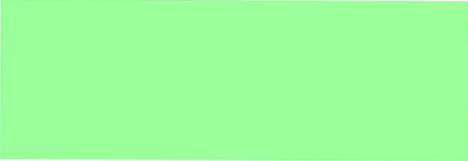


(b)(6)

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

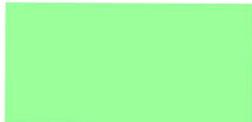


U.S. Citizenship
and Immigration
Services



DATE: **MAY 23 2013**

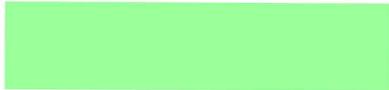
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

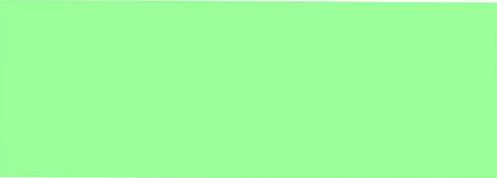
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On October 22, 2002, United States Citizenship and Immigration Services (USCIS) received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center, (the director) on April 11, 2003. The director, however, revoked the approval of the immigrant petition on May 5, 2010, and the petitioner subsequently appealed the director's decision to revoke to the Administrative Appeals Office (AAO). The appeal will be dismissed and the director's decision to revoke the approval of the petition will be affirmed and the labor certification will remain invalidated.

The petitioner is an import/export company and seeks to employ the beneficiary permanently in the United States as a bilingual secretary.¹ The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the above-named beneficiary. As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner misrepresented a material fact on the labor certification regarding the beneficiary's experience. The director revoked the approval of the petition accordingly and invalidated the labor certification.²

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

On June 30, 2003, the director sent a notice of intent to revoke (2003 NOIR), informing the petitioner that its former counsel, [REDACTED] was convicted of several federal offenses

¹ 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.

² The director also concluded that the petitioner has failed to demonstrate a successor-in-interest and its ability to pay the proffered wages as of the priority date and onward. The AAO will not address the successor-in-interest and the ability to pay issues in this decision, because no valid labor certification exists.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

relating to the filing of fraudulent immigrant worker visa petitions. The director indicated that the evidence submitted in support of the petition was therefore in question and requested additional evidence. The petitioner responded to the director's NOIR. However, subsequent to the petitioner's response to the NOIR, the director discovered new information regarding the evidence the petitioner had submitted in support of the beneficiary's experience and sent a second NOIR to the petitioner on February 17, 2010 (2010 NOIR). In his second NOIR, the director informed the petitioner that the U.S. Department of State Consulate General in Brazil contacted the [REDACTED] to confirm the beneficiary's employment with the university and was told that the university had no employment registration for the beneficiary. The 2010 NOIR indicated that the director found the beneficiary's work experience claim to be false and provided 30 days for the petitioner to respond to finding of fraud or willful misrepresentation.

The AAO notes that the NOIRs were properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's second NOIR sufficiently detailed the evidence of the record, pointing out the work experience which the petitioner and the beneficiary had indicated on the labor certification was found to be false. The willful misrepresentation concerning the beneficiary's work experience would warrant a denial if unexplained and un rebutted, and thus the NOIRs were properly issued for good and sufficient cause.

On March 15, 2010, the petitioner responded to the director's 2010 NOIR. However, the director concluded that the evidence submitted was not sufficient to overcome the finding of fraud or willful misrepresentation made on the labor certification. The director revoked the approval of the Form I-140 visa petition and invalidated the labor certification on May 5, 2010. The petitioner timely appealed the director's decision to revoke. On February 21, 2013, the AAO sent a notice of derogatory information and intent to dismiss (NODI/NOID) informing the petitioner of the AAO's discovery that the beneficiary is now the owner of the petitioner; and therefore, that a *bona fide* job offer no longer exists. In the NODI/NOID, the AAO stated that the petitioner's and the beneficiary's fraud or willful misrepresentation regarding the beneficiary's experience also continues to be an issue on appeal.

In his response to the AAO's NODI/NOID, counsel does not dispute that the beneficiary is the owner of the petitioner; however, he asserts that section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21) allows the beneficiary to port her position to a different employer if the beneficiary's adjustment application remained pending over 180 days. Citing Question 8 of Memorandum from Michael Aytes, dated 27 December 2005, counsel also asserts that the beneficiary may port to self-employment. Counsel states that the fact that the beneficiary owns the petitioner is not derogatory information. Counsel further asserts that the

issue is not whether the beneficiary owns the company, rather the issue is whether the job is the same or similar to those specified in the job description.

We disagree. To address the portability issue, it is important to analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

AC21, Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

It is true that, absent revocation or denial, a beneficiary would be eligible for adjustment of status with a new employer provided that the new job is in the same or similar occupation as that for which the petition was filed. However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "**remain valid with respect to a new job.**" (Emphasis added). Section 204(j) of the Act, 8 U.S.C. § 1154(j).⁴ A Form I-140 petition is no longer valid for porting purposes if it is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after a Form I-485 adjustment application has been pending for 180 days. Here, the petition was revoked based on fraud or material misrepresentation; not based on a withdrawal that was submitted based on a pending Form I-485 adjustment application. Therefore, the petition is not valid for porting purposes.

