

(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: AUG 27 2013

OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

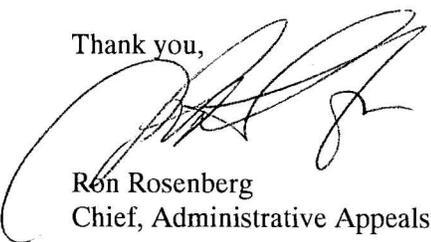
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a finding of willful misrepresentation against the beneficiary. The labor certification application will also be invalidated based on the beneficiary's misrepresentation.

The petitioner sought to employ the beneficiary permanently in the United States as a roofer pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, a labor certification (ETA Form 9089) accompanied the petition. It stated that the job of roofer required 24 months in the job offered. The priority date established by the ETA Form 9089 is June 28, 2008. Upon reviewing the petition, the director determined in part that the petitioner had not established that the beneficiary possessed the qualifying employment experience. The director also made a finding of fraud and misrepresentation and invalidated the labor certification.¹

On appeal, the petitioner, through counsel, indicated that the beneficiary was simply the victim of unscrupulous former counsel.

The AAO issued a Notice of Intent to Dismiss and Notice of Derogatory Information on June 24, 2013, (Notice). The AAO issued the Notice informing the petitioner of the results of an overseas investigation regarding the beneficiary's claim of employment in Poland.² The NOID advised the petitioner that:

The AAO hereby issues this Notice of Intent to Deny (NOID) and Notice of Derogatory Information (NDI) pursuant to 8 C.F.R. § 103.2(b)(16)(i) the petition and informs the petitioner and beneficiary of derogatory information pertinent to this proceeding, 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.

¹ The director also determined that the petitioner had not properly recruited for the offered job. See 20 C.F.R. § 656.17.

² 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).

- A. It is noted that Section K instructs the petitioner to list all jobs that the alien has held for the past three years as well as any other experience that qualifies the alien for the certified position. The beneficiary and the petitioner signed the ETA Form 9089 under penalty of perjury on February 5, 2009 and February 11, 2009, respectively. Section K lists one past job that the beneficiary has held. It states that he was a roofer from April 29, 1988 to August 1, 1993 for a firm in Pisz, Poland.³ An Employment Record Certificate submitted to the record states that the beneficiary was employed from April 29, 1988 to August 1, 1993 by the [REDACTED] in Lomza, Poland. Another certification from the [REDACTED] in Lomza, dated December 16, 2011 states that it employed the beneficiary from April 29, 1988 to September 1, 1993 but that he was transferred to [REDACTED] in Pisz and assigned to work at the construction site of the [REDACTED].
- B. Pursuant to the statements of the letter dated December 16, 2011, an overseas investigation has been conducted. The human resources director at the [REDACTED] was contacted and stated that the beneficiary was never an employee of the company and was never issued a letter stating such.

Based on the above, the AAO intends to affirm the finding of fraud and/or misrepresentation by the director in this matter as the information relevant to the beneficiary's claimed experience has compromised the credibility of the evidence in the record.⁴ *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon 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 Id.*

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.

³ Another labor certification, filed by a different employer, lists the beneficiary's only prior work experience as an electrician working for [REDACTED] from January 1992 to May 1994.

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 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.⁵

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.

⁵It 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.

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

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."⁶

Accordingly, it appears that fraud or willful misrepresentation as to the *bona fides* of the labor certification and the Form I-140 may have been made in this case by the petitioner and the beneficiary. It is incumbent on the petitioner and/or beneficiary in this case 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).

Based on the foregoing, the AAO will dismiss the appeal and will consider a finding of material misrepresentation and/or fraud and invalidate the labor certification unless the petitioner and/or the beneficiary can submit independent credible evidence sufficient to overcome the indices of misrepresentation and/or fraud submitted to the record consisting of the findings of the overseas investigation. Any evidence and/or statements submitted any individual must include five exemplars of his/her signature, must be notarized, and must be accompanied by photo identification. The petitioner should submit the beneficiary's foreign workbook⁷ with English translation or other official government records to establish this

⁶The 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).

⁷ The translation of the must comply with the terms of 8 C.F.R. § 103.2(b)(3):

experience. Please be advised that by submitting false documents to USCIS, both a petitioner and beneficiary may be deemed to seek to procure a benefit provided under the Act through willful misrepresentation. The burden of proof remains with the petitioner and beneficiary to show by a preponderance of the evidence that any proposed invalidation of the labor certification is not appropriate and that a willful misrepresentation and/or fraud has not been committed in these proceedings. *See Matter of Ho*, 19 I&N Dec. at 589. A finding of misrepresentation or fraud may lead to invalidation of the ETA Form 9089. *See* 20 C.F.R. § 656.30(d).

In response to the AAO's Notice, counsel has submitted a statement by the beneficiary, similar to an earlier statement contained in the record, asserting that he has the documented experience in Poland as a roofer and that the eighties and early nineties were "crazy times" in Poland as the government changed in the early nineties. No independent corroborative evidence related to the beneficiary's claimed experience was submitted as directed in the AAO's Notice. Given that the beneficiary's former employer in [REDACTED] specifically denies the beneficiary's employment or ever issuing a letter stating that the beneficiary worked for it, the AAO must conclude that the employment verification letter is fraudulent and that the beneficiary has willfully misrepresented his past employment on the ETA Form 9089 in attempt to qualify for the position offered. By submitting falsified documents to include a labor certification with inaccurate, false representations, this misrepresented the *bona fide* nature of the job opportunity, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because no independent and objective evidence has been submitted to overcome, fully and persuasively, this finding that a falsified document has been submitted, the AAO hereby makes a finding of willful misrepresentation against the beneficiary. This finding shall be considered in any future proceeding where admissibility is an issue. Further, the AAO hereby invalidates the ETA Form 9089 pursuant to 20 C.F.R. § 656.31(d) based on the willful misrepresentation.

The burden of proof in these proceedings rests solely with the petitioner.⁸ Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

⁸ It is additionally noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires the petitioner establish the continuing financial ability to pay the proffered wage from the priority date onward. The current record reflects that the petitioner's 2008 federal tax return shows that the Schedule L balance sheet was not completed. As the petitioner's total receipts for this year exceeded \$250,000, Part 6 of Schedule B directs that Schedule L should have been completed. Its omission raises a question whether this is the actual tax return filed with the Internal Revenue Service and whether the petitioner established its ability to pay the proffered wage in this year.

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NON-PRECEDENT DECISION

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FURTHER ORDER:

The AAO finds that the the beneficiary willfully misled DOL and USCIS on elements material to the alien'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 misrepresentation.