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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: JUN 25 2015

[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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

[Redacted]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), approved the immigrant visa petition on April 11, 2003, but revoked the petition's approval on May 5, 2010. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and denied its prior three motions to reopen and reconsider. We now consider the petitioner's fourth motion to reopen and reconsider. The motion will be granted in part and denied in part, and the appeal will be dismissed. The petition's approval will remain revoked.

The petitioner describes itself as an import and export company. It sought to permanently employ the beneficiary in the United States as a bilingual secretary.¹ The petition requests her classification as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).

A Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is October 10, 2000, which is the date an office within DOL's employment service system accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d).

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause to revoke if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

In our prior decisions in this matter, we agreed with the Director's conclusion that the petitioner and/or the beneficiary fraudulently represented the beneficiary's qualifying experience for the offered position. We therefore affirmed the Director's invalidation of the accompanying labor certification and the revocation of the petition's approval.

In our October 24, 2014 decision, we also found that the record at the time of the revocation did not establish the beneficiary's qualifying experience or the petitioner's continuing ability to pay the proffered wage. However, in our most recent decision, dated February 19, 2015, we found that the petitioner demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward.

¹ The record indicates that the beneficiary acquired an ownership interest in the petitioner in 2008 and became its sole shareholder in 2012. The beneficiary's ownership of the petitioner does not prevent the petition's approval. See *Matter of Allan Gee*, 17 I&N Dec. 296, 298 (Acting Reg'l Comm'r 1979) (holding that a corporation may petition for its sole shareholder because it is a separate legal entity existing independently of its shareholders). However, the beneficiary's ownership of the petitioner does cast doubt on the petitioner's intention to employ her in the offered position. As noted in our prior decision of October 24, 2014, we do not consider whether the petitioner, after its acquisition by the beneficiary, continues to intend to employ her in the offered position specified on the accompanying labor certification. See *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding the denial of a petition where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the accompanying labor certification).

The petitioner's current motion states new facts supported by documentary evidence. We will therefore treat it as a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2).

Invalidation of the Labor Certification

A petition for a skilled worker or professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation establishing the alien's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate an individual labor certification after its issuance "upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification." 20 C.F.R. § 656.30(d) (2004).²

Fraud "consist[s] of false representation of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Ortiz-Bouchet v. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013 (citing *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). Also, to constitute fraud, "[t]he representation must be believed and acted upon by the party deceived to his [or her] disadvantage." *Id.*

Fraud involves the same elements as a willful misrepresentation of a material fact. *Id.* at 1356-57. However, a willful misrepresentation of a material fact does not require proof "that the person to whom the misrepresentation was made was motivated to action because of the misrepresentation." *Id.* A willful misrepresentation also does not require "intent to deceive." *Id.* at 1357 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

In the instant case, the accompanying labor certification states that the offered position of bilingual secretary requires at least four years of high school, two years of experience in the job offered, and oral and written fluency in the Portuguese language. The beneficiary attested on the labor certification that she worked full-time in the offered position for [REDACTED] in Brazil from February 17, 1994 to June 7, 1996. The beneficiary confirmed the veracity and accuracy of this information in an affidavit dated July 28, 2003.

The petitioner also submitted documentary evidence in support of the beneficiary's claimed qualifying experience. A September 6, 2002 letter on university stationery accompanied the petition. The petitioner also submitted copies of purported salary receipts from the university, indicating the beneficiary's employment as an executive bilingual secretary during the months of February 1994 and June 1996.

In 2008, a university official told an officer of the United States Consulate in [REDACTED] Brazil that the university had no record of employing the beneficiary. The petitioner and the beneficiary later

² The petitioner filed the accompanying labor certification before March 28, 2005. Thus, the prior DOL regulations govern the labor certification. See Final PERM Regulations, 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). We will therefore cite to the regulations at 20 C.F.R. § 656, *et seq.* as they existed in 2004, before the effective date of the current DOL regulations.

admitted that she did not gain qualifying experience at the university. However, they deny intentionally misrepresenting her experience. They blame the false statements and evidence on their first attorney, who prepared and filed the labor certification and petition, and who was convicted of 11 counts of making false statements in other I-140 petitions. *See* 18 U.S.C. § 1101.

In our most recent decision, we found substantial evidence that the beneficiary fraudulently stated her qualifying experience for the offered position on the accompanying labor certification. We also found substantial evidence that the petitioner and/or the beneficiary submitted fraudulent documentation in support of the beneficiary's claimed qualifying experience.

