

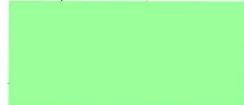


U.S. Citizenship
and Immigration
Services

(b)(6)

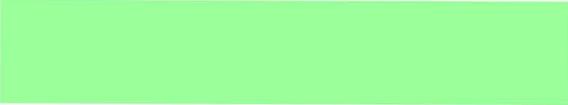


Date: Office: NEBRASKA SERVICE CENTER FILE:



APR 26 2013

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 Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a software company. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. 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).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).² The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 4, 2003. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that the permanent job offer was *bona fide* because the address(es) at which the petitioner indicated the beneficiary would be employed was a mail drop and not a legitimate office address.³ The director found that the evidence submitted by the petitioner failed to overcome the inconsistencies in the record, finding that the petitioner committed material misrepresentation on the Form ETA 750 because the permanent job offer on the labor certification was not *bona fide*. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director denied the petition and invalidated the labor certification on August 13, 2011.

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.

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), 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 requested substitution will be permitted.

³ A site-check conducted on December 28, 2006, revealed that the address [REDACTED] Lincoln, Nebraska [REDACTED] listed on the labor certification, immigrant petition and the beneficiary's Forms W-2, Wage and Tax Statements, was a mail drop. A second site-check of a subsequently provided address [REDACTED] Lincoln, Nebraska) revealed that the location was a "shell office."

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.⁴ On appeal, counsel submits a brief and copies of leases, bills and service contracts.

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 and that a *bona fide* job opportunity is available to U.S. workers. In the instant case, the labor certification states that the offered position is to be performed at [REDACTED] Lincoln, Nebraska [REDACTED]. However, a site-check of the address revealed that it was a mail drop and not an office at which the petitioner conducted services or business. In response to the director's requests for evidence (RFE), dated November 10, 2010, the petitioner indicated that it had since leased office space at [REDACTED] Lincoln, Nebraska [REDACTED]. A site-check of this location revealed that the office location contained little evidence of a viable and active business. It is incumbent upon a petitioner to resolve the inconsistencies in the record concerning the beneficiary's experience by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, counsel states that the petitioner emphatically contends that there has been no willful misrepresentation of a material fact regarding the offer of permanent employment in Lincoln, Nebraska. Counsel contends that the job offer is *bona fide* and that, at the time of filing the labor certification, the petitioner was expanding its business into a new geographical area. Counsel states that a *bona fide* job offer can exist when the new product/service/business enterprise is in the process of being created, as in the instant case. In support of her contentions, counsel cites to multiple DOL Board of Alien Labor Certification Appeals (BALCA) decisions. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of United States Citizenship and Immigration Services (USCIS) are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In support of her contention that the petitioner was expanding into a new geographic location, counsel submits copies of leases, bills and consulting agreements between the petitioner and third parties. The leases reflect that the petitioner entered into an agreement on June 19, 2003, for mail drop forwarding to its Virginia location from [REDACTED] and that the petitioner began to lease the [REDACTED] location on January 2, 2007. The evidence establishes and the petitioner concedes that it did not have a physical business location within Nebraska until 2007, more than four years after the filing of the

⁴ 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).

instant labor certification and two-years after the filing of the instant Form I-140 petition. It is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant Form I-140 petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁵ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish that it had a location in Lincoln, Nebraska that could actually employ the beneficiary at the time the instant labor certification was filed.

In support of counsel's contention that the petitioner was expanding into a new geographic location, she submits copies of telephone bills from 2003, however, these bills are for the petitioner's Virginia location.⁶ Counsel also submits utility bills and rent checks for the [REDACTED] location, however, these bills and checks are dated in 2010 and do not overcome the evidence in the record indicating that there was no *bona fide* permanent job offer in Lincoln Nebraska at the time the labor certification, which was filed on December 4, 2003, or the Form I-140 petition, which was filed on December 20, 2004. Moreover, these bills do not establish that the petitioner is currently engaging in business services in Lincoln, Nebraska.

Counsel also submits a copy of a subcontractor consulting agreement between the petitioner's Virginia location and [REDACTED] in Omaha, Nebraska, dated February 13, 2002, along with invoices for services and copies of payments for those services from [REDACTED] to the petitioner. These documents imply that the petitioner did not have a business location in Lincoln, Nebraska. Furthermore, the contract was terminated in 2002, more than 12 months prior to the filing of the instant labor certification.

⁵ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

⁶ The bills list the account holder as the petitioner with an address of [REDACTED] Richmond, VA [REDACTED] and the assigned number has an area code of 804 which corresponds to the Richmond area.

In addition, counsel submits a copy of a job requisition posting from the Nebraska Department of Health & Human Services (NDHHS) placing a requisition order for two project managers in 2010. These documents do not reflect that the petitioner was actually hired to provide such services.⁷ Moreover, these services were not required until 2010, more than seven years after the filing of the instant labor certification in December 2003.

None of the documentation submitted by counsel establishes that the permanent job offer was *bona fide* at the time of filing the instant labor certification or the immigrant petitioner or that the petitioner currently has a *bona fide* job offer in the Lincoln, Nebraska area. 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.

The material issue remaining in this case is whether the petitioner has willfully misrepresented the job offer to obtain an immigration benefit.

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); DHS Delegation Number 0150.1 (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." DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, 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

⁷ Moreover, the terms of the job requisition reflect that the positions would be subject to control by NDHHS and the petitioner would not be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

fraud or willfully misrepresenting 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.⁸

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

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. In the present matter, we find that the documentation submitted below was not sufficiently independent and objective evidence of the *bona fides* of the permanent job offer in view of the noted inconsistencies and that the petitioner made a willful misrepresentation of a material fact by stating that there was a *bona fide* permanent job offer in Lincoln, Nebraska.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, “(i) in general – any alien; who 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.”

⁸ 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 discloses fraud or a material misrepresentation. In this case, the petitioner has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

A material issue in this case is whether there is a *bona fide* permanent job offer. 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, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut 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.

In this case, the petitioner certified, upon completing and signing the Form ETA 750 labor certification application that there was a *bona fide* job offer in Lincoln, Nebraska. The petitioner maintained that there was a *bona fide* job offer, even though there is no evidence in the record of a viable business location for the petitioner within Lincoln, Nebraska.

Based on the noted inconsistencies and the petitioner's failure to provide independent objective evidence to overcome those inconsistencies, the AAO finds that the petitioner has deliberately concealed and misrepresented facts about the job offer.

By misrepresenting the job offer and making misrepresentations to the DOL, the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The director specifically issued notice to the petitioner to allow it an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, the response was insufficient to overcome the noted inconsistencies. Furthermore, the evidence submitted by the petitioner on appeal raises additional questions about the proffered position listed on the ETA 750 and Form I-140 petition.

The AAO affirms the director's decision that the petitioner failed to establish that the permanent job offer was *bona fide*. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The AAO also affirms the director's finding of fraud and misrepresentation involving the labor certification and the director's invalidation of the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 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.

As the evidence reflects fraud involving the labor certification, the director appropriately invalidated the ETA Form 750 in this case.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2). The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed more than thirty (30) I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

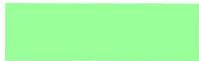
The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner knowingly misrepresented a material fact by indicating that there was a *bona fide* job offer where none existed in an effort to procure a benefit under the Act and the implementing regulations.

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FURTHER ORDER:

The alien employment certification, Form ETA 750, ETA case number [REDACTED] is invalidated.