(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: JUN 30 2014 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 or establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION**: The Director, Nebraska Service Center (the director) denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for further action consistent with this decision.

The petitioner is a business that imports and delivers window film. It seeks to employ the beneficiary permanently in the United States as an Operations Research Analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is November 3, 2011, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d).

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 on appeal.[1] The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.

**Procedural History**

On March 29, 2012, the petitioner filed the instant petition. On April 3, 2012, the director issued a Notice of Intent to Deny (NOID) to the petitioner, requesting evidence to resolve inconsistencies relating to the petitioner's business location and the position held by the beneficiary, as well as documentation of the petitioner's and its parent company's business organization and ownership. On May 2, 2012, the petitioner responded with additional evidence, which the director found insufficient to resolve the identified inconsistencies. Accordingly, on May 7, 2012, he denied the petition.

On June 8, 2012, the petitioner appealed the director's decision to the AAO. On March 5, 2013, we issued a Request for Evidence (RFE) that asked the petitioner for information relating to its three employees and to resolve inconsistencies in the beneficiary's employment history. We also requested copies of the petitioner's 2012 tax return and the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement (Form W-2), for 2012. The petitioner responded to the RFE on April 18, 2013.

On May 29, 2013, after determining that the record indicated that the beneficiary might own or control the petitioner, we referred the underlying labor certification to DOL and notified the petitioner that this proceeding would be held in abeyance until DOL had reviewed the matter. On March 21, 2014, DOL issued a Notice of Intent to Revoke (NOIR) to the petitioner, requesting a response within 30 days. On May 5, 2014, DOL issued its final decision, finding that the petitioner

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

had submitted sufficient documentation to demonstrate that the beneficiary did not have an ownership interest in the business. Accordingly, DOL determined that the labor certification remained valid and voided the NOIR issued on March 21, 2014.

As DOL has found that the underlying labor certification in this matter remains valid, we will resume our consideration of the appeal.

**Withdrawal of Director's Decision**

The director denied the visa petition after finding that the petitioner had failed to demonstrate that the offered position was a *bona fide* job opportunity or to establish its business location. He indicated that the identification of the beneficiary as the petitioner's President or CEO on some company profile websites was inconsistent with the beneficiary's claim on the labor certification that he had been employed as the petitioner's Operations Research Analyst since 2008. The director further noted that it seemed unlikely that if the beneficiary were operating as the petitioner's President or CEO, he would accept employment with a lesser title and responsibilities. The director also indicated that research had identified the beneficiary as the President or CEO of [2] which conflicted with the beneficiary's claimed employment history with the petitioner. Finally, the director found that the petitioner's inability to reconcile its reporting of two different business addresses, one at California and the other at California, prevented it from reliably establishing its business operations.

Like the director, we have noted the online reporting of the beneficiary as the petitioner's President or Chief Executive Officer (CEO) and agree that it raises questions regarding his claim on the labor certification to have been employed by the petitioner as an Operations Research Analyst since 2008. However, in light of DOL's May 5, 2014 decision reconfirming the validity of the underlying labor certification, we find that the director erred in denying the visa petition because the job offer for an Operations Research Analyst is not *bona fide*. We also find the record to contain sufficient information to resolve the inconsistencies in the petitioner's reporting of its business address, the other basis for the director's denial of the visa petition.

The record, which includes a prior L-1 nonimmigrant proceeding involving the same petitioner and the instant beneficiary, provides sufficient documentation to establish the petitioner's operation at both locations.[3] Two leases, dated April 14, 2009 and December 28, 2010,[4]

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[2] Records maintained by the California Secretary of State at http://kepler.sos.ca.gov/ reflect that was dissolved as of February 26, 2010.

[3] Although the L-1A petition was filed by is the same corporation as the instant petitioner. The record contains a copy of a Certificate of Amendment of Articles of Incorporation for that reflects the company changed its name to on December 21, 2009.

[4] The term of the 2010 lease is from January 1, 2011 until December 31, 2011 and may be renewed upon written mutual agreement of the parties.

for the California reflect that the petitioner is leasing an office of less than 439.83 square feet from the , a U.S.-based incubator for Korean start-ups that is operated by an affiliate of the In a May 20, 2009 letter, the Center's director, identifies the petitioner as a tenant. The director further states that provides marketing and administrative assistance, research, seminars and other support and resources to Korean companies opening businesses in the United States until such time as the businesses achieve success and "graduate" from the program.

The other lease, signed by the petitioner on February 3, 2009, is for approximately 2,420 square feet of space at California. The lease indicates that the petitioner may use the site for "office and warehouse for distribution of automobile tinting film. No installation of film to be done on site." The term of the lease is three years and one month, beginning on February 15, 2009.

