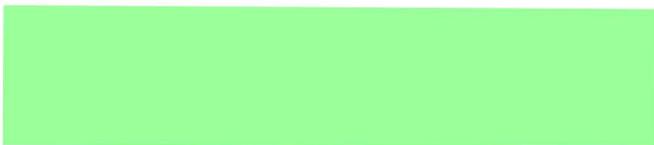


(b)(6)

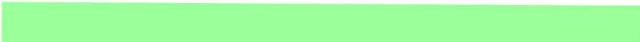
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



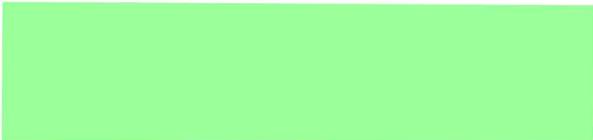
U.S. Citizenship
and Immigration
Services



DATE: **NOV 27 2013** Office: NEBRASKA 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Nebraska Service Center (the director) on March 13, 2002. The director issued a Notice of Intent to Revoke (NOIR) approval of the petition on July 12, 2005. On September 26, 2005, the petitioner submitted a response to the director's NOIR. The director revoked the approval of the petition on February 7, 2006 based upon a finding of marriage fraud on the part of the beneficiary. Prior counsel¹ filed an appeal to the Administrative Appeals Office (AAO) on March 9, 2006. The AAO dismissed the appeal on February 28, 2007, finding that the beneficiary entered into a fraudulent marriage, and was thus barred from obtaining the Form I-140 immigration benefit. On March 27, 2007, prior counsel for the beneficiary filed a Motion to Reopen/Reconsider the AAO's decision.² The AAO rejected the motion on February 17, 2009, as having been filed by the wrong party. On August 17, 2009, current counsel filed a Motion to Reopen/Reconsider. The AAO dismissed the motion as being untimely filed and as not being properly filed.³ On May 28, 2010, current counsel filed the current Motion to Reopen/Reconsider.⁴ The motion will be approved. Upon review, the previous decisions of the AAO and the director will be withdrawn. The matter will be remanded to the director.

The director determined that the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154 (c) and, therefore revoked the petition's approval accordingly. The petitioner subsequently filed an appeal to the AAO.

The AAO dismissed the appeal, finding that the director had demonstrated good and sufficient cause in revoking the approval of the petition, and that the beneficiary's claimed marriage to a United States citizen was a fraudulent marriage according to substantial and probative evidence found in the record of proceeding.⁵ The AAO determined that therefore, the petitioner had not established that the beneficiary is eligible for the proffered position.

On motion, the AAO noted that the record of proceeding contained a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for the beneficiary's representative.⁶ The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary

¹ [REDACTED] represented the petitioner in the initial Form I-140 proceedings and filed the appeal on March 9, 2006. He represented both the petitioner and the beneficiary.

² [REDACTED] appeared on behalf of the beneficiary.

³ The AAO stated that the moving party did not establish that it was the successor-in-interest to the original petitioner, and thus was not an affected party.

⁴ Current counsel, [REDACTED] will be referred to as counsel or current counsel throughout this decision.

⁵ A marriage certificate in the record between [REDACTED] the beneficiary of the instant petition, was submitted on behalf of the beneficiary in a previous proceeding to accord the beneficiary lawful permanent residence as the spouse of a United States citizen. (Receipt # [REDACTED])

⁶ The Form I-290B, Notice of Appeal or Motion, filed on March 9, 2006 was accompanied by a Form G-28 that was signed by the beneficiary on February 26, 2006, as the name of the consenting party.

of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. The AAO further noted that there was no evidence in the record indicating that the original petitioner, [REDACTED] consented to the filing of the motion to reopen the AAO's appeal. Accordingly, the AAO rejected the motion.

In response to the second motion filed, the AAO noted that the motion was untimely filed (181 days after the AAO's February 17, 2009 decision); and that the moving party had not established itself as the successor-in-interest to the petitioner. The AAO dismissed the second motion.

With the current motion counsel asserts that the procedural defects that led to the denial of the 1st and 2nd motions should have been excused, and that the AAO's decision on appeal should be reopened and reconsidered. However, the AAO finds that the reasoning in the two previous motions to reopen and reconsider was sound, in that the petitioner's motion was untimely, there was no evidence of a successor-in-interest relationship, and because the wrong party had filed the motion. Counsel further asserts that the evidence is insufficient to establish the beneficiary's participation in marriage fraud. Further investigation now reveals that there was no actual marriage.⁷ There can be no finding of marriage fraud under Section 204(c) of the Immigration and Nationality Act (the Act) 8 USC section 1154(c) without an actual marriage. Thus, the AAO withdraws its previous decision and the director's decision with respect to the marriage fraud determination, decisions that relied in part on the marriage certificate which indicated that a marriage took place between [REDACTED] the beneficiary.

