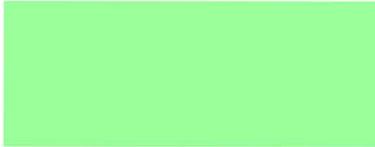


(b)(6)

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



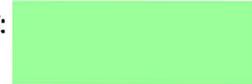
U.S. Citizenship  
and Immigration  
Services



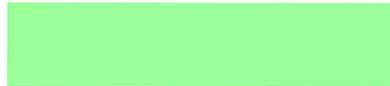
DATE: OFFICE: TEXAS SERVICE CENTER

FILE:

**FEB 21 2013**

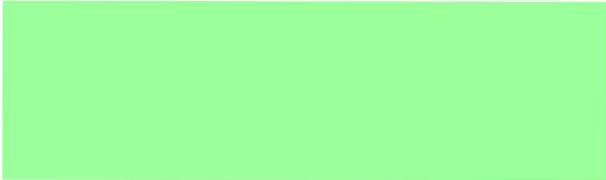


IN RE: Petitioner:  
Beneficiary:



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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the director's finding that the petitioner misrepresented a material fact on the labor certification will be upheld.

The petitioner describes itself as a gas station and convenience store. It seeks to employ the beneficiary permanently in the United States as a manager. 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).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision concluded that the petitioner misrepresented its staffing needs in order to obtain labor certification approvals for three morning shift managers.

The appeal is properly filed 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.

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.<sup>2</sup>

The petitioner filed three labor certification applications on or about April 30, 2001 for morning shift managers. Two of the labor certifications stated that the manager would supervise two workers. Following the approval of the three labor certifications by the DOL, the petitioner filed Form I-140 petitions based on them.

The petition states that the petitioner was established on January 1, 1999 and employed two workers. In its response to the director's notice of intent to deny the petition, the petitioner stated it has never employed more than three workers.

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<sup>1</sup> 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

The director's decision denying the petition states that the petitioner misrepresented its staffing needs in order to obtain labor certification approvals for three morning shift managers.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C) states:

(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.

In addition, according to 20 C.F.R. § 656.31(d) states: “[If USCIS] determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated. . .”

The term “willfully” means “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 a 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*. 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).

On appeal, counsel asserts that the petitioner extended *bona fide* job offers to the three individuals named as beneficiaries on the labor certifications and I-140 petitions. The brief submitted on appeal states:

Petitioner did not exaggerate its staffing levels to justify managerial positions. Rather, as stated in the attached affidavit, at the time of filing the labor certifications in 2001, [REDACTED] planned to rapidly expand its business and open additional retail stores, which mandated its need for managerial employees. The two owners, [REDACTED] desired to hire managers to manage the stores so that they could focus their attention on expansion and overall operations, and leave the daily running of the store to the managers. As such, they sought out qualified individuals who could run their stores. Their job offers were always bona fide and valid, and were not offers for any fraudulent or impressible reasons. At no time did Petitioner lie or provide fraudulent information on the labor certifications or I-140 petitions. On the labor certifications, Petitioner intended for each manager to manage a different store, and oversee the other employees (cashiers) on the shift. Petitioner had the

immediate intentions in 2001 to open at least two additional stores, which required a manager to oversee each of the three stores (thus the reason for the three am shift managers).

In 2005, when the company determined that an expansion was not likely in the foreseeable future, it withdrew its offer of employment to one of the beneficiaries, [REDACTED] then ported to another company under AC 21. The original letter of portability can be found in I [REDACTED] file at USCIS as the original signed letter of portability was given to the officer at Mr. [REDACTED] green card interview (and the beneficiary did not keep a signed copy). Thus, Petitioner only had two remaining I-140 petitions, one for [REDACTED] (the beneficiary of this underlying petition) and N [REDACTED] I-140 was later withdrawn and a new I-140 petition was filed as a labor certification substitution in 2007 for Mr. [REDACTED] and remains pending today. Both Mr. [REDACTED] currently work for Petitioner. [REDACTED] has been working for Petitioner as a full time manager since 2004 and Mr. [REDACTED] has worked with Petitioner as a part-time manager since 2008. The fact that the remaining two beneficiaries of the I-140 petitions have been working with Petitioner, and are currently employed with Petitioner, [is] further proof of the bona fides of the original offers.”

The record contains an unsigned statement of [REDACTED], dated September 17, 2009 that repeats the claims in the appeal brief. However there is no objective documentary in the record evidence that [REDACTED] “planned to rapidly expand its business and open additional retail stores.” There are no correspondences, contracts or other documentation that support this claim. Unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the labor certifications do not indicate that the beneficiaries would work anywhere other than the petitioner’s one address.<sup>3</sup>

The petitioner is a small business that had never employed more than three workers. In 2001, it filed three labor certifications for morning shift managers, two of whom it claimed would manage two employees each. The petitioner claims on appeal that two of the three labor certifications were for prospective positions at different locations it planned on opening in the future. Therefore, by the petitioner’s own admission, the offered positions were, at best, speculative. Further, the petitioner provided no independent, objective documentary to support the claim that it intended to open two

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<sup>3</sup> 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. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

additional locations, and the address of intended employment stated on the labor certification applications undermines the petitioner's explanation submitted on appeal. Further, even though the claimed expansion plans did not materialize, the petitioner still submitted petitions based on the other labor certification approvals.

Based on the facts set forth above, it is concluded that the petitioner misrepresented to the DOL and USCIS that it intended to employ three alien beneficiaries on a full-time basis in the position of morning shift manager. It is also concluded that these misrepresentations were made knowingly and intentionally. The misrepresentations shut off a line of inquiry which was relevant to the eligibility of the labor certifications and petitions and, if the true facts were known, the labor certifications and petitions would have been denied.

Therefore, the director's conclusion that the petitioner misrepresented a material fact is affirmed. In addition the validity of the labor certification underlying the instant petition is invalidated pursuant to 20 C.F.R. § 656.31(d).<sup>4</sup>

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 petitioner knowingly misrepresented a material fact in an effort to procure a benefit under the Act and the implementing regulations.

**FURTHER ORDER:** The AAO invalidates the labor certification based on a determination of willful misrepresentation of a material fact involving the labor certification pursuant to 20 C.F.R. § 656.31(d).

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<sup>4</sup> The petitioner 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). According to USCIS records, the petitioner filed three additional I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the ability to pay the combined proffered wages to each beneficiary from the relevant priority dates until each petition has been withdrawn, revoked, or its beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). Following a review of evidence in the record, including the wages paid to the instant beneficiary and the petitioner's tax returns, the petitioner failed to establish its ability to pay the proffered wage for 2001, 2002, 2003 and 2004.