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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: MAR 01 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 and invalidated the labor certification. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The labor certification will remain invalidated. The AAO will also enter an administrative finding of material misrepresentation against the beneficiary.

The petitioner describes itself as a bakeshop. It seeks to permanently employ the beneficiary in the United States as a Filipino specialty baker. 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 (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. See 8 C.F.R. § 204.5(d).

The director's September 23, 2008 decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The director invalidated the labor certification² due to inconsistencies in the record regarding the beneficiary's claimed work experience.

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.³

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 A labor certification application is subject to invalidation by U.S. Citizenship and Immigration Services (USCIS) if it is determined that 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."

³ 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

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Evidence of the Beneficiary's Qualifications

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: blank

High School: 4 years

College: blank

College Degree Required: blank

Major Field of Study: blank

TRAINING: blank

EXPERIENCE: Two years in the job offered.

OTHER SPECIAL REQUIREMENTS: Job references.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a baker at [redacted] from May 1986 to August 1989. No other experience is listed. Part 11 of the labor certification requests the names and addresses of all schools, colleges and universities attended by the beneficiary. The beneficiary stated that she attended high school at the [redacted]. The beneficiary did not represent that she attended college. The beneficiary signed the labor certification on April 11, 2001 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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

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 experience of the alien.

The record contains an experience letter from [REDACTED] President, on [REDACTED] letterhead stating that the company employed the beneficiary full-time as a baker of Filipino pastries from May 1986 until August 1989. However, as noted by the director in his decision, on Form G-325A, Biographic Information, signed by the beneficiary on July 28, 1993, the beneficiary stated that from July 1987 until August 1992, she was a reporter/broadcaster at [REDACTED] in Manila. No mention is made of employment as a baker at [REDACTED]. The record also indicates that the beneficiary has been a member of the [REDACTED] since 1986, that she has a degree in journalism from [REDACTED], and that she was a journalist in the Philippines.

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).

On appeal, counsel submits the beneficiary's October 20, 2008 affidavit that states that she was not aware that an asylum application was filed on her behalf.⁴ She states that in 1993, the beneficiary's husband was in contact with a self-described immigration specialist named "Dan" who indicated that he could obtain work permits for the couple. The beneficiary states that she signed blank forms and disavows the information contained on the Form G-325A and the asylum application. She indicates that she graduated from [REDACTED] with a Bachelor's Degree in Journalism but was not able to find employment in her field due to high rate of unemployment, and political upheaval in the Philippines at the time she graduated. Thus, the beneficiary asserts that she accepted employment as a baker at [REDACTED] from May 1986 until August 1989. The beneficiary indicates that she was familiar with the business as a customer prior to accepting employment there.

Counsel has not, however, provided any evidence which corroborates the beneficiary's claim. There are no police reports showing that the beneficiary alerted authorities about "Dan" and no affidavits from other victims who remember or can vouch for the beneficiary's claims. It is unreasonable to expect USCIS to accept an affidavit of the beneficiary, as the evidence in the record contradicts the beneficiary's statements.⁵ Further, the petitioner did not submit independent, objective evidence of

⁴ The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. *See id.* Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

⁵ If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th

the beneficiary's employment with [REDACTED] such as payroll records, tax records or paystubs. The petitioner has not resolved the inconsistencies in the record regarding the beneficiary's prior work experience.

The beneficiary's disavowal of participation in misrepresentation cannot be sustained in light of her admission of willingly signing blank documents. Specifically, her failure to apprise herself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve her of responsibility for the content of Form G-325A and Form I-589 that she signed on July 28, 1993. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). To allow the beneficiary to absolve herself of responsibility by simply claiming that she had no knowledge or participation in a matter where she provided all the supporting documents and signed blank documents would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

Furthermore, the beneficiary's claim that she had absolutely no knowledge of the content of the above-referenced forms signed in 1993 is not persuasive. The forms list personal information about the beneficiary, including her parents' and children's names, places and dates of birth, her religion and information regarding her entry into the United States. The beneficiary does not explain how "Dan" would have come to know of this information without her participation. Similarly, her asylum application correctly identifies that she earned a bachelor's degree in the field of journalism from [REDACTED], a fact that she would have had to have shared with the person preparing the form. It is noted for the record that this degree in journalism was omitted on a later the Form G-325A signed by the beneficiary.

As confirmed by the beneficiary, the asylum application and supporting documents bear the beneficiary's signature. The beneficiary had her fingerprints taken in connection with that filing. We find the statements that the beneficiary was a non-participant in the preparation and submission of all the documents mentioned above not credible. 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 *Matter of Ho*, 19 I&N Dec. at 591.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Regarding misrepresentation, 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.

The regulation at 20 C.F.R. § 656.31 states:

- (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

A willful misrepresentation of a material fact occurs is one which "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- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position. The job offered requires two years of prior experience as a Filipino specialty baker. As noted above, the beneficiary claimed to have gained qualifying experience as a baker at [REDACTED] from May 1986 until August 1989. However, during much of this time, she also claimed to have been employed as a reporter and broadcaster for [REDACTED]. Neither the work experience as a reporter nor the beneficiary's journalism degree was included on Form ETA 750. The beneficiary in listing on Form ETA 750B that she gained this experience as a baker 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. The listing of such experience misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience is a willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the ETA 750.

The AAO finds that the beneficiary knowingly 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 will remain invalidated.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage of \$13.50 per hour (\$28,080 per year). 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). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The instant petition was filed on July 20, 2007 and carries a priority date of April 30, 2001. However, the record only contains the petitioner's⁶ IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001 and 2005. The record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2002, 2003, 2004, and 2006.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Additionally, according to USCIS records, the petitioner has filed at least four other 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).

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane*, 381 F.3d at 143, 145.

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.

⁶ Form I-140 lists the petitioner's name as [REDACTED]. The submitted tax returns also have the same EIN, but list the company's name as [REDACTED]. The record does not contain evidence to establish that [REDACTED] is a fictitious name for [REDACTED].

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FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact on the labor certification application in an effort to procure a benefit under the Act and the implementing regulations. The alien employment certification, Form ETA 750, ETA case number P-05021-37793, remains invalidated.