The procedural history in this case is documented by the record of proceeding and incorporated into the decision. Further elaboration of the procedural history and case precedent will be made only as necessary.

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.

The petitioner describes itself as a motel. It seeks to employ the beneficiary permanently in the United States as a facilities planner. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary 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

⁷ No marriage certificate containing [REDACTED] and the beneficiary's name was ever filed with or by the state authorities in connection with the beneficiary's claimed marriage to [REDACTED] in the state of New York on February 6, 1995.

under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS]**. (emphasis added).

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154 (c) provides:

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The AAO finds, based upon the evidence in the record at the time of the director's NOIR, that the derogatory information, if not responded to, would have resulted in the revocation of approval of the

petition under Section 204(c) of the Act, 8 U.S.C. § 1154 (c). Thus, the director had good and sufficient cause to initiate revocation proceedings.

Counsel claims that the evidence is insufficient to demonstrate the beneficiary's involvement in filing the Form I-130 that was denied based upon a finding of marriage fraud, and that the beneficiary was never married to the United States citizen as indicated on the marriage certificate.

Based upon an independent review of the documentation in the record of proceeding and inquiries into the legitimacy of the marriage certificate, it does not appear that a marriage ever existed between the beneficiary and a United States citizen. Thus, the prohibition of section 204(c) of the Act does not apply, and the petition will not be denied on that ground. Nevertheless, the petition may not be approved, as the record does not establish that the petitioner has the ability to pay the proffered wage, that the beneficiary was qualified for the position as of the priority date, and that the petitioner intends to pursue the petition through a successor-in-interest.

Upon review of the record, the AAO has determined that the petitioner has overcome the director's decision that the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154 (c). However, the petition may not be approved in that it does not appear from the record that the petitioner can establish its ability to pay the proffered wage to the beneficiary or that the beneficiary is qualified for the offered position, in that the record fails to establish that he possessed all the education, training, and experience specified on the labor certification as of the priority date. Further, the petitioner has failed to establish a successor-in-interest relationship exists. It does not appear from the record of proceeding that the director examined these issues. Thus, the director's decision will be withdrawn and the petition will be remanded in order for the director to issue a new NOIR.

On appeal, the AAO determined that the evidence in the record was insufficient to demonstrate that a successor-in-interest relationship existed in the instant matter and requested in a Notice of Intent to Deny (NOID), dated February 21, 2013, that the petitioner submit evidence establishing a successor relationship. In response to the NOID, the petitioner submitted copies of Form 1065 income tax returns for [REDACTED] South Dakota, and covering the tax years 2005 through 2009. The petitioner also submitted letters dated March 18, 2002 and May 27, 2004 from the general manager of [REDACTED]. Although the letters have different dates, their content is identical. The letters express the hotel's intent to employ the beneficiary as a full-time facilities manager.

Although the petitioner submitted the above noted evidence, there is insufficient evidence in the record of proceeding to demonstrate that [REDACTED] is a successor-in-interest to the petitioner, [REDACTED]. The record of proceeding shows that the [REDACTED] on June 17, 2005, indicating that [REDACTED] as a business was dissolved for failure to file the annual report when due. Thus, if the petitioner does not establish that

it has a successor-in-interest, the petition is moot. If the petitioning business is no longer an active business, the petition has become moot.⁸ In which case, the petition shall be dismissed as moot.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, the petitioner must submit evidence of the ability of both the predecessor entity and the purported successor to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2); the predecessor entity must be able to pay beginning on the priority date until the date the transfer of ownership to the successor is completed, while the purported successor must demonstrate its continuing ability to pay the proffered wage from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor (a Bill of Sale), but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See generally Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. Black's Law Dictionary 1473 (8th ed. 2004); *see also Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law, the purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold. *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

Even if the AAO were to consider [REDACTED] as a successor-in-interest to [REDACTED] there is no evidence in the record to demonstrate that either the petitioner or [REDACTED] has established the ability to pay the proffered wage since April 18, 2001, which is the priority date in the instant matter and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R.

⁸ Where there is no active business, no legitimate 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.