This evidence is sufficient to demonstrate that beginning in 2009 and for several years thereafter, the petitioner was both a tenant of the at California, where it was administratively supported, and the operator of a warehouse at California, from which it distributed window film. As a result, the fact that the petitioner has two business addresses reflected in the record is not a valid basis for the director's denial of the visa petition. Accordingly, the director's May 7, 2012 decision will be withdrawn in its entirety.

Nevertheless, the appeal cannot be sustained as the visa petition is not approvable. As discussed below, the record does not establish that the beneficiary has the employment experience required by the labor certification or that the petitioner has the continuing ability to pay the beneficiary the proffered wage. Moreover, new evidence indicates that there may be a familial relationship between the beneficiary and the petitioner's owner, which raises a new question as to whether the offered position is *bona fide*.

**Beneficiary Qualifications**

The petitioner is seeking classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2), which states:

> Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree . . . .

The labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's.
H.4-B. Major field of study: Chemistry/Chemical Engineering.
H.5. Training: None required.
H.6. Experience in the job offered: Required.
H.6-A. Number of months experience required: 60 months.

H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: engages in manufacturing of ceramic films. The Operations Research Analyst will provide [the] following functions: Support business goals by developing and deploying operational improvement solutions to deliver increased profit and performance relating to manufacturing and distribution of chemical automotive film (dyed stamina, moderate type), commercial film (silver and sputtered type), and industrial safety film. Understand the business processes relating to technical, quality issues, material purchasing, and installation support. Study and analyze information about alternative courses of action in order to achieve best operational outcomes. Develop business methods and procedures, including logistics systems and production schedules.

A petitioner must establish that a beneficiary satisfies all of the educational, training, experience and any other requirements of the offered position set forth on the labor certification as of the date it was filed with DOL. 8 C.F.R. § 103.2(b)(1). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). To satisfy the requirements of the labor certification in the present case, the beneficiary must possess a Bachelor's degree in Chemistry or Chemical Engineering and have five years of experience as an Operations Research Analyst. No other employment experience is acceptable.

In Part K. of the labor certification, the beneficiary claims to have worked as an Operations Research Analyst for the petitioner from August 1, 2008 until November 3, 2011, the priority date of the instant petition. He also states that he was employed by in South Korea, the company that owns the petitioner, as an Operations Research Manager from September 1, 2001 until July 31, 2008.[5]

In the labor certification, the beneficiary provided the following description of his job duties for the petitioner, which was established in 2008 and prior to December 17, 2009 operated under the name

> Currently . . . performing [the] following duties: Support business goals by developing and deploying operational improvement solutions to deliver increased profit and performance relating to manufacturing and distribution of chemical

[5] The labor certification further reflects that the beneficiary worked for the in South Korea as a Polymer Research and Chemical Analysis Manager from January 1, 1995 until October 31, 2000. The beneficiary's experience with will not be considered as the labor certification does not allow for qualifying experience in an alternate occupation.

> automotive film (dyed stamina, moderate type), commercial film (silver and sputtered type), and industrial safety film. Understand the business processes relating to technical, quality issues, material purchasing, and installation support. Study and analyze information about alternative courses of action in order to achieve best operational outcomes. Develop business methods and procedures, including logistics systems and production schedules . . . .

He described his responsibilities as an Operations Research Manager for as follows:

> Job duties and responsibilities included: Analyzed information obtained from management in order to define operational problems relating to manufacturing and distribution of chemical films used for industrial, automotive, and commercial purposes. Collaborated with senior managers and decision-makers to identify and solve operational problems and clarified management objectives. Observed system in operation and recommended suggestions for improvement. Addressed operational inefficiency relating to manufacturing and logistics involved in production and distribution. Managed development of new prototypes and performed analysis of new materials. Organized and conducted complex experiments in support of the project goals. Provided technical oversight of all projects including planning and directing research, communicating with industrial partners. Developed strategic plans to keep operational . . . .

The beneficiary's claim that he was employed by the petitioner as an Operations Research Analyst from August 1, 2008 until November 3, 2011 is not supported by the record. The record contains a business plan submitted by the petitioner in response to the RFE that identifies the beneficiary as the petitioner's president and describes his responsibilities under the headings of Direct Financial Management, Direct Organization Management, Direct Delivery Management and Direct Marketing and Sales Management. The petitioner's response to the RFE also includes an October 30, 2009 letter addressed to the U.S. Embassy in Seoul, which relates to a nonimmigrant E-2 investor visa application filed by the beneficiary. The letter, which is written by the beneficiary in his role as the petitioner's president, states the following with regard to the duties he would perform for the company in the United States:

> The beneficiary will be president of [the petitioner], the top position of the company. He will be principally responsible for overall management, directing business strategies, personal control and day to day control of the operation of the business, also including establishing policy and goals, along with the exercise of wide latitude in discretionary decision-making.

