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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: SEP 09 2013

Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

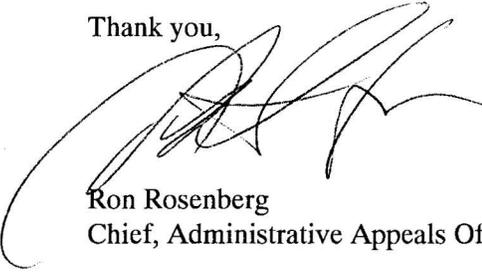
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the employment-based petition. Upon further review, the director issued a Notice of Intent to Revoke (NOIR) and subsequently revoked the petition's approval (NOR). The matter 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 beneficiary.

The petitioner sought to employ the beneficiary permanently in the United States as an automotive service technician 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. The petition was initially approved. Upon reviewing the petition, the director determined that the job offer was not *bona fide*¹ and issued a NOIR and subsequently revoked the petition's approval.

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

¹ The director also determined that the petitioner had not established the continuing ability to pay the proffered wage. Nothing was submitted on appeal to overcome the basis of revocation. See 8 C.F.R. § 204.5(g)(2). In his Notice of Intent to Revoke (NOIR), the director raised concerns about the number of workers petitioned, the credibility of the petitioner's tax return, signature discrepancies, and the eligibility for substitution of the alien. The director requested that the petitioner submit a copy of the original labor certification, clarification of the individual signing the Section N of the ETA Form 9089 and the signer of the petition, articles of incorporation and any documents identifying persons authorized to act on behalf of the petitioner, notarized statement from petitioner of bona fide job offer to beneficiary accompanied by copy of official photo ID with signature, explanation of large number of filings relative to current size of the business with supporting documentation and an IRS-issued tax return transcript corroborating the 2006 return already submitted.

In the director's decision, revoking the petition's approval, it was noted that the petitioner had not responded to the NOIR, which was sent by certified mail, which went unclaimed and was returned. The director noted in the final decision that the record raised doubts as to the bona fides of the job offer and that the record lacked credible evidence of the petitioner's ability to pay the proffered wage.

The petitioner, through counsel, filed an appeal. No specific grounds were stated and no acknowledgment was made by counsel of the lack of response to the director's NOIR. Accompanying the appeal, was a copy of a 2006 federal tax return, which had already been submitted to the underlying record, as well as copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Return for the first three quarters of 2007, which had also already been submitted to the underlying record. Counsel did not address any of the issues set forth on the director's NOIR.

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).

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30 (2010) further 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 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.

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 AAO issued a Notice of Intent to Affirm Revocation and Notice of Derogatory Information on June 18, 2013, (Notice). The AAO specifically alerted the petitioner that failure to respond to the Notice may result in the appeal being dismissed and that a request to withdraw may not prevent a finding of

fraud or misrepresentation. 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 Notice, the AAO is dismissing the appeal. The AAO is also making a further finding of willful misrepresentation against the beneficiary and invalidating the labor certification.

No correspondence from the petitioner has been received. The AAO issued the Notice on June 18, 2013, informing the petitioner of doubts concerning the *bona fide* nature of the job offer based on the petitioning owner's own disclaimers that he had sponsored the beneficiary or signed any documents sponsoring the beneficiary.² The NOID advised the petitioner that:

The AAO hereby issues this Notice of Intent to Dismiss (NOID) and Notice of Derogatory Information (NDI) pursuant to 8 C.F.R. § 103.2(b)(16)(i) the petition and informs the petitioner and beneficiary of derogatory information pertinent to this proceeding, pursuant to 8 C.F.R. § 103.2(b)(16) which provides in relevant part:

- (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 [U.S. Citizenship and Immigration Services (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.

