 1965), counsel states that the beneficiary is the affected party and has the right to challenge the AAO's finding of fraud/material misrepresentation against the beneficiary especially when the injury is "within the zone of interest protected by the relevant statute." Counsel also cites *Taneja v. Smith* 795 F.2d 355, at fn. 7 (4<sup>th</sup> Cir. 1986) and *Stenographic Machines, Inc. v. Regional Administrator*, 57878 F.2d. 521, 527-28 (7<sup>th</sup> Cir. 1978) and indicates that the beneficiaries in those cases were the affected party and had legal standing to challenge the denial of the Form I-140 petition. Finally, counsel cites *Ore v. Clinton*, 675 F. Supp.2d. 217, 220 (1<sup>st</sup> Cir. 2009) where the court discussed the three-factor test for constitutional standing.<sup>4</sup>

On motion, counsel for the beneficiary argues that the AAO's finding of fraud/willful misrepresentation against the beneficiary is based on an assumption that the beneficiary could not have worked as a landscaper for a retail business selling veterinary products and a veterinary office. Counsel further states that the assumption is from a lack of knowledge of Brazil corporation structure and law and Brazilian horticulture. Counsel states that not allowing the

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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). Therefore, he was provided notice, and any response would have been considered herein.

<sup>3</sup> In different parts of his brief, counsel wrote:

This is an appeal by the beneficiary in regard to the specific findings of fraud and/or misrepresentation against the beneficiary only.

...

This is an appeal solely by the beneficiary of the petition, requesting the Court [to] reconsider the Findings and Order of the Decision of April 7, 2011 with regard to the beneficiary only.

<sup>4</sup> The court in *Ore v. Clinton*, 675 F. Supp.2d. at p. 220 stated that in order to establish constitutional standing, the plaintiff must show: (1) that he has suffered an "injury in fact," (2) there is a causal connection between the injury and the conduct complained of, and (3) that the injury would "likely be redressed by a favorable decision."

beneficiary to challenge the AAO's finding in this case violates the beneficiary's rights to due process.

The USCIS regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states:

For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition.** (Emphasis added).

Moreover, 8 C.F.R. § 103.5(a)(1)(iii) in pertinent part states:

*Filing Requirements* – A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be: (A) In writing and signed by the affected party or the attorney or representative of record, if any.

The language of the cited regulations above explicitly states that neither the beneficiary nor his counsel has legal standing in this visa petition proceeding, and neither is authorized to file the motion to reopen/reconsider in this matter. A review of the record shows that the petitioner no longer employs the beneficiary,<sup>5</sup> and has not expressed any interest in the outcome of these proceedings. The motion must therefore be dismissed as it was not filed by an affected party.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Here, the motion does not state new facts to be proved in the reopened proceeding. Nor does it provide reasons for reconsideration.<sup>6</sup>

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<sup>5</sup> The record contains an approved Form I-140 filed for the beneficiary by another landscaping company called "Landscape, Inc." See File [REDACTED] Landscape, Inc. claimed in the Application for Permanent Employment Certification (ETA Form 9089) that the beneficiary had been employed since June 5, 2010.

<sup>6</sup> Even if the beneficiary and his counsel could be considered proper parties in this proceeding, on motion, the beneficiary through his counsel submits no evidence in support of the motion and no legal precedents challenging the AAO's finding of fraud and misrepresentation against the beneficiary. The beneficiary does not submit independent objective evidence of his two-year qualifying employment in Brazil, and does not address discrepancies between the nature of the services rendered by the employers and the experience claimed by the beneficiary.

Upon review, the AAO declines to reopen as the moving party is an unaffected party without standing. Additionally, the motion is unaccompanied by evidence, reasoning or precedents in support of the challenge to the AAO's prior decision. *See* 8 C.F.R. § 103.5.

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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed. The AAO's finding of willful misrepresentation against the beneficiary and decisions to dismiss the appeal and to invalidate the labor certification remain undisturbed.