We also note that in the previously referenced L-1 nonimmigrant proceeding contained in the record, the beneficiary's employment with the same petitioner is described in terms similar to those used by the beneficiary in the above letter. A March 19, 2009 statement, signed by the beneficiary as the petitioner's president, indicates that he is responsible for budgeting, planning and implementing business goals and objectives, executing company policies and strategies, and handling corporate

affairs. In a September 20, 2009 statement describing his duties, the beneficiary states that he has been the petitioner's president since the petitioner was established (which the record indicates was in March 2008). He describes his duties as including the management of cash flow, credit, bill payment/check issuance, the collection of payments, human resources, consulting companies, the Certified Public Accountant, warehouse/inventory and the sampling of new products.

In light of the inconsistent accounts of the beneficiary's responsibilities while employed by the petitioner, we do not find the record to establish that the beneficiary worked for the petitioner as an Operations Research Analyst from August 1, 2008 until November 3, 2011. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). However, even if the record did establish that the beneficiary was employed by the petitioner as an Operations Research Analyst during the relevant period, this experience could not be used to establish his eligibility for the offered position.

Representations made on the labor certification, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly establish that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. Specifically, the petitioner indicated that questions in Parts J.19. and J.20. of the labor certification, which ask about experience in an alternate occupation, were not applicable. In response to the question at Part J.21., which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner also indicated in response to the question in Part H.6-A. that 60 months of experience in the job offered was required and in response to the question in Part H.10. that experience in an alternate occupation was not acceptable.

In general, if the answer to the question in Part J.21. of the labor certification is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if that experience was not substantially comparable[6] and the terms of the labor certification in Part H.10. provide that applicants can qualify through an alternate occupation. Here, however, the beneficiary indicated in Part K.1. of the labor certification that his position with the petitioner was as an Operations Research Analyst, and the job duties he described are those of the offered position.

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[6] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
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> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

Therefore, the claimed experience with the petitioner was in the position offered and its duties substantially comparable to those of the offered position. Accordingly, this experience, even if established, could not be used by the petitioner to demonstrate that the beneficiary has three of the five years of experience required by the labor certification. Conversely, the beneficiary's experience with the petitioner, even if not substantially comparable to the offered position, would still not be considered by United States Citizenship and Immigration Services (USCIS) as the terms of the labor certification do not allow for experience in an alternate occupation.

The record also fails to establish that the beneficiary's employment with provides him with the experience required by the labor certification. Although the record contains a February 15, 2012 letter from that supports the beneficiary's claim on the labor certification to have been employed from 2001 to 2008 as Operations Research Manager, an addendum to the Form I-129, Petition for Alien Worker, filed by the petitioner for the beneficiary in the L-1 proceedings noted above, offers a markedly different description of the beneficiary's duties for

> Trained and supervised sales fleet with technical background. Procured business opportunities and managed personnel responsible for orders and shipments. Negotiated with customers, suppliers and vendors as to general terms and conditions of business. Attended international trade shows and exhibitions to introduce company products to potential buyers and attract new business opportunities. Planned mid to long term goals for international and technical marketing department and implemented and executed measures to attain goals. Budgeted for and appropriated funds to different functions of the company's operations. Made ultimate decisions with respect to managing the company.

The inconsistencies between the above job description and those provided by the beneficiary and in the instant proceeding cast doubt on the beneficiary's claim to have experience as an Operations Research Manager. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Even if true, the job duties described above do not give the beneficiary the needed experience as an Operations Research Analyst.

As previously discussed, the petitioner indicated in the labor certification that the questions in Parts J.19. and J.20. were not applicable and specifically checked "No" in response to the question in Part H.10. of the labor certification that asks "Is experience in an alternate occupation acceptable?" The beneficiary claims experience with as an Operations Research Manager, a position whose duties differ in significant ways from the duties that the petitioner indicates are to be performed by its Operations Research Analyst. As the only employment experience accepted by the labor certification is as an Operations Research Analyst, the beneficiary's claimed employment with as an Operations Research Manager does not appear to be qualifying employment. Accordingly, the record does not establish that the beneficiary has the five years of experience required by the labor certification.

