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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 08 2013

OFFICE: NEBRASKA 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:  
[REDACTED]

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,

*Elizabeth McCormack*

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). The AAO will additionally find fraud and misrepresentation against the petitioner and the beneficiary in an effort to procure an immigration benefit, and will invalidate the labor certification.

The petitioner describes itself as a roofing company. It seeks to permanently employ the beneficiary in the United States as a roofer. 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: 1) the owner of the petitioner had a familial relationship with the beneficiary which the petitioner failed to explain or provide evidence of; and, 2) the petitioner failed to demonstrate 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.<sup>1</sup>

The AAO issued a May 1, 2012 Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI), with a copy to counsel of record, requesting the petitioner to submit evidence that the petitioning business is active, that ██████████ Corporation is a successor-in-interest to the petitioner or is the same entity as ██████████ Corporation, and to explain why ██████████ filed the appeal if ██████████ Corporation was its successor-in-interest. The AAO requested evidence of both entities' ability to pay the proffered wage. The AAO also requested the petitioner to explain the familial relationship between the petitioner's owner and the beneficiary, and to establish that DOL was aware of that relationship during the labor certification process.

On September 7, 2012, the AAO sent the petitioner a second NOID/NDI, with a copy to counsel of record, noting that on June 1, 2012, the petitioner responded to its May 1, 2012 NOID, but that the evidence contained in the response did not establish that ██████████ Corporation is a successor-in-interest

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<sup>1</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 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).

to the petitioner and did not explain why [REDACTED] filed the appeal and not [REDACTED] Corporation. We noted that the response did not establish that DOL was aware of the family relationship between the owner of the petitioner and the beneficiary.<sup>2</sup> We also noted that the beneficiary was not qualified to perform the duties of the proffered position in that [REDACTED] did not sign the letter of experience from [REDACTED] attesting to the beneficiary's experience; and that the petitioner's submission of the false work experience letter constituted willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the Form ETA 750 and Form I-140. The AAO also indicated that if the beneficiary did not work for [REDACTED] that the beneficiary had misrepresented his work experience on the Form ETA 750B. The AAO informed the petitioner that failure to respond to the NOID would result in a dismissal of the appeal, and that a finding of fraud would lead to invalidation of the labor certification.

As of the date of this decision, the petitioner has not responded to the AAO's September 7, 2012 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, the AAO finds that the beneficiary materially misrepresented his work experience on the Form ETA 750B, and that the petitioner submitted a false document to obtain an immigration benefit.

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. 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 an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, 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

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<sup>2</sup> The record establishes that the petitioner's owner and the beneficiary are brothers.

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 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.

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. See section 212(a)(6)(C) of the Act.

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. In the present matter, we find that the petitioner’s documentation with respect to the beneficiary’s qualifications has been falsified, a finding that the petitioner does not challenge in that it did not respond to the AAO’s September 7, 2012 NDI/RFE.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, “(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.”

A material issue in this case is whether the beneficiary has the required two years of experience for the position offered. Submitting a false document amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

(1) the alien is excludable on the true facts; or (2) the misrepresentation 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 & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

In this case, the beneficiary certified, upon completing and signing the Form ETA 750 part B labor certification application that he had at least two years of work experience in the job offered before the priority date. The beneficiary maintained that he was employed by [REDACTED] located at [REDACTED], as a roofer, from May 1997 to March 2001. The record shows that the experience letter provided to establish the beneficiary's claimed experience is fraudulent, therefore the beneficiary misrepresented his qualifications on ETA 750B. Such evidence is material because if true, would demonstrate that the beneficiary had the requisite qualification as specified on the labor certification.

Based on the petitioner's submission of the false work experience letter, and the beneficiary's statement on the Form ETA 750B that he worked at [REDACTED] the AAO finds that the petitioner and the beneficiary have each deliberately concealed and misrepresented facts about the beneficiary's prior work experience from May 1997 to March 2001.

On the true facts, the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the Department of Labor in order for the beneficiary to be admissible to the United States. See section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the Department of Labor issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d). The regulation at 20 C.F.R. § 656.30(d) provides:

(d) After issuance labor certifications are subject to invalidation by the INS 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 a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as

appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

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.

Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification" (emphasis added). The beneficiary did not establish the necessary qualifications in this case, as he did not possess two years' work experience as a roofer as of the filing date of the labor certification. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The petitioner's submission of a forged or falsified work experience document shut off a line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (en banc). In addition, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the petitioner and the beneficiary shut off a line of relevant inquiry. If the

DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chines Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By the beneficiary's misrepresenting his work experience and the petitioner's submitting a fraudulent document to USCIS and the DOL, the beneficiary and the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

In response to the AAO's NOID/NDI the petitioner, who is the beneficiary's brother, does not dispute that the work experience document submitted in support of the labor certification was fraudulent. The petitioner does not offer any testimony, or documentation to dispute that the document submitted to USCIS and the DOL was false, and that he does have the required work experience.

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to the petitioner and gave him an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, he did not submit a response. Thus, the AAO finds that the letter from [REDACTED] was fraudulent, that the petitioner knowingly submitted a false document, and that the beneficiary misrepresented his work experience on the Form ETA750 when he attested under the penalty of perjury that he worked for [REDACTED] from May 1997 to March 2001. The labor certification is invalidated pursuant to 20 C.F.R. § 656.30(d).

By signing the Form ETA 750, and submitting a forged or fraudulent work experience letter, the beneficiary and the petitioner have sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that it submitted falsified documents, and because the beneficiary misrepresented his work experience, we affirm our finding that the petitioner and the beneficiary have each sought to procure immigration benefits through material misrepresentation. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

The record in this case also lacks conclusive evidence as to whether the petition is based on a *bona fide* job offer or whether a pre-existing family, business, or personal relationship may have influenced the labor certification. 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo*

basis). In the instant case, as is evidenced by the birth certificates of the petitioner's owner and the beneficiary, the beneficiary is the brother of the petitioner's owner.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

In the instant case the owner of the petitioner and the beneficiary are brothers. The record does not contain any indication that the petitioner disclosed the familial relationship between the owner and the beneficiary to the DOL.

The facts of the instant case suggest that this case may too be the functional equivalent of self-employment. As the familial relationship was not disclosed to the DOL at the time the petitioner submitted the labor certification application and the request for reduction of recruitment to the DOL, the certifying officer would not have been aware of the need for heightened scrutiny prior to certification, and may have failed to examine more carefully whether the position was clearly open to qualified U.S. workers.<sup>3</sup> The AAO finds that under the circumstances of this case, the DOL's labor certification may have been flawed.

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<sup>3</sup> The petitioner stated to DOL at the time the Form ETA 750 was filed that the recruitment was complete at the time of filing, under a procedure termed reduction in recruitment. Thus, the certifying officer, who has the option of requiring an applicant for labor certification to perform traditional recruitment supervised by a local office, would not have been alerted to the need for heightened scrutiny during the recruitment process. See, 20 C.F.R. § 656.656.21 (2004).

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 with a finding of willful misrepresentation of a material fact against the beneficiary and against the petitioner.

**FURTHER ORDER:** The AAO finds that the petitioner and the beneficiary each knowingly misrepresented a material fact in an effort to procure a benefit under the Act and the implementing regulations.

**FURTHER ORDER:** The alien employment certification, Form ETA 750, ETA case number [REDACTED] is invalidated.