§ 204.5(g)(2). The priority date in the instant matter is April 18, 2001. The proffered wage is \$40,000.00 per year.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁹ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, there is insufficient evidence in the record to demonstrate that the petitioner, [REDACTED] employed the beneficiary or paid the beneficiary wages. The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax transcripts for the 2001 tax year. However, the petitioner's ability to pay payroll taxes is insufficient to demonstrate the business entity's ability to pay the proffered wage to the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. In addition, the petitioner, [REDACTED] did not submit any federal income tax returns, annual reports, or audited financial statements to establish its ability to pay the proffered wage since the priority date. Therefore, the evidence in the record is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

The AAO has also reviewed the record of proceeding and determined that it does not appear that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 *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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁹ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

In the instant case, the labor certification states that the offered position requires a two year associate's degree in civil engineering. On the labor certification, the beneficiary claims to qualify for the offered position based on a diploma in mechanical engineering obtained from the M.S. [REDACTED] India completed in May 1990. The record contains a copy of the beneficiary's certificate of completion issued by the [REDACTED] which indicates that the beneficiary completed the certificate course in [REDACTED] and passed the final examination held in April 1986. The record also contains a copy of transcripts from The [REDACTED] in India indicating that the beneficiary took courses at the university in 1988, 1989, and 1990; however, the petitioner did not submit an official copy of any degree received by the beneficiary as a result of taking the courses listed in the transcripts. Even if the AAO were to consider the transcripts sufficient evidence of the beneficiary's diploma in engineering, there is insufficient evidence in the record to demonstrate that the diploma represents attainment of a level of education comparable to two years of university study in the United States, and that a diploma in mechanical engineering is the equivalent to an associate's degree in civil engineering as required by the labor certification.

The petitioner also submitted a copy of a certificate of completion which indicates that the beneficiary completed the course entitled [REDACTED] in July of 1990; it also indicates that the beneficiary's performance has been "below average." The certificate indicates that the beneficiary was enrolled in the course from February 21, 1990 to July 11, 1990. The record does not contain an equivalency evaluation indicating that this certificate program may be counted as academic credit.

The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

In addition, it does not appear that the petitioner has established that the beneficiary has the required work experience for the offered position. As noted above, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). 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 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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered, facilities planner. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a facilities planner at [REDACTED] from January 1989 to February 1992; and as a facilities planner at [REDACTED] from February 1992 to April 1995.

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 record contains a letter from the manager of [REDACTED] dated February 2, 1992 in which he stated that the hotel employed the beneficiary as a facilities planner from January 1989 to February 1992. The declarant described the beneficiary's job duties. The record also contains a letter from the general manager of [REDACTED] dated April 22, 1995 in which he stated that the hotel employed the beneficiary as a facilities planner from February 1992 to April 1995. The declarant described the beneficiary's job duties.

Contrary to the declarant's statements of employment, the beneficiary stated on his IRS Form 1040 for 1995 that his income was from self-employment and not from Form W-2 salaries or wages. The beneficiary listed the self-employment taxes he paid for that year and indicated, when asked to list his occupation, that he was a "laborer." It is noted that the beneficiary listed the information noted above on all of his income tax returns for 1995 through 2000. In addition, on the Form G-325A, signed by the beneficiary and dated April 15, 2002, he indicated "None" when asked to list former employers. Further, it appears from the record that during an immigration interview, the interviewer noted that the beneficiary indicated that he was employed by the petitioner from January 2004. On the Form G-325A that accompanied the Form I-485 filed in 1996, the beneficiary indicated that he was "self-employed" as a "construction worker" since January 1994.

Furthermore, there is no legible business address on either of the employment letters, there is no indication that the beneficiary was employed full-time, and the record is devoid of information pertaining to the declarant's association with the beneficiary or the basis of their personal knowledge. See 8 C.F.R. § 204.5(l)(3)(ii)(A). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

As noted above, the petition may not be denied based on marriage fraud prohibiting the beneficiary from obtaining further benefits. See section 204 (c) of the Act. Nevertheless, the approval of the petition may not be reinstated, as the petitioner did not establish that it has the ability to pay the proffered wage, that the beneficiary has the required education or experience, or that the petitioner, whose corporate existence is dissolved, is succeeded by a successor-in-interest. Thus, the petition will be remanded for the issuance of a new Notice of Intent to Revoke specifically outlining the deficiencies and providing the petitioner with the opportunity to respond. Upon submission of a response, if any, the director shall enter a new decision on the validity of the petition, which, if adverse to the petitioner, should be submitted to the AAO for review. On remand, the director may consider whether there is sufficient evidence of record to enter a finding of fraud or misrepresentation to obtain an immigration benefit against the beneficiary.

It has been established that the marriage certificate is fraudulent, in that it has been altered. It is also

noted that there has been a finding of fraud relating to the birth certificates of the beneficiary and the United States citizen that was submitted with the marriage certificate and the Form I-130. It appears from the record that the marriage certificate, along with the other documents, was submitted with the intent to defraud the government in order to obtain an immigration benefit via Form I-130. Although there is insufficient evidence to demonstrate that such a marriage existed, the documents submitted in support of the alleged marriage were falsified and altered. Furthermore, based upon the beneficiary's subsequent actions and other evidence contained in the record, it appears that the beneficiary had knowledgeable of and consented to the filing of such fraudulent and altered documents in support of the family-based Form I-130.

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 Immigration and Nationality Act (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).

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*, 19 I&N Dec. at 591-592.

