

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 14 2013** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE Petitioner: [REDACTED]  
Beneficiary [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(i)

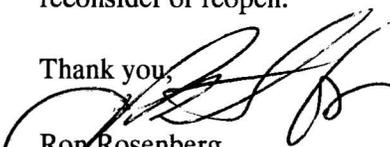
ON BEHALF OF PETITIONER:

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, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner distributes medical equipment. It seeks to employ the beneficiary permanently in the United States as technical sales representative pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. Upon reviewing the petition, the director determined that it was not eligible for approval because the petitioner failed to establish that the petitioner made a *bona fide* job offer to the beneficiary. The director denied the petition on April 21, 2011, invalidating the ETA Form 9089.

The petitioner<sup>1</sup> filed an appeal. The AAO issued a Notice of Intent to Dismiss (NOID) on February 13, 2013, informing the petitioner of doubts concerning the *bona fide* nature of the job offer.<sup>2</sup> Specifically, the NOID informed the petitioner of the following:

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<sup>1</sup> The regulation at 20 C.F.R. § 656.3 states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

*Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

Further, the regulation at 20 C.F.R. § 656.3 provides that “An employer must possess a valid Federal Employer Identification Number (FEIN). As noted in the AAO’s NOID, the ETA Form 9089 states that the petitioner’s FEIN is 01-0902984, which is different than the FEIN on the Form I-140, Immigrant Petition for Alien Worker. The petitioner failed to address this discrepancy. 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).

<sup>2</sup> The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. 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).

At the outset, it is noted that on June 17, 2010, the beneficiary and on June 18, 2010, the petitioner's representative, [REDACTED], signed the ETA Form 9089, Application for Permanent Employment Certification under penalty of perjury. Two of the ten declarations contained on page 9 of the ETA Form 9089 are that the job opportunity has been and is clearly open to any U.S. worker and that the position offered is for full-time, permanent employment for an employer other than the alien.

On Part C.9 of the ETA Form 9089, a question is asked as follows:

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?

In adjudicating the petition, the director observed that the petition and the record raised doubts as to the *bona fide* nature of the job opportunity. The director issued a Request for Evidence (RFE), dated December 16, 2010, and notified the petitioner that the record indicated that the beneficiary is the spouse of [REDACTED]. She is listed as a director of the corporate petitioner on the State of Virginia online corporate records, which establishes a familial relationship to a corporate officer. The director also noted that the record indicated that a foreign entity, "[REDACTED]" held 100% of the corporate petitioner's stock and requested information related to the ownership of that entity. It is noted that that current online Virginia corporate records<sup>3</sup> list three officers and/or directors of the petitioner:

1. [REDACTED] Secretary
2. [the beneficiary] Director
3. [beneficiary's spouse] Director

It is further noted that the annual reports filed by the petitioner with the state of Virginia indicate the following:

1. In 2008, signed on July 23, 2008 by [REDACTED] [REDACTED] is listed as the petitioner's registered agent and as a director. The beneficiary is listed as an officer and director.
2. In 2009, signed on April 29, 2009 by the beneficiary as "President," the beneficiary is listed as the petitioner's registered agent and also as an officer and director. [REDACTED]

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<sup>3</sup> See [REDACTED] (accessed December 12, 2012).

- [REDACTED] is listed as an officer and director and [the beneficiary's spouse] is specified as a director.
3. In 2010, signed on May 11, 2010 by the beneficiary as "President," the beneficiary is listed as the petitioner's registered agent and also as an officer and director. [REDACTED] is identified as an officer and director and [the beneficiary's spouse] is listed as a director.
  4. In 2011, signed by the beneficiary as "Director" on April 27, 2011, the beneficiary is specified as the petitioner's registered agent and as an officer and director. [REDACTED] is also identified as an officer and director and [the beneficiary's spouse] is shown as a director.
  5. Another annual report was filed for 2011 and signed on March 26, 2012 by the beneficiary as "Director." The beneficiary is listed as the petitioner's registered agent and as an officer and director. [REDACTED] is also listed as an officer and director. [The beneficiary's spouse] is shown as a director.
  6. In 2012, signed by the beneficiary on April 24, 2012, with the beneficiary is listed as the petitioner's registered agent and as an officer and director. [REDACTED] is also listed as an officer and director. [The beneficiary's spouse] is shown as a director.

Following the petitioner's response to the director's RFE, the director denied the petition on April 21, 2011, concluding that both the beneficiary and the beneficiary's spouse are corporate officers of the petitioner. Based on this relationship, the director concluded that the petitioner should have answered "yes" to the question shown on Part C.9 of the ETA Form 9089. The director determined that the petitioner had not made a *bona fide* job offer in that the failure to disclose the relationship of the beneficiary to the petitioner to DOL calls into question the true availability of the position to other qualified U.S. workers. The director denied the petition on this basis and invalidated the labor certification.

On appeal, the petitioner, through counsel, asserts that the denial was unjust because neither the beneficiary nor his wife has any ownership interest in the petitioner or in the foreign parent company.

