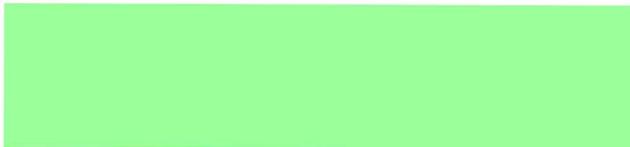


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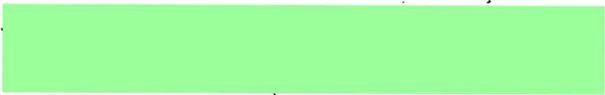
U.S. Citizenship
and Immigration
Services



DATE: **MAR 29 2013**

OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a 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:



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.

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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. The labor certification application will also be invalidated based on the petitioner's misrepresentation.

The petitioner seeks to employ the beneficiary permanently in the United States as a videographer. 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 determined that the petitioner had not established that the ETA Form 9089 supported the visa category of "skilled worker" as selected by the petitioner in Part 2, paragraph f of the Immigrant Petition for Alien Worker (Form I-140). The director also determined that a family relationship existed between the petitioner's president and the beneficiary, which constituted a misrepresentation of the petitioner's claims on the ETA Form 9089 whereby the petitioner denied any familial relationship to the beneficiary. The director invalidated the ETA Form 9089 based on this misrepresentation.

On appeal, the petitioner, through counsel, offered an amended Form I-140 designating a different visa category of "unskilled worker" as shown on Part 2, paragraph g of the Form I-140. The petitioner also submitted copies of birth certificates of the petitioner's president and the beneficiary, asserting that they were not related. Counsel claimed that the director's NOID was not timely received. The record shows that it was mailed to the petitioner at counsel's last known address. On appeal, counsel's stated address was different.

On August 13, 2012, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) the petition and a Notice of Intent to Deny (NDI/NOID) the petition.¹ The petitioner, through new counsel has submitted a response. For the reasons set forth below, the AAO will dismiss the appeal for misrepresentation, failure to establish the continuing ability to pay the proffered wage,² failure to establish the beneficiary's educational requirements, failure to

¹ 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.

² The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

establish the beneficiary's qualifying experience³ and failure to establish that the ETA Form 9089 supports a visa designation of skilled worker.

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.

Relevant to the ability to pay the proffered wage, the beneficiary's educational requirements, employment verification of the required experience, and the designation of the wrong visa category, the AAO's NOID/RFE informed the petitioner of the following:

1. Additionally, the petitioner has not established its continuing ability to pay the proffered wage of \$9.50 per hour (\$19,760) from the priority date of November 10, 2009, onward in accordance with 8 C.F.R. § 204.5(g)(2), which requires the submission of federal tax returns, audited financial statements or annual reports. If you organization has not filed federal tax returns, you have the option of submitting audited financial statements. The "annual report" that you have submitted appears to be an unaudited financial record. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the

accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

³ The priority date is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition and must also establish its continuing ability to pay the proffered wage. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date is November 10, 2009. The proffered wage is \$19,760 per year.

(b)(6)

proffered wage. Moreover, it is noted that the annual report fails to demonstrate sufficient income to cover the proffered wage.

The petitioner has also submitted selected bank statements. They do not demonstrate a sustainable ability to pay the proffered wage. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Therefore, if you respond to this notice, please submit the following:

- a. Evidence of the petitioner's continuing ability to pay the proffered wage from the priority date to the present date. Evidence must be submitted in accordance with 8 C.F.R. § 204.5(g)(2), including but not limited to federal tax returns, audited financial statements, or annual reports.
 - b. *Certified* copies of all quarters of the petitioner's state quarterly wage report (Florida Employer's Quarterly Report, Form UCT-6) filed with the state of Florida from the priority date of November 10, 2009, onward until the present time. The reports must identify all workers by name and amount of wages paid per quarter.
2. The record does not contain any evidence of the beneficiary's completion of a high school education as required by Part H.4 of the ETA Form 9089. Please submit copy of high school diploma accompanied by corresponding grade transcript and certified English translation in accordance 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.

(b)(6)

3. A copy of an employment verification letter from [REDACTED] dated March 2009 does not establish the required 12 months of work experience in the job offered as a videographer as of the priority date. The letter does not confirm the dates the beneficiary was employed, and does not sufficiently describe his duties so as to conclude that he obtained 12 months of full-time experience as a videographer. It is further noted that the English translation does not comply with 8 C.F.R. § 103.2(b)(3) as set forth above. Please submit evidence that the beneficiary acquired 12 months of experience in the job offered as a videographer and submit

certified English translations of any foreign documents in compliance with 8 C.F.R. § 103.2(b)(3).⁴

4. On appeal, counsel asserts that the designation of a skilled worker was an inadvertent error on Form I-140 and that the petitioner intended to check Part 2.g. indicating that it was filing the petition for an unskilled worker. Counsel offers an amended Form I-140 on appeal. The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the applicant must have a high school education and twelve months of experience in the job offered of videographer. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The petitioner has not responded to the AAO's issues set forth in #1, #2, and #3 above in its NOID/RFE and indicates its concurrence with the AAO's rationale set forth in #4 above; that the petitioner filed the Form I-140 designating the wrong category.

