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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

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 03 2011

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On March 8, 1999, [redacted] filed Form ETA 750, Application for Alien Employment Certification (labor certification) with the U.S. Department of Labor (DOL). Subsequently after the DOL approved the labor certification on February 1, 2001, [redacted] filed Form I-140 (Petition for Alien Worker) with the Immigration and Naturalization Service (currently called U.S. Citizenship and Immigration Services or USCIS) on February 21, 2001. The record shows that the employment-based immigrant visa petition was approved by the director, Vermont Service Center, on October 12, 2001. On March 6, 2009, the director, however, revoked the approval of the immigrant petition. [redacted] in turn, appealed the director's decision to revoke to the Administrative Appeals Office (AAO). On November 8, 2010, the AAO issued a notice of derogatory information (NDI) to the original petitioner, [redacted] indicating that the petitioner's business status had been forfeited, and if the petitioner's business had been dissolved or not been active, the appeal would be dismissed as moot. In response to the AAO's NDI, [redacted] the owner of both [redacted] states that [redacted] merged with [redacted] and became one [redacted] in 2005. Further, counsel for [redacted] claims that even though the petitioner [redacted] has lost its corporation status after the merger, the business continues to be viable for the petitioner. The appeal will be dismissed as moot. The AAO will enter a separate administrative finding of fraud and material misrepresentation against the petitioner and will invalidate the alien employment certification, Form ETA 750.

The petitioner [redacted] is a restaurant. It seeks to permanently employ the beneficiary in the United States as a specialty cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] While adjudicating the beneficiary's application to register permanent residence or adjust status (Form I-485), the USCIS Baltimore District Office found that the beneficiary did not intend to give up his full-time position at the [redacted] as an office assistant/messenger and intended to keep his part-time job at [redacted] if his application to adjust status were granted.[2] Further, an investigation by the [redacted] in New Delhi, India, revealed that the employment letter that the beneficiary had provided to the DOL to show that he qualified for the position as set forth in the labor

[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

[2] At his adjustment interview on December 5, 2007, the beneficiary was asked, "Do you intend to terminate your full-time employment at the [redacted] once you receive lawful permanent residence?" The beneficiary stated, "No, I do not; I will continue to maintain my full-time employment at the [redacted] and my part-time (evening) employment at [redacted] This statement was recorded in writing and witnessed by two USCIS officers. The beneficiary certified under penalty of perjury that all of his statements are true and correct and that he understands the questions and answers in his sworn statement.

certification was fraudulent.[3] The director sent a copy of the [redacted] investigative report to the petitioner along with the notice of intent to revoke (NOIR) on August 12, 2008 and informed the petitioner that the petition's approval would be revoked unless the petitioner could provide evidence as listed in the investigative report, such as a letter of appointment, a contract of employment, an experience/employment certificate, salary certificates, pay slips, and/or an employment relieving letter. The director also stated that any evidence of employment must be corroborated by the following evidence from the beneficiary's prior employer in India: registers in Form B/C/D or E pursuant to the Labour Laws Act, 1988; wage slips in accordance to Minimum Wages Rules, 1950; copies of payroll; and attendance register. As for the beneficiary's intention, the director requested that the petitioner provide a notarized statement stating whether or not it intends to employ the beneficiary on a full-time basis.

In response to the director's NOIR, counsel for the petitioner reveals that the petitioner [redacted] has been closed and ceased doing business in 2004. However, counsel states that the owner of [redacted] has been conducting business as [redacted] since 1998. [redacted] according to counsel, is managed and operated the same way as [redacted] For instance, [redacted] also uses [redacted] as its business name; it operates the same kind of business as [redacted] it is located in the same county as [redacted] and it offers the same employment position and work schedules to the beneficiary. In addition, to show that the beneficiary worked at [redacted] as a cook in India, counsel provided numerous statements from former employees and customers of [redacted] and from friends of the beneficiary. None of the evidence submitted is evidence specifically listed by the director in the NOIR, however.

