

(b)(6)

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: **MAY 16 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)

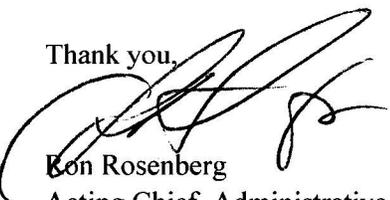
ON BEHALF OF PETITIONER:
[REDACTED]

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,


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

The petitioner sought to employ the beneficiary permanently in the United States as a fashion designer pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, a labor certification accompanied the petition.¹ Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that it had the continuing financial ability to pay the proffered wage, that it failed to submit all the requested evidence, and found that based on deficiencies in the record, the job offer did not appear to be *bona fide*.

The AAO issued a Notice of Intent to Deny (NOID), the AAO specifically alerted the petitioner that failure to respond to the NOID 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 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, the AAO is dismissing the appeal. The AAO is also making a further finding of fraud and willful misrepresentation and invalidating the labor certification.

The AAO issued a notice of intent to deny and a notice of derogatory information² on January 3, 2011 informing the petitioner (and the beneficiary by notice to the beneficiary's attorney of record)³ of doubts

¹The I-140 petition was submitted with a copy of the labor certification, not the original. The record does not contain an explanation where the original labor certification is located. Without the original labor certification the AAO cannot determine whether the labor certification has already been used on behalf of another alien, in which case the instant beneficiary would not be able to adjust his status to permanent residence in connection with any application filed based on this I-140 petition. Significantly, USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm'r 1986). While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006). Without the original labor certification, the I-140 petition is not properly filed, should not have been accepted for filing, and should be rejected. The regulation at 8 C.F.R. § 103.2(b)(4) requires that labor certifications must be submitted in the original.

²The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides that if a decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and which the applicant or petitioner is unaware, they shall be advised and offered an opportunity to rebut the information and present information on his/her own behalf except as provided in paragraphs (b)(16)(ii),(iii), and (iv) of this section.

concerning the *bona fide* nature of the job offer and the nature of the petitioner's business.⁴ The NOID advised the petitioner that:

[The director] had requested that you provide evidence that you could pay the proffered wages of all beneficiaries for whom you had petitioned. Documentation which was requested by the director and not provided were copies of quarterly wage reports from April 2006 to the present, tax return transcripts including all schedules for 2006 in sealed envelope from the Internal Revenue Service (IRS); evidence that allows USCIS to determine the nature of the business actually conducted such as current print ads, yellow page listings, brochures, invoices, etc.; copies of articles of incorporation, including any additional documents which establish the individuals authorized to act on your behalf on the dates the application for employment certification and I-140 were filed. The director also advised you to submit original letters of employment verification including corroborating evidence of the beneficiary's prior employment such as payroll records, pay receipts, tax returns. No financial corroboration of previous employment was provided, and a letter from [redacted] signed in the original was not provided until the appeal.

The director further noted that although requested, you failed to provide the certified tax return. The director determined that the financial documentation was not sufficiently reliable to conclude that you have had the ability to pay the proffered wage. The director cited the regulation at 8 C.F.R. § 103.2(b)(14) to state that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

³ Alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano*, 19 I. & N. Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I. & N. Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). However, since a fraud finding affects an alien's admissibility, the AAO permitted the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I. & N. Dec. 533, 536 (BIA 1988).

⁴The 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).

Specifically, the AAO's notice of derogatory information also informed the petitioner and beneficiary that pursuant to an investigation conducted by Immigration and Customs Enforcement, a determination was made that the named petitioner in this case, [REDACTED] was created solely for the purpose of sponsoring aliens through the labor certification program and that [REDACTED] conducted no legitimate business.⁵ For this reason, the AAO advised the petitioner and beneficiary that the filing was based on fraud and willful misrepresentation by the petitioner and the beneficiary and would be dismissed on this basis.⁶ Further, the underlying labor certification supporting the petition would be invalidated pursuant to 20 C.F.R. § 656.30.⁷

⁵ Online state corporation records reflects that the petitioning business is inactive. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

⁶ Subsequent to the AAO issuing its NOID, the United States Attorney's office issued an indictment in the [REDACTED] that named [REDACTED] and a number of "co-conspirators" in a "scheme" of filing "petitions containing false information and fabricated supporting documentation." The individual signing in the present matter on the petitioner's behalf was named as a "co-conspirator ("sponsor defendant"). See <http://justice.gov/usao/nys/pressrelease/April12/david/davidearlsethetalindictment.pdf>, accessed May 6, 2013.

⁷ This regulation 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) of the Act, 8 U.S.C. § 1182 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. Although the immigrant visa petition may present an 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) fo the Act, 8 U.S.C. §§ 1182(a) and 1255(a). It is further noted that the law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (1st Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th cir. 1993); see also, *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

As noted above, in the notice of the intent to deny, 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 material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).⁸ Regarding the instant petition, the petitioner's failure to respond and to submit independent and objective evidence to overcome the derogatory information seriously compromises the credibility of the petition. As outlined by the director and additionally requested by the AAO, the petitioner was afforded an opportunity both with the initial filing and on appeal to submit independent objective evidence related to the petitioner's business to verify the *bona fide* nature of the company and the job offer. No such evidence was submitted. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the foregoing, the AAO finds that the petition was filed based on fraud and willful misrepresentation that the petitioner was a legitimate business making a valid job offer to the alien. Because the sole recipient of the immigration benefit was the alien, we find the alien's participation as the beneficiary of such petition constitutes fraud and willful material⁹ misrepresentation that a *bona fide* job offer was extended or accepted.¹⁰

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.

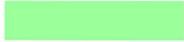
knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents).

⁸Additionally, without a response to verify the petitioner's authenticity and the authenticity of financial documentation and experience letters submitted, the petition would be denied on the merits as outlined by the director in his decision for failure to establish the petitioner's ability to pay pursuant to 8 C.F.R. 204.5(g)(2) and failure to submit independent objective evidence to verify the beneficiary's experience. 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).

⁹ 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).

¹⁰ 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).

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Page 6

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petition was filed based on fraud and willful misrepresentation by the petitioner and willful misrepresentation of the beneficiary that the job offer was valid. The AAO additionally invalidates the labor certification pursuant to 8 C.F.R. § 656.30(d).