Facsimile transmission information on the copy of the false salary receipts indicated the copy's transmission from the petitioner's office in July 2003, after the first attorney's conviction in May 2003 and the issuance of the Director's first Notice of Intent to Revoke (NOIR), dated June 30, 2003. The fax transmission information suggested that the petitioner and/or the beneficiary knew of the misrepresentation of the beneficiary's qualifying experience on the labor certification and sent the copy of the false salary receipts to their second attorney to support the false experience.

However, the petitioner submits convincing evidence on motion that neither its then owner nor the beneficiary knew the contents of the faxed documents. The evidence indicates that immigration documents from the first attorney's office were sent to the petitioner's office after the attorney's conviction and that a friend of the beneficiary copied and faxed the documents to the second attorney without prior review by the petitioner's owner or the beneficiary. The evidence includes a polygraph test of the beneficiary and affidavits from the beneficiary, the petitioner's former owner, and the beneficiary's friend, who now lives in Japan. The evidence indicates that the beneficiary's friend helped in responding to the NOIR because the beneficiary risked a miscarriage of her first child at that time if she did not rest.

The petitioner also submits evidence that its owner and the beneficiary lacked time to review the NOIR response. The evidence indicates that, because of an address change, the petitioner did not receive the June 30, 2003 NOIR until July 10, 2003. The record also indicates that it did not receive a list of documentation to gather from its second attorney until July 18, 2003. Thus, the record indicates that the petitioner and the beneficiary effectively had only about 12 days in which to gather documentation in response to the NOIR.

In light of this rebuttal evidence, the record indicates that neither the petitioner nor the beneficiary knowingly submitted the false experience letter. Rather, the preponderance of the evidence indicates that the first attorney drafted the letter in English and sent it to a university clerk in Brazil, who signed it and returned it to the attorney in the mistaken belief that it verified the beneficiary's studies and internships at the university, not her employment there.

The record also does not establish the beneficiary's knowing misrepresentation of her qualifying experience on the labor certification. The beneficiary credibly testified that, under pressure from the first attorney, she signed the labor certification application without fully reviewing and understanding its contents. *See Ortiz-Bouchet*, 714 F.3d at 1357 (reversing a fraud finding

unsupported by substantial evidence that an alien made, knew of, or authorized a misrepresentation on an immigration form).

In addition to the stress of responding to the NOIR after the first attorney's conviction and her potential miscarriage, the record indicates that the beneficiary coped at that time with the recent death of her mother-in-law in Brazil. The record also indicates that the NOIR and the petitioner's response to it focused on the validity of the petitioner's job offer, as many of the first attorney's false petitions involved fictitious employers or real employers who were unaware of labor certification applications filed in their names. Under these circumstances, the beneficiary's testimony that she did not review the immigration documents from the first attorney and assumed that the labor certification stated correct information is credible.

The record does not establish the beneficiary's fraudulent misrepresentation of her qualifying experience on the accompanying labor certification, or that the petitioner and/or the beneficiary submitted fraudulent evidence in support of the claimed experience. We will therefore withdraw our fraud finding and reinstate the validity of the labor certification.

The Beneficiary's Qualifying Experience

Although the evidence indicates that neither the petitioner nor the beneficiary knowingly misrepresented the beneficiary's employment history, the record does not establish the beneficiary's qualifying experience for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements for the offered position. We may not ignore a term of the labor certification, nor may we impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

As previously indicated, the instant labor certification states that the offered position of bilingual secretary requires at least four years of high school, two years of experience in the job offered, and oral and written fluency in the Portuguese language. The beneficiary's educational qualifications and fluency in Portuguese are not at issue.

The beneficiary attested on the labor certification to more than two years of full-time experience in the job offered at the university in Brazil from February 17, 1994 to June 7, 1996. However, as previously discussed, the petitioner and the beneficiary concede that the university did not employ the beneficiary. Rather, the petitioner asserts that the beneficiary worked full-time in the job offered at a Brazilian preparatory school, [REDACTED] from September 22, 1992 to October 3, 1994.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and a description of the beneficiary's experience. *Id.*

As indicated in our most recent decision, the petitioner submitted a November 8, 2014 declaration from the former owner of the school, confirming the beneficiary's dates of employment and providing a description of her duties. The declaration states that the beneficiary's "duties at the school were, among others, the job of secretary of the school, attending to students, parents and teachers, marketing and advertising."