A. As noted above, the Form I-140 and certain accompanying documents all contain the signature of [REDACTED]. The documents containing Mr. [REDACTED] signature include a copy of the labor certification, the original labor certification, copies of the petitioner's Form 941, Employer's Quarterly Federal Tax Form for the first three quarters of 2007, a December 6, 2007 transmittal letter, a Notice of Entry of Appearance as Attorney or Representative for [REDACTED] as attorney, an August 12, 2008 transmittal letter related to the appeal, and the Form I-290B, Notice of Appeal or Motion.

The copy of the original labor certification submitted to the record with the Form I-140 contains the signature of the beneficiary, signed under penalty of perjury on April 19, 2007.

²The 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).

A site visit of your premises was conducted by Immigration and Customs Enforcement (ICE) on June 16, 2011. You confirmed that signatures on the Form I-140 petition and labor certification identifying the individual stated as the beneficiary and you as the signatory do not belong to you.

Based on the above, the AAO intends to enter a finding of fraud and/or misrepresentation against the beneficiary as the information above indicates that the filing of the Form I-140 as well as the labor certification was fraudulent. Copies off the relevant documents and signatures in question are attached.

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.³

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.

A labor certification is subject to invalidation by USCIS if it is determined that fraud or a willful misrepresentation of a material fact was made in the labor certification application. See 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

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." (footnote omitted)

Accordingly, it appears that fraud or willful misrepresentation as to the *bona fide* nature of the job opportunity have been made in this case. It is incumbent on the petitioner and/or beneficiary in this case to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent

³ It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discovers fraud or a material misrepresentation.

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).

Based on the foregoing, the AAO will dismiss the appeal and will enter a finding of fraud and/or misrepresentation against the beneficiary and invalidate the labor certification unless the petitioner and/or the beneficiary submit independent credible evidence sufficient to overcome the indices of fraud submitted to the record.

Any response and any evidence and/or statements submitted in support of any response by any individual must include five exemplars of his/her signature, must be notarized, and must be accompanied by photo identification. By submitting false documents to USCIS, a beneficiary may be deemed to seek to procure a benefit provided under the Act through willful misrepresentation. The burden of proof remains with the petitioner and beneficiary to show by a preponderance of the evidence that any proposed invalidation of the labor certification is not appropriate and that a willful misrepresentation and/or fraud has not been committed in these proceedings. *See Matter of Ho*, 19 I&N Dec. at 589. A finding of misrepresentation or fraud may lead to invalidation of the ETA Form 9089. *See* 20 C.F.R. § 656.30(d).

If you elect to submit a response to this notice, you are permitted a period of thirty (30) days in which to submit a rebuttal or respond to this notice. Please be advised that 8 C.F.R. § 103.2(b)(13)(i) provides that the failure to respond to a notice of intent to deny by the required date may result in the petition being summarily denied as abandoned, denied based on the record, (including a possible finding of misrepresentation and/or fraud), or denied for both reasons. The AAO will be unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in this notice. Please send your response to the return address on the first page, and attach a complete copy of this notice to the top of your submission.

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).

The term “willfully” in the statute has been interpreted to mean “knowingly and intentionally,” as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant

to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

As stated above, the AAO received no response. Based on the above, by signing the ETA Form 9089, the beneficiary has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact; that a *bona fide* job offer was existent between him and the petitioner. The AAO finds that the petition was filed based on fraud and willful misrepresentation that the petitioner made a valid job offer to the alien. The AAO finds that the beneficiary's representations constitute fraud and willful material⁴ misrepresentation that a *bona fide* job offer was extended to him by the petitioner.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record, which raised numerous inconsistencies in the evidence as set forth above at the time the decision was rendered, warranted such denial.

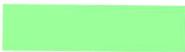
This finding shall be considered in any future proceeding where admissibility is an issue. Further, the AAO hereby invalidates the ETA Form 9089 pursuant to 20 C.F.R. § 656.31(d) based on the willful misrepresentation.

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.

⁴ 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).

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NON-PRECEDENT DECISION

FURTHER ORDER:

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