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

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U.S. Citizenship
and Immigration
Services



B6

DATE: **MAR 06 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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sought to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. Upon reviewing the petition, the director determined that it was not eligible for approval because the petitioner failed to submit the original labor certification with the petition and failed to establish that the petitioner made a valid job offer to the beneficiary.¹ The director denied the petition on February 8, 2008 and reaffirmed that denial on April 23, 2008 in response to the petitioner's motion to reopen and reconsider.

The AAO issued a Notice of Intent to Deny and Notice of Derogatory Information on September 26, 2011² on September 15, 2011, informing the petitioner of doubts concerning the *bona fide*

¹ The petitioner sought to substitute the instant 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). The filing of the instant petition predates the final rule. The I-140 petition was submitted with a copy of the labor certification which named the initial labor certification beneficiary, but did not contain the original labor certification. The record does not contain an explanation where the original labor certification is located. Without the original labor certification we cannot determine whether the labor certification has already been used on behalf of another alien in another petition, in which case the instant petition could not be approved and the instant beneficiary would not be able to consular process or adjust status to permanent residence in connection with any application filed based on this I-140 petition. Significantly, USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm'r 1986). While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

² The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides that if a decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and which the applicant or petitioner is unaware, they shall be advised and offered an opportunity to rebut the information and present information on his/her own behalf except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section.

nature of the job offer and the nature of the petitioner's business.³ Specifically, the notice of derogatory information informed the petitioner of the following:

During the adjudication of the appeal, evidence has come to light that the petitioning business in this matter that:

A. Based on information received through an investigation conducted by Immigration and Customs Enforcement (ICE), a determination was made that [REDACTED] the named individual in this case and 100% shareholder of the petitioner [REDACTED] from a period from 1995 through 2008 [REDACTED] submitted fraudulent labor and immigration petitions with the Department of Labor and USCIS through at least five fictitious employers including [REDACTED]

[REDACTED] These businesses used the same address and were controlled and operated by [REDACTED]. The investigation revealed that these businesses, including the named petitioner in this case, were created solely for the purpose of sponsoring aliens into the United States and that they conducted no legitimate business. On October 31, 2008, [REDACTED] pleaded guilty to Visa Fraud, (18 U.S.C. § 1546), and Money Laundering (18 USC §1956) and was sentenced on March 16, 2009 to concurrent sentences of 15 months incarceration and 3 years supervised release.⁴ For this reason, the AAO finds that this filing is based on fraud or willful misrepresentation by the petitioner and the beneficiary and will be dismissed with a finding of fraud and/or willful misrepresentation. Further, the underlying labor certification supporting this application will 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

³ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. 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).

⁴ *See* <http://www.justice.gov/usao/cac/pressroom/pr2008/104.html> (accessed August 25, 2011) and http://www.pe.com/localnews/immigration_stories?PE_News_Local_wvisa19.45400a4.... (accessed August 25, 2011).

documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

We are sending you this notice of intent to deny and notice of derogatory information⁵ advising you of this. *See* 20 C.F.R. § 656.30(d).

We additionally note that according to pertinent California online corporation records, the corporate status of [REDACTED] which will do business in California as [REDACTED] was forfeited.⁶ Pertinent Nevada online corporation records further indicates that the status of [REDACTED] was revoked. If the petitioning business is no longer an active business, the petition and its appeal to this office have become moot. In which case, the appeal shall be dismissed as moot.⁷

As noted above, a determination was made that the petitioner in this case, [REDACTED] wholly owned and operated by [REDACTED] Inc., (a revoked Nevada corporation, whose sole shareholder was [REDACTED] created solely for the purpose of sponsoring aliens through the labor certification program and that [REDACTED] conducted no legitimate business. For this reason, the AAO advised the petitioner that the appeal would be dismissed as moot with a finding that the filing was based on fraud and/or willful misrepresentation by the petitioner and would be dismissed on this basis. Further, the underlying labor certification supporting the petition would be invalidated pursuant to 20 C.F.R. § 656.30.⁸

⁵ *See* 8 C.F.R. § 103.2(b)(16)(i).

⁶ *See* <http://kepler.sos.ca.gov/cbs.aspx> (accessed July 28, 2011). Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

⁷ *See* Nevada online corporation records of [REDACTED] Inc. with an address of [REDACTED] listing [REDACTED] as the President at the same address as [REDACTED] <http://nvsos.gov/sosentitysearch/CorpDetails.aspx?lx8nvq=mqUm8afx0IbRHHH5bA4%25...> (accessed July 28, 2011).

⁸ This regulation 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. . ."

As set forth in the AAO's Notice of Intent to Deny and Notice of Derogatory Information, the AAO specifically alerted the petitioner that failure to respond to the notice may result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to respond to the Notice of Intent to Deny and Notice of Derogatory Information, the AAO is dismissing the appeal. The AAO is also making a further finding of fraud and willful misrepresentation and invalidating the labor certification.

Based on the foregoing, the AAO finds that the issues raised in the petitioner's appeal are moot as the petition was based on the fraud⁹ and willful misrepresentation by the petitioner and [REDACTED] individually, that the petitioner was a legitimate business extending a *bona fide* job offer to the beneficiary.¹⁰

Further, 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. Although the immigrant visa petition may present an 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) fo the Act, 8 U.S.C. §§ 1182(a) and 1255(a). It is further noted that the law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (1st Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th cir. 1993); see also, *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents).

⁹ United States Citizenship and Immigration Services (USCIS) may invalidate labor certifications where willful misrepresentation has occurred. Whether a petitioning business is a *bona fide* employer extending a real job offer and not operating solely to facilitate the procuring of immigration benefits for a particular alien is a material misrepresentation where it shuts off a line of inquiry relevant to the alien's eligibility. See *Matter of S & B-C-*, 9 I&N Dec. 436 (A.G. 1961).

¹⁰ A willful misrepresentation requires a knowingly made material misstatement to a government official for the purpose of obtaining an immigration benefit. See *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (B.I.A. 1975). To constitute a fraud, an alien must have made a false representation of a material fact, with knowledge of its falsity and with an intent to deceive a government official, and the misrepresentation must have been believed and acted upon by the official. See *Matter of GG-*, 7 I&N De. 161, 164 (B.I.A. 1975).

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 petition was filed based on fraud and willful misrepresentation by the petitioner and [REDACTED] individually, that the job offer was valid. The AAO additionally invalidates the labor certification pursuant to 20 C.F.R. § 656.30(d).