The named petitioner on the Form I-140 is Criticare Inc. with a FEIN of [REDACTED]. [REDACTED] It is not the foreign parent company. Form I-140 states that the petitioner only has four employees. ETA Form 9089 states that the petitioner

only had two employees.<sup>4</sup> The petitioner's 2009 tax return shows total wages paid of \$81,040 and no other costs of labor or officer compensation. Other information submitted in support of this and a previous Immigrant Petition for Alien Worker (Form I-140) filed for the beneficiary as a first preference, multinational executive or manager, indicates that the foreign parent company is [REDACTED]. The beneficiary served as President of this company from 2003 to 2007 when the company decided to open an office in the United States. It incorporated this office as Criticare, Inc. The affidavit of [REDACTED] submitted in support of the prior petition for the beneficiary, indicates that the beneficiary is currently the president of [REDACTED] as well as a director. The beneficiary also serves on the Board of Directors for the parent company of [REDACTED]. The beneficiary receives direction and general guidelines from [REDACTED] but, according to an April 11, 2011, statement from [REDACTED] submitted in support of the prior petition, the beneficiary is "responsible for hiring, firing and employee incentive actions and policies." An affidavit executed by [REDACTED] on April 8, 2010 indicates that the beneficiary is currently president of the petitioner and that he will continue "to be responsible for planning, directing and implementing the business activities of the entire [REDACTED] business organization in the North and South America, Canada, UK & Europe." The copy of the organizational chart of the petitioner shows the beneficiary as president at the top of the chart with all other eight individuals shown, including [REDACTED] and the beneficiary's wife in subsidiary positions.

It is noted that 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).

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

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<sup>4</sup> ETA Form 9089 states Criticare's FEIN as [REDACTED] which is different than the FEIN on the Form I-140. The petitioner must address this discrepancy.

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.

As noted herein, the regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself."

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,406 (Comm. 1986). In that case, the labor certification was signed on behalf of the petitioner by an individual identified as [REDACTED]. After certification and in the course of examining the petitioner's tax returns, the former Immigration and Naturalization Service (now USCIS) observed that the 1981 tax return showed the beneficiary as the sole officer and a 50% shareholder in the company. The 1982 return reflected that the beneficiary and Mr. [REDACTED] were each 50 percent shareholders with officer compensation going to the beneficiary. In light of these facts, the Board of Immigration Appeals (BIA) observed that the beneficiary is not supervised by Mr. [REDACTED] who signed the petition as president. Second, the job was not actually open to qualified U.S. Citizen or resident workers. It was concluded that the misrepresentation was both "willful and material." While it was noted that ownership in a petitioning relationship does not automatically disqualify an alien, the DOL has denied labor certifications where it was determined that the prospective alien employee controlled the prospective corporate employer to the extent that the job offer could not be properly regarded as open to all qualified applicants. *Id.* at 3.

The BIA further noted that the labor application was signed by an individual other than the beneficiary, despite the fact that the petitioner's corporation income tax return shows that the beneficiary to have been the sole officer of the corporation during that period of time. In *Matter of Silver Dragon Chinese Restaurant*, the BIA determined that these were material misrepresentations that were willful because the officers and principals of the corporation were presumed to be aware and informed of the organization and staff of the enterprise. *Id.* at 4. As in this case, the BIA concluded that the petitioner's statement "that the beneficiary would be supervised by its corporate president, when the beneficiary, at the time the statement was made, was in fact the president of the petitioning corporation" can only be held to be a misrepresentation calculated to secure a benefit for which the petitioner was not eligible, and thus a misrepresentation which subjects the labor certification to invalidation.

In this matter, although the facts are not identical, based on the foregoing, not only are the beneficiary and one of the petitioner's directors directly related, the beneficiary is the President of the corporate petitioner and, according to the state annual reports filed by the petitioner, appeared to be President during the time the ETA Form 9089 was submitted to DOL sponsoring him as a beneficiary. It appears that he controlled the corporate employer, [REDACTED] to the extent that the job offer could not be properly regarded as open to all qualified U.S. workers. This appeared to amount to the functional equivalent of self-employment (i.e. directly related to his spouse and himself as a corporate officer). None of this was disclosed to DOL as indicated by the negative answer to Part C.9 of the ETA Form 9089, when he was actually the president and one of two officers (not counting his spouse) of the petitioning business during the relevant time.

By failing to properly answer Part C.9 of the ETA Form 9089, DOL was unable to assess the beneficiary's control over the job offer. *See* 20 C.F.R. § 656.17(l).<sup>5</sup>

As set forth in the AAO's NOID, the AAO specifically alerted the petitioner that failure to respond to the notice may result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a

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<sup>5</sup> The regulation at 20 C.F.R. § 656.17 provides in relevant part:

(l) *Alien Influence and control over job opportunity.* If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, *i.e.*, the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation /firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of the 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to respond to the NOID, and based upon the record, the AAO is dismissing the appeal. The AAO is also making a further finding of misrepresentation and invalidating the labor certification.

Based on the foregoing, as raised in the AAO's NOID, the AAO finds that by denying the relationship of the beneficiary to the petitioning business and its officers and directors on the ETA Form 9089, the employer and the beneficiary, based upon his position within the hierarchy of the petitioning business, engaged in a material misrepresentation integral to the labor certification process in misrepresenting that a *bona fide* job offer existed that was otherwise available to eligible U.S. workers.

United States Citizenship and Immigration Services (USCIS) may invalidate labor certifications where willful misrepresentation has occurred. Whether a petitioning business is a *bona fide* employer extending a real job offer and not operating solely to facilitate the procuring of immigration benefits for a particular alien is a material misrepresentation where it shuts off a line of inquiry relevant to the alien's eligibility. *See Matter of S & B-C-*, 9 I&N Dec. 436 (A.G. 1961). A willful misrepresentation requires a knowingly made material misstatement to a government official for the purpose of obtaining an immigration benefit. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (B.I.A. 1975). To constitute a fraud, an alien must have made a false representation of a material fact, with knowledge of its falsity and with an intent to deceive a government official, and the misrepresentation must have been believed and acted upon by the official. *See Matter of GG-*, 7 I&N De. 161, 164 (B.I.A. 1975).

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).

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.

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.

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)

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."

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 AAO finds that the petition was filed based on the fraudulent misrepresentation by the petitioner and beneficiary that the job offer was bona fide and available to otherwise eligible U.S. workers. The AAO additionally invalidates the labor certification pursuant to 20 C.F.R. § 656.30(d).