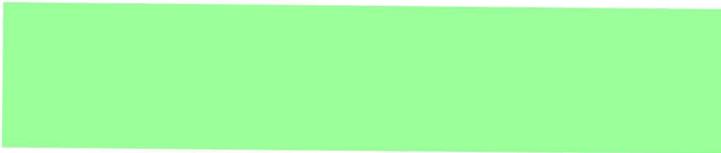
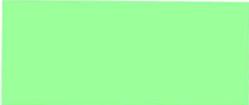


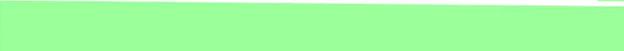
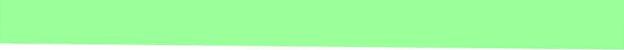


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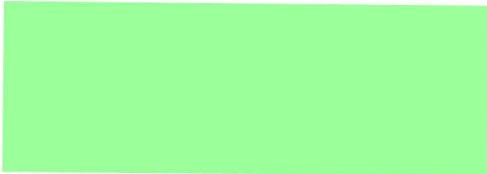


DATE: JUN 21 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

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:



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 summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i), with a separate administrative finding of willful misrepresentation of a material fact against the beneficiary. The labor certification will also be invalidated based on the beneficiary's willful misrepresentation.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a Filipino foods head cook. 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). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date, and that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The record shows that 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.¹

On September 14, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss and Derogatory Information (NOID), with a copy to counsel of record. The NOID stated, in part:

According to a Google search, your organization no longer operates a restaurant at [REDACTED] [REDACTED]. According to a Google search of that address, a [REDACTED] now operates out of that location.

If your organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of your organization's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

¹ 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).

Moreover, any concealment of the true status of your organization seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). You must resolve any inconsistencies in the record with independent, objective evidence. *Id.*

It appears that the instant appeal is moot. If you intend to continue your appeal, you must demonstrate the continued existence, operation, and good standing of your organization.

Beyond the decision of the director, it appears from the evidence in the record that the beneficiary misrepresented her employment history on the Form ETA 750. In Part B, the beneficiary listed her employment experience with [REDACTED]. She listed her progressive experience as Assistant Cook from January 1996 to January 1998, Filipino Foods Cook from February 1998 to February 2000 and Filipino Foods Head Cook from March 2000 to the date of signing on April 27, 2001. A letter from the former owner of [REDACTED] was submitted listing the same job titles and dates of employment.

A Form I-485, Application to Register Permanent Residence or Adjust Status (I-485), filed by the beneficiary on October 15, 1996, included a Form G-325A, Biographic Information (1996 G-325A). On the 1996 G-325A, the beneficiary listed her employment as a babysitter for [REDACTED] from February 1996 to the date of signing on August 8, 1996. The 1996 G-325A does not list employment with [REDACTED]. Further, the beneficiary included a copy of a letter from [REDACTED] dated September 30, 1996 thanking the beneficiary for her job application and indicating that he was offering the beneficiary a position as a Kitchen Manager with a first date of work scheduled for October 15, 1996. The letter does not specify the name of the business.

The record contains inconsistencies regarding the beneficiary's employment, including the dates and job titles. Doubt cast on any aspect of the petitioner's evidence 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Accordingly, it appears that the beneficiary misrepresented her prior work experience in order to meet the requirements of the certified Form ETA 750.

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the

position offered. The job offered requires two year of prior experience as a Filipino foods head cook or related occupation of assistant Filipino foods cook. The beneficiary's listing on Form ETA 750B that she gained this experience with [REDACTED] and signing that form under penalty of perjury, constitutes an act of willful misrepresentation if the beneficiary was not employed in that position.

Because of the inconsistencies in the record, your organization must provide independent, objective evidence of the beneficiary's former employment. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Such evidence may include pay checks, pay stubs, tax documents, payroll records, financial statements or other evidence of payments made to the beneficiary by her previous employers during her periods of employment that precede the priority date. We note that evidence that a petitioner creates after United States Citizenship and Immigration Services (USCIS) points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision.

Unless you can resolve the inconsistent information with independent objective evidence, the AAO intends to dismiss the appeal and enter a finding of willful misrepresentation against the beneficiary. The AAO may also invalidate the labor certification based on willful misrepresentation. See 20 C.F.R. § 656.31(d).² While you may withdraw the appeal, withdrawal will not prevent a finding that the beneficiary has engaged in the willful misrepresentation of material facts.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

States where he or she “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.” See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).³

Based on the foregoing, the AAO intends to enter a finding of material misrepresentation against the beneficiary and invalidate the labor certification unless the petitioner can submit independent objective evidence to overcome the inconsistencies in the record concerning her prior employment.

The NOID allowed the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond to the NOID would result in a dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to the AAO’s NOID. 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). Since the petitioner failed to respond to the NOID, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

Further, by signing the labor certification application and listing false information on the Form ETA 750 that would lead to a positive determination that the beneficiary had the required experience for the proffered position, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Thus, the AAO finds that the beneficiary willfully misrepresented a material fact on the labor certification application. This finding of willful

³ 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 material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. See 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, see 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, see *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). 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).

misrepresentation of a material fact shall be considered in any future proceeding where admissibility is an issue. We also invalidate the labor certification based on the beneficiary's willful misrepresentation of a material fact on the labor certification application.

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 summarily dismissed as abandoned.

FURTHER ORDER: The AAO finds that the beneficiary willfully misrepresented a material fact on the labor certification application in an effort to procure a benefit under the Act and the implementing regulations. The labor certification application, Form ETA 750, ETA case number [REDACTED] filed by the petitioner is invalidated.