The director revoked the petition, finding that the labor certification was obtained through fraud, that the beneficiary did not intend to work full-time for the petitioner if his application to adjust status were to be granted, that the petitioner had no ability to pay the proffered wage, and that the petitioner's business had been closed and there was no evidence of successorship-in-interest to [redacted]

On appeal to this office, counsel, among other things, contends that [redacted] though its business status has been forfeited, remains a viable business since it has "merged" with [redacted]. Counsel specifically stated:

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[3] The report detailed some of the actions that the officers with the [redacted] in New Delhi, India, took to verify the beneficiary's prior employment with [redacted] in India. First, the officers were able to verify the existence of [redacted] in Secunderabad, Andhra Pradesh, India. Second, they were able to find out that the manager of the restaurant for the past 23 years was [redacted] and that [redacted] was the proprietor of the restaurant. Finally, they were able to interview [redacted], who stated that he and his brother, [redacted] were the two owners of [redacted] During the interview, [redacted] however, was unable to produce any evidence such as letterheads, attendance register, payroll records, or wage slips that would indicate that the beneficiary was employed at [redacted] The officers also noted that [redacted] and his brother were reluctant to talk to them and that [redacted] refused to provide anything in writing.

> The termination or dissolution of an entity in corporate form, does not terminate or dissolve the right of the business entity to continue in business in a non-corporate format, without the protections offered by a duly incorporated entity. The "India Bistro" restaurant identified in the labor certification and the visa petition documentation, on [redacted] in Gaithersburg, Montgomery County, Maryland, was merged with the [redacted] restaurant on [redacted] in Gaithersburg, Montgomery County, Maryland. Both restaurants are merged under the holding company, [redacted] The [redacted] restaurant on [redacted] relinquished its corporate form and ceased its business operations in order to be merged into an existing restaurant situated elsewhere in Gaithersburg, Maryland, while maintaining an identity of ownership, management, food offerings, and services.

To demonstrate that the two companies merged, [redacted] submitted a copy of a letter dated January 31, 2005 that he sent to Internal Revenue Service (IRS) Center inquiring of the procedure to merge two companies. The response by IRS to [redacted] inquiry is not in the record. The record also does not contain articles of merger or other documentation showing that the two companies merged.

As previously noted in the AAO's NDI, if the petitioning business has been dissolved, or its privilege to conduct business has been forfeited,[4] the petition and its appeal to this office have become moot in which case the appeal shall be dismissed as moot. The appeal, however, will not be dismissed as moot if the petitioning entity can demonstrate that it somehow survives despite of its dissolution or forfeiture.

If the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred.

No regulations govern immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), a binding legacy INS precedent that was decided by the Administrative Appeals Unit and designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

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[4] 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.

The facts of the precedent decision are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987).* Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

Matter of Dial Auto at 482-3 (emphasis added).

The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the government could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved." *Id.* (emphasis added).

Accordingly, the Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims.

In view of the above, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of

a successor-in-interest is more broad: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary at 1473 (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[5] *Id.* (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[6]

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *Id.*; *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.[7] *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

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[5] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group comprehends "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is, either in law or in point of fact, the reincarnation or reorganization of one previously existing. To the fourth group belong those transactions in which a corporation, although continuing to exist as a legal entity, is in fact merged in another which, by acquiring its assets and business, has left the first with only its corporate shell. 19 Am. Jur. 2d Corporations § 2165 (2010).

[6] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[7] The mere assumption of immigration obligations, or the transfer of immigration benefits, derived from approved or pending immigration petitions or applications will not give rise to a

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, 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, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) 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, 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.

As the certified labor certification was issued to [redacted], the AAO must, in this case, determine if [redacted] is a successor-in-interest to [redacted]. If [redacted] has not established that it is a successor-in-interest to [redacted] then the petition may not be approved.