In its NOID/RFE, the AAO further informed the petitioner that:

5. As noted by the director, with respect to the relationship of the beneficiary to the petitioner, Part C.9 of the ETA Form 9089 states:

Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?

⁴ The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petitioner answered "no" to this question. On appeal, counsel submits the copies of the birth certificates of the petitioner's president, "[REDACTED]"⁵ and the beneficiary, and asserts that they are not related and that their shared surname is common in Bolivia. The AAO notes that shared parents are not the only way a familial relationship is created. Further, it is noted that the question on the ETA Form 9089 addresses all owners, shareholders and partners. It appears that the beneficiary may be related to one or more officer of the corporation.

If you elect to respond to this notice, please submit the following:

- a. A sworn statement from the beneficiary and each officer, director, incorporator or shareholder of the petitioning organization, including but not limited to [REDACTED], and [REDACTED], identifying each person's name and title of the position held, and stating whether he/she is related to the beneficiary by blood or marriage to any degree.

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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). 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).

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)(1).

⁵ The name "[REDACTED]" has been alternately spelled as "[REDACTED]" for both the petitioner's president and the beneficiary throughout the record. As [REDACTED] is reflected on both birth certificates, the AAO considers this to be the correct surname for both the petitioner's president and the beneficiary.

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.⁶

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.

⁶ 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.

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) 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."⁷

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."⁸

In this case, in response to the AAO's NOID/RFE requesting sworn statements from the beneficiary and each officer, director, incorporator or shareholder of the petitioner, including but not limited to [REDACTED] and [REDACTED] specifying their job title and relationship by blood or marriage to any degree to the beneficiary, counsel states that the beneficiary is brother to [REDACTED] (who is a director and secretary of the petitioner. Counsel also states that the

⁷ The underlying labor certification supporting this application may be invalidated pursuant to 20 C.F.R. § 656.30, which provides in pertinent part:

(d) 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. . ." 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.

⁸ 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).

beneficiary is the brother-in-law of [REDACTED], who is the petitioner's president and also a director and who signed the original and amended Form I-140 submitted on appeal, as well as counsel's Form G-28, notice of entry of appearance submitted on appeal. Current counsel blames the misrepresentation of the familial relationship of the beneficiary to two of the petitioner's officers and directors on former counsel. In support of this theory, counsel submits a copy of an unsigned draft of a January 7, 2013 letter from the beneficiary, as President, a copy of a signed letter from [REDACTED] as President, a copy of two retainer agreements in Spanish between the petitioner's president, [REDACTED], and former counsel, a copy of a retainer agreement in English between [REDACTED] and former counsel, copies of various receipts, a copy of a diploma in Spanish without an English translation, copies of the petitioning entity's articles of incorporation, copies of former counsel's online January 9, 2013 listing by the Florida Bar of counsel's "delinquency notice," for failure to complete continuing legal education requirements, and copies of retainer agreements and receipts between the beneficiary and former counsel related to various immigration matters including for an I-140 petition and labor certification.

It remains that both the petitioner's representative and the beneficiary signed the ETA Form 9089 under penalty of perjury, which disavowed any familial relationship between the beneficiary and any owner, stockholder, partner, officer or incorporator. The petitioner also appeared to endorse former counsel's appeal on this matter. According to the copies of the letters to former counsel, the issue of the relationship was known to the petitioner's representative and the beneficiary but the petitioner's representative signed the labor certification,⁹ assigning the blame for misrepresentation and other deficiencies to former counsel's alleged malfeasance.¹⁰

⁹ The paragraphs on page 9 of the ETA Form 9089 above the signature of the petitioner's representative state:

I hereby designate the agent or attorney identified in section E (if any) to represent me for the purpose of labor certification and, by virtue of my signature in Block 3 below, **I take full responsibility** for the accuracy of any representations made by my agent or attorney.

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S. C. §§ 1546 and 1621.*

(Original Emphasis)

¹⁰ 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

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, this misrepresented the *bona fide* nature of the job opportunity, and the petitioner has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because no independent and objective evidence has been submitted to overcome, fully and persuasively, our finding that the falsified documents have

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 himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a blank document 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.

It is noted that an appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

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 concurs with the director's invalidation of the ETA Form 9089 pursuant to 20 C.F.R. § 656.31(d) based on the willful misrepresentation.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner willfully misled DOL and USCIS on elements material to the alien's eligibility for a benefit sought under the immigration laws of the United States. The labor certification application remains invalidated pursuant to 20 C.F.R. § 656.31(d) based on the misrepresentation.