The declaration of the school's former owner does not indicate that the beneficiary performed the same job duties of the offered position stated on the labor certification. The job duties stated on the labor certification include preparing and maintaining files, composing and typing routine correspondence, answering telephone calls, providing guidance to services in the English and Portuguese languages, operating office machinery, and translating documents in English and Portuguese.

The declaration also does not state that the beneficiary worked on a full-time basis. If the beneficiary worked for the school part-time, she may not possess the required two years of full-time experience in the job offered as specified on the labor certification. *See Matter of Cable Television Labs.*, 2012-PER-00449, 2014 WL 548115, *2 (BALCA Oct. 23, 2014) (finding that an alien's part-time experience equals one-half the amount in full-time experience).

The record also contains a declaration from a woman who completed an internship between 1992 and 1994 at the prep school where the beneficiary worked during the same period. As with the declaration from the school's former owner, the declaration of the former intern does not state that the beneficiary worked on a full-time basis and also indicates that the beneficiary performed duties at the school beyond those of a secretary. The declaration states that the beneficiary "worked at the Administrative Department" of the school, "fulfilling secretary activities as well."

On motion, the petitioner argues that a secretary generally performs a wide variety of duties and that the declarations of record implicitly refer to the job duties stated on the labor certification when they mention secretarial duties. The petitioner also submits a March 5, 2015 affidavit from the former intern. This affidavit details duties that she saw the beneficiary perform at the school, including answering phone calls, preparing teachers' plans, assisting students, copying documents, and writing memoranda.

Based on the evidence and arguments on motion, the record establishes the beneficiary's performance of duties of the offered position at the school. However, the record does not establish the beneficiary's employment at the school for at least two years on a full-time basis as required by the labor certification.

None of the declarations or affidavits state that the beneficiary worked at the school full-time. Also, as indicated in our most recent decision, copies of pages in the beneficiary's "work and social security card," issued by the Brazilian Ministry of Labor and Employment, do not identify the school as one of the beneficiary's former employers. The work card also indicates that the beneficiary completed an

internship through the university at a branch of the [REDACTED] from March 18, 1994 to July 31, 1995. The dates of this reported internship overlap the dates of the beneficiary's claimed qualifying experience at the prep school from September 22, 1992 to October 3, 1994. The petitioner also previously indicated that the beneficiary worked and participated in internships at other Brazilian businesses in 1992 that might have overlapped her period of employment at the school.

In a March 18, 2015 affidavit, the beneficiary stated that the former owner of the prep school "believed that my intentions were to request a[n employment verification] letter so I could sue him for working without registering in my work card." This statement suggests that the former owner neglected to register the beneficiary's employment with Brazilian authorities, which might explain the employment's absence from the work card.

In the same affidavit, the beneficiary stated that she "worked at an internship with the Bank in the mornings, at [REDACTED] in the afternoons and on Saturday, and went to school in the evenings." However, the beneficiary's statement does not establish that her work on afternoons and Saturdays at [REDACTED] constituted full-time employment as required for the offered position. The statement also does not explain whether she worked different hours at [REDACTED] before her bank internship began or whether her 1992 internships affected her work schedule at the school. *See Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies of record by independent, objective evidence).

The record does not establish the beneficiary's possession of two years of full-time experience in the job offered by the petition's priority date as specified on the labor certification. Therefore, we will affirm our dismissal of the petitioner's appeal.

Conclusion

The record establishes that the beneficiary did not fraudulently represent her qualifying experience on the accompanying labor certification, and that the petitioner and/or the beneficiary did not submit fraudulent documents in support of the claimed experience. We will therefore grant this portion of the petitioner's motion, withdraw our prior finding, and reinstate the validity of the labor certification.

However, the record does not establish the beneficiary's possession of the qualifying experience specified on the labor certification. We will therefore deny this portion of the motion and affirm the appeal's dismissal.

The petition's approval will remain revoked for the reason stated above. As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act; 8 U.S.C. 1361; *Ho*, 19 I&N Dec. at 588. Here, that burden was not met on all grounds.

[REDACTED]

NON-PRECEDENT DECISION

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ORDER: The motion to reopen is granted in part and denied in part. The appeal's dismissal is affirmed, and the petition's approval remains revoked.

FURTHER ORDER: The validity of the labor certification, [REDACTED] is reinstated.