However, prior to reaching a decision regarding the beneficiary's experience for the offered position, the director shall provide the petitioner with the opportunity to rebut the finding that the beneficiary's employment experience with is in an alternate occupation. At that time, the petitioner should also be asked to submit independent, objective evidence to resolve the inconsistencies between the description of the beneficiary's employment provided in the previously noted addendum to the Form I-129 and the descriptions found in Part K.9., Job 2 of the labor certification and in the February 15, 2001 verification of experience letter by Inconsistencies must be resolved by the submission of "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, 591-92 (BIA 1988).

**Ability to Pay**

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must demonstrate its ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(d). Here, the priority date of the visa petition is November 3, 2011. The proffered wage is $67,350.40 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by the Department of Labor (DOL) and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[7] If the petitioner's net income during the required time

[7] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas

period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither the petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In response to the RFE, the petitioner submitted its 2012 tax return and the beneficiary's IRS Form W-2 for the year 2012, which reflects that it paid the beneficiary $96,000 in salary. While this evidence establishes the petitioner's ability to pay the beneficiary the proffered wage in 2012, no similar documentation demonstrates that it also had the ability to pay the beneficiary the proffered wage in 2011 and 2013. We also find no evidence to demonstrate that the totality of the petitioner's circumstances establish its ability to pay, as was the case in *Sonegawa*. Accordingly, the record does not establish the petitioner's ability to pay the proffered wage.

Prior to issuing his decision, the director shall provide the petitioner with the opportunity to submit evidence to satisfy the requirements at 8 C.F.R. § 204.5(g)(2) for the years 2011 and 2013. The director should also request the beneficiary's Forms W-2 for these years.

**Relationship of Beneficiary to Petitioner**

Although DOL has determined, based on the record before it, that the beneficiary does not have an ownership interest in the petitioner, new evidence indicates that he may be the son of the president of the Korean company that owns the petitioner. Under 20 C.F.R. § 626.20(c)(8) and §656.3, a petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

The labor certification specifically asks in Part.C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" In the present case, the labor certification reflects that the petitioner checked "no" in

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1989); K.*C.P. Food Co., Inc. 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).

response to this question. The record finds that the beneficiary sought admission to the United States as an E-2 nonimmigrant investor in 2011. In the DS-160, Online Nonimmigrant Visa Application, filed by the beneficiary (as the petitioner's President) on October 31, 2011, counsel[8] indicated that the beneficiary had been previously employed by and described the beneficiary's duties as those of the general manager of his parent's/parents' overseas sales department.[9] Therefore, the record appears to demonstrate that the beneficiary has a familial relationship to the petitioner's owners.

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the legacy Immigration and Naturalization Service (INS) Commissioner noted that while it is not an automatic disqualification for a beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. In the present case, the record does not reflect that the petitioner acknowledged a family relationship between the beneficiary and its owner(s) during the labor certification process and subsequently during revocation proceedings (now terminated), thereby precluding DOL from auditing and assessing the nature of the relationship and the extent of the beneficiary's influence and control over the job opportunity. Accordingly, the record does not demonstrate that the offered position is a *bona fide* job opportunity.

Further, if the petitioner knowingly failed to identify the beneficiary as a relative of its owner(s) during the labor certification process, it would constitute a willful misrepresentation of a material fact that adversely affected DOL's adjudication of the labor certification. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A finding of misrepresentation may also lead to the invalidation of the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of

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[8] The DS-160 reflects that it was prepared by the same attorney who represents the petitioner in the present matter.

[9] Information from the DS-160 is available to USCIS through the Consular Consolidated Database. Pursuant to guidance provided by the U.S. Department of State's Visa Office Legal Affairs, USCIS may use information provided by an applicant in the DS-160 to establish relevant facts in immigration proceedings.

> 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.

The petitioner has not had the opportunity to address the information provided by the DS-160. Therefore, the director shall provide the petitioner with the chance to rebut the preceding findings regarding the beneficiary's familial relationship to owner(s) and the petitioner's failure to make DOL aware of this relationship during labor certification process and the subsequent investigation referred to above. To overcome these findings, the petitioner must submit independent, objective evidence that establishes either that the information provided by the DS-160 is inaccurate or that DOL was aware of the beneficiary's relationship to the petitioner's owner(s) at the time it approved the labor certification. Inconsistencies must be resolved by the submission of "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, 591-92 (BIA 1988). The petitioner should also be asked to identify any additional ties, familial or otherwise, that the beneficiary may have to officers, incorporators or shareholders and to provide evidence establishing that DOL was aware of these relationships during the labor certification process.

**Conclusion**

For the reasons previously discussed, the director's May 7, 2012 decision will be withdrawn. The matter will be remanded for further action consistent with the preceding discussion and the issuance of a new decision.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has not been met.

**ORDER**: The director's decision is withdrawn. The matter is remanded to the director for further action, consistent with the preceding discussion and the issuance of a new decision.