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.¹⁰

¹⁰ 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

The AAO notes that the record of proceeding contains two original fingerprint cards dated November 9, 1995. The fingerprint cards demonstrate fingerprints taken from the right and left thumbs, index, middle, ring, and little fingers, the left four fingers taken simultaneously, the left and right thumb, and the right four fingers taken simultaneously. These cards appear to bear the beneficiary's signature as the signature of the person fingerprinted, and the organization to receive this information is listed as "NYINSNY00, USINS, NEW YORK, N.Y." The fingerprint cards state the reason fingerprinted "I.N.S." The fingerprints are dated less than 30 day prior to the filing of the Form I-130, Application for Alien Relative (November 28, 1995), the Form I-485, Application to Register Permanent Residence or Adjustment of Status and Form G-325A, Biographic Information (November 28, 1995); and the fingerprint cards appear from the record to have been filed in response to or as a part of the initial Form I-130 application. This evidence contradicts the beneficiary's assertions relating to lack of knowledge and involvement in filing the Form I-130, thus bringing into question the reliability of the beneficiary's statements.

Furthermore, the record of proceeding contains information indicating that on July 22, 1996, the beneficiary filed a Form I-765, Application for Work Authorization, [REDACTED] pursuant to 8 C.F.R. § 274a.12(c)(9) (adjustment of status). As such, the beneficiary's claim that he had no knowledge of the immigrant visa application to adjust status to permanent residence, based on his marriage to a United States citizen, is undermined.

In addition to the fingerprint evidence, the record of proceeding contains a copy of a Form I-94, Departure Record, numbered [REDACTED] bearing the name ' [REDACTED] of India, with a date of birth of [REDACTED]. The Form I-94 also shows that it was stamped by "U.S. Immigration New York, N.Y. 2468" on September 26, 1994, and that [REDACTED] was admitted into the United States via New York, N.Y. on a "B-1" status. Although the beneficiary claims that he first entered the United States in 1995 through Boston, and has no knowledge of the Form I-130 being filed on his behalf, this evidence contradicts such assertions.¹¹

Furthermore, it appears from the record that the beneficiary's photos were submitted with the Form I-130 application package, and there is no evidence in the record to show that anyone else stood to benefit from filing the Form I-130, or could represent themselves as the beneficiary based upon the photographs of the beneficiary that are contained in the record of proceeding.

In addition, as stated by the AAO on appeal, although the beneficiary denies knowledge of the Form I-130 and does not claim to have filed or had knowledge of having filed the Form I-485 in 1995, he has failed to satisfactorily explain how or why he filed a Form I-765 in 1996 for work

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, USCIS has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation.

¹¹ This evidence will be further addressed in any subsequent proceedings pertaining to the instant matter.

authorization under Adjustment of Status when the only I-485 that had been filed at that time was based on the Form I-130, that he claims no knowledge of and claims not being a party to. Furthermore, as noted by the AAO, the beneficiary fails to satisfactorily explain how the "agent" obtained and filed the Form I-765 in 1996 with the beneficiary's correct social security number and correct I-94 number, when based upon his sworn statement submitted by the petitioner on appeal, the beneficiary does not claim to have given the "agent" his I-94, and that he had not yet obtained a social security number.

Although the beneficiary claims to have no knowledge of filing the Form I-765 in 1995 for work authorization, he fails to explain on what basis he acquired his social security card in the United States. He did state in the affidavit noted above that the "agent" was supposed to obtain these documents for him but that the "agent" failed to do so. Despite the beneficiary's statements, the record of proceeding contains copies of the beneficiary's IRS Form 1040 for the 1995, 1996, 1997, 1998, 1999, 2000, and 2001 tax years. The beneficiary listed his social security number as 360-90-5047 on each of these tax documents. There has been no explanation given for the inconsistencies. It also appears from the record of proceeding that the signatures that appear on the Form 1040 tax returns for 1995 through 2001 are very similar to the signatures that appear on the beneficiary's passport, the Form ETA 750 in 2001, Form I-485 in 1995, and Form G-325A in 1995, as noted above.

Although the beneficiary claims that the signatures that appear on the immigration applications and petitions are not his, and that the handwriting report from [REDACTED] substantiates this claim, Ms. [REDACTED] states in the report that she is unable to make a conclusive statement regarding the signatures without original signatures and without verifying the true signature of the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Although the beneficiary may not have entered into a marriage for the purpose of defrauding the government in an attempt to obtain immigration benefits, it appears that he had knowledge of and/or participated in the fraud or misrepresentation to obtain an immigration benefit.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. In the new NOIR, the director should specifically outline the deficiencies constituting good and sufficient cause to revoke the approval of the petition. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a NOIR and/or a new, detailed decision, which if adverse to the petitioner, shall be certified to the AAO for review.