The AAO will next address the issue of revocation of the instant petition's approval. To warrant an approval, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d). Here, the ETA Form 750 was accepted for processing on October 10, 2000.⁵ Furthermore, the petitioner must demonstrate that its job offer is a *bona fide* offer. In the case of a successor-in-interest, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983). Where the job requirements in a labor certification are not otherwise unambiguously

⁴ In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.

⁵ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” (Emphasis added). *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

In this case, the Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of a bilingual secretary. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of two years of experience in the job offered. Item 15 of Form ETA 750A reflects the special requirements of oral and written fluency in Portuguese language. The duties listed by the petitioner at Item 13 of the Form ETA 750 are:

Performs clerical work for import & export office. Prepares and maintains files. Composes and types routine correspondence and answer[s] phone calls and provide[s] guidance to services in English and Portuguese language. Operates office machinery. Translates documents from Portuguese into English and vice-versa.

On the Form ETA 750B signed by the beneficiary on September 28, 2000, she indicated that she qualifies for the proffered position based on her work experience as a secretary at the [REDACTED] in Brazil from February 1994 until June 1996. The beneficiary did not indicate any other employment on the labor certification. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury. The record also contains a notarized statement from the beneficiary titled “Sworn Statement”, dated July 28, 2003, stating that the information listed on the Form ETA 750 Part B is true and correct.

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 submits two letters from [REDACTED] letterhead, both dated September 6, 2002, stating that the beneficiary worked there as a bilingual secretary from February 17, 1994 to June 7, 1996. The record shows that the U.S. Department of State Consulate General in Brazil contacted the [REDACTED] to confirm the beneficiary’s employment and was told that the university had no employment registration for the beneficiary. The AAO notes that although these two letters are identical in content, the fonts and layout of the text are different. The petitioner also submits two documents in Portuguese with English translations, which is titled “Salary Receipt” in its translation, for the beneficiary indicating her work place as [REDACTED] her position as “Executive Bilingual Secretary;” and, her net salary for the February 1994 pay period as 713.71 reais, and for the June 1996 pay period as 1,421.60 reais. The translation of the document indicates

1 U.S. dollar equals to 2.75 reals. The salary receipt also indicates that costs for employee state funds, social security, and health plan were deducted from the beneficiary's pay.

The record contains a statement from the beneficiary, dated June 2, 2010, in which the beneficiary confirms that she did sign the labor certification, however, she states that "the letter" was not signed by her. It is not clear to which letter the beneficiary is referring. The beneficiary further states that she studied and completed an internship at the [REDACTED] and did not need to jeopardize her process by attaching a letter of employment from the university when in fact she did not work there. The petitioner also submits a letter from [REDACTED] Business Management School Manager at [REDACTED] stating that the beneficiary was enrolled in a supervised internship during 1995.

On appeal, the petitioner submits another letter from [REDACTED] dated March 15, 2010, stating that he worked at the [REDACTED] from 1998 to 2006 as an administrative clerk. He states that he was contacted by the beneficiary requesting a letter from the department confirming her good status as a student intern. He indicates that he received a sample letter from the beneficiary's attorney, but signed the letter without understanding its content because he could not read English. The petitioner also submits an affidavit from [REDACTED] dated May 20, 2010, in which he affirms his statements of the March 15, 2010 letter. The AAO notes that the signatures on the 2010 letter and the 2010 affidavit are different than the signatures on the 2002 letters.

In addition, [REDACTED] does not indicate that he signed two letters in 2002 with two different fonts. Furthermore, the record fails to explain the salary receipt that the petitioner submitted in support of the beneficiary's employment, whereas the beneficiary states in her 2010 statement that she did not have such employment. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

While the petitioner submits a letter and an affidavit from [REDACTED] in attempts to explain the circumstances surrounding his 2002 employment verification letter, the record contains no explanation as to why the petitioner submitted two identical letters with different fonts and layouts from [REDACTED] and why the signatures on the 2002 letters are different than the ones on his 2010 letter and statement. The petitioner also fails to explain the salary receipt submitted in support of the beneficiary's claimed experience. The petitioner has failed to provide independent, objective evidence pointing to where the truth in fact lies, which casts a shadow of doubt over all of the evidence provided in support of the petition. *Id.* Therefore, the

AAO finds that the petitioner has failed to demonstrate that the beneficiary had the experience required by the labor certification on the priority date.

With regards 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 DHS 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).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. 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* at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of DHS 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.

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 and USCIS have the authority to enter a fraud or a material misrepresentation finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

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. 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 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. at 447. 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.

Furthermore, a finding of willful 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.

In examining the evidence of record, we find that the petitioner and the beneficiary willfully misrepresented the beneficiary's experience on the Form ETA 750. We also find that the two 2002 experience letters with two different fonts and layouts containing the signature of [REDACTED] and the salary receipt that were submitted in support of the beneficiary's experience at the [REDACTED] are, more likely than not, fraudulent as the record establishes that the beneficiary was not employed by the [REDACTED]. By misrepresenting the beneficiary's experience to qualify for the offered position, the petitioner would seek to procure a benefit provided under the Act through fraud or willful misrepresentation of a material fact. Any finding

of fraud or willful misrepresentation as a result shall be considered in any future proceeding where admissibility is an issue. On appeal, the petitioner has not overcome the director's finding of willful misrepresentation. Therefore, the director's revocation of the approval of the petition is affirmed. The petition remains revoked and the labor certification remains invalidated.

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.