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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 7 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner seeks to employ the beneficiary permanently in the United States as an automotive service technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition based on the petitioner's failure to establish its continuing ability to pay the proffered wage. The director also noted that the petitioner had failed to provide requested information relevant to the petitioner's *bona fides* and the beneficiary's work experience.

On appeal, counsel[1] objected to the director's conclusions and asserted that there was no regulatory basis for the director's requests for evidence.

On February 26, 2013, the AAO issued a Notice of Derogatory Information and Notice of Intent to Dismiss (NDI/NOID) the petition.[2] No response has been received by this office. For the reasons set forth below, the AAO will dismiss the appeal with a finding of misrepresentation.

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 if properly submitted upon appeal.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

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[1] On January 3, 2013, the petitioner's counsel pleaded guilty to immigration fraud. He has since been disbarred.

[2] As noted in the NDI/NOID, alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano,* 19 I&N Dec. 299, 300 (BIA 1985). 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 finding of misrepresentation, if during the course of adjudication, it discovers fraud or a material misrepresentation.

As set forth in the AAO's NDI/NOID:

1. The AAO hereby issues this Notice of Derogatory Information and Notice of Intent to Dismiss pursuant to 8 C.F.R. § 103.2(b)(16)(i) the petition and informs the petitioner and beneficiary[3] 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.

During the adjudication of the appeal, evidence has come to light suggesting that the petitioning business in this matter: has been dissolved. *See* attached print-outs from New York official website which indicates that was dissolved on September 23, 1998. If the petitioning business is no longer an active business, the petition and its appeal to this office have become moot. 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. In which case, the appeal shall be dismissed as moot. If you wish to contest this observation or assert that this not the petitioner in this proceeding, provide the following:

> Certified copy of your articles of corporation registered with the state of New York. Certified copies of every annual report that you have filed with the state of New York. Evidence that your organization is registered with the state of New York and has been in good standing since the priority date of May 7, 2006.

Any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *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.*

2. Counsel's transmittal letter accompanying the Form I-140 indicates that the beneficiary was requested as a substitution for an alien named on the ETA Form 9089 labor certification. However, counsel identifies a different employer than your organization and indicates that the beneficiary has a priority date of April 30, 2001. A copy of an ETA Form 9089 accompanies the Form I-140 and does identify your organization seeking to employ However, no original labor certification, ETA Form 9089 is contained in the record. Did your organization ever sponsor on an ETA Form 9089? If you did, provide the original ETA Form 9089 for this individual. The petition does not merit approval without an original ETA Form 9089. Also, explain whether a Form I-140 was ever filed by your organization on behalf of and indicate when this Form I-140 was filed and whether possesses an Alien Number. Please identify the Alien Number.
3. Counsel also claims that the instant beneficiary was entitled to an April 30, 2001 priority date based on another DOL labor certification filed by ' ' However, the copy of the DOL document indicates that it is a "notice of case closure." Further, the record contains another labor certification with another case number filed by It purportedly identifies the current beneficiary as the alien. It has been determined to be fraudulent, based on a comparison with the actual DOL record showing that a different alien than the beneficiary was actually sponsored under that case number.
4. The following discrepancies are reflected in the record pertinent to the beneficiary's claim of previous qualifying experience:
    a. In this proceeding, the petitioner has submitted an employment verification letter from The letter is dated December 31, 1996 and is in English and signed by as manager. He states that the beneficiary worked for that company as a full-time auto mechanic from January 1987 until November 1993. The beneficiary's duties as a mechanic are described.
    b. An employment verification letter in English from the same company, was submitted in support of a prior Form I-140 filed by another employer on behalf of the beneficiary as an electrician. In this letter, dated January 3, 1997 and appearing to be signed by as personnel manager, the beneficiary is stated to have worked full-time for this entity "planning, installation, layout and repair of electrical systems. Measuring, cutting, bending threading, assembling and

> installing electrical conduits." The period of employment performing these duties is given as from December 1993 to January 1996. No job title[4] is given as required by 8 8 C.F.R. § 204.5(l)(3)(ii).

These discrepancies must be addressed. 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. It is incumbent on 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 Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Please submit independent verifiable evidence, such as the beneficiary's translated workbook issued by the relevant government ministry, along with a copy of the document in its original language.[5]

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[4] The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

[5] Any English translation of a foreign document must comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *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.

Based on the foregoing, it appears that the employer and/or alien may have engaged in a material misrepresentation involving the labor certification. It also appears that the job offer may not be *bona fide* and open to all qualified U.S. workers.[6]

The AAO is sending you this notice of derogatory information and notice of intent to dismiss advising you of this. 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).

It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). *See* 8 C.F.R. § 204.5(c).

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).[7]

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[6] The regulation at 20 C.F.R. § 656.30 (2010) provides in pertinent part:

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

[7] As noted above, 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.").

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 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.[8]

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

[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 discovers fraud or a material misrepresentation.

> 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.

As noted above, 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)[9]

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."[10]

5. If you elect to respond to this notice, please address *each* of the concerns raised above. Any signed documents submitted must be notarized and must be submitted in the original with a photo ID containing the signer's signature.

6. Further, please provide certified copies from the state of New York (in an envelope with seal unbroken) of the petitioner's quarterly state wage reports filed with the state of New York for all quarters of 2006, 2007, 2008, 2009, 2010, 2011 and 2012. They must show all workers employed and all compensation paid to these individuals. Additionally, please provide copies of all Wage and Tax Statements (W-2s) issued to

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

[10] The 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).

the beneficiary if the petitioner employed him during any period from May 7, 2006 to the present.

7. Provide copies of all federal income tax returns filed with the Internal Revenue Service (IRS) in 2007, 2008, 2009, 2010, 2011, and 2012.

8. Provide certified copies of federal income tax return transcripts from the IRS in an envelope with the seal unbroken for 2006, 2007, 2008, 2009, 2010, and 2012.

If you have filed Form I-140s for other beneficiaries, as USCIS electronic records reflect, provide evidence of your ability to pay the proffered wage for each respective beneficiary from his or her priority date to the present include the following:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

The AAO may enter a finding of material misrepresentation and/or fraud against the petitioner and the labor certification will remain invalidated unless the petitioner can submit independent credible evidence sufficient to overcome the indices of misrepresentation and/or fraud submitted to the record. 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 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 as noted above. *See* 20 C.F.R. 656.30(d).

The petitioner was afforded 65 days to respond to the AAO's NDI/NOID. However, as noted above, no response to the AAO's NDI/NOID has been received by this office. Accordingly, it appears that willful misrepresentation as to the *bona fide* nature of the job opportunity was made in this case by the petitioner.

By submitting falsified documents to include a labor certification with inaccurate, false representations, the petitioner misrepresented the *bona fide* nature of the job opportunity. Because no independent and objective evidence has been submitted to overcome, fully and persuasively, our finding that the falsified documents have been submitted, we affirm our administrative finding of willful misrepresentation. 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. 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 labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the misrepresentation.