In the present matter, counsel contends that the original petitioner, though it has lost its privilege to conduct business, is survived by [redacted]. Counsel asserts that the original petitioner ceased its business operations in order to merge into an existing business – [redacted]. However, no evidence of such merger has been provided. The record contains no articles of merger or other documentation showing the merger or combining of assets and interests of the two companies. Nor does it include explanation why the petitioner was unable to produce such evidence. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

Without any evidence of successorhip-in-interest in the record, we find that the original petitioner has not been survived by [redacted] and therefore, the appeal will be dismissed as moot.

As stated above, the director revoked the petition because the petitioner had provided fraudulent document of the beneficiary's work experience abroad. On part A of the Form ETA 750, the petitioner set forth the minimum education, training, and experience that an applicant must have for the position as a specialty cook; it indicated on item number 14 that the applicant must have, at least, two years of experience in the job offered or as a preparer of Indian and Asian cuisine to qualify for the position. To show that he qualified for the proffered position, the beneficiary on part B of the Form ETA 750 claimed that he worked as a full-time cook in India at a place called [redacted] from February 1991 to April 1997. The record contains a letter from [redacted] stating that the beneficiary worked full-time as a "chief chef" at [redacted] from September 1991. The letter is dated April 30, 1997 and signed by [redacted] The record shows that the labor certification application was approved by the DOL on February 1, 2001.

In his NOIR, the director notified the petitioner of the finding by the [redacted] in New Delhi, India, pertaining to [redacted] and the beneficiary's alleged employment there. The director advised the petitioner to submit independent objective evidence to demonstrate that the beneficiary had worked as a cook in India prior to the filing of the labor certification application on March 8, 1999.

Confronted with this finding, the petitioner submitted the following evidence

- A signed statement from the beneficiary confirming his prior work experience at [redacted] as a chief cook from February 1991 to April 1997; and
- Numerous letters and notarized statements from former co-workers, friends, and customers of the beneficiary, all attesting to the beneficiary's employment at [redacted]

The director revoked the approval of the immigrant petition, noting that the petitioner had knowingly provided fraudulent documentation of the beneficiary's work experience abroad. In his notice of revocation, the director indicated that the petitioner failed to provide any tangible, documentary evidence establishing the beneficiary's employment at [redacted]

On appeal to the AAO, counsel for the petitioner maintains that the beneficiary qualifies for the position as set forth in the labor certification and submits two letters, both written by [redacted] from [redacted] as evidence of his assertion.[9]

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[8] According to the investigative report from the [redacted] in New Delhi, India, the owner of [redacted] advised the officers not to take [redacted] verbal testimony and should talk to his brother, [redacted]

[9] [redacted] in his letter dated March 19, 2009 states that the beneficiary worked at his restaurant from September 1991 to April 1997. In his other letter dated April 14, 2009, [redacted]

The material issues in this case are (1) whether or not the petitioner has sufficiently established the beneficiary's qualifications to perform the duties of the position prior to March 8, 1999, and (2) whether the petitioner has materially misrepresented the beneficiary's qualifications to obtain an immigration benefit.

The labor certification regulation at 20 C.F.R. § 656.17, in pertinent part, states:

> (i). *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

Consistent with the labor certification regulation above, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "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." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).[10]

[redacted] indicates that he met with two men from the [redacted] and that he answered a lot of questions about the beneficiary. The investigative report from the [redacted] in New Delhi, India, did not state that [redacted] met and talked with the officers from the embassy. According to the report, the officers from the embassy only interviewed [redacted]

[10] 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 material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

(1) The alien is excludable on the true facts, or
(2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

See Matter of S-- and B--C--, 9 I&N Dec. 436, 447 (AG 1961).

The materiality test has three parts. First, if the record shows that the foreign national is inadmissible on the true facts, then the misrepresentation is material. *See id.* If the foreign national would not be inadmissible on the true facts, then the second and third questions, called the "rule of probability,"[11] must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the foreign national's admissibility. *See id.* There must be a direct connection between the misrepresentation and the relevant line of inquiry. Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

In this case, the petitioner certified, upon filing the Form ETA 750 labor certification application with the DOL, that the position stated on the labor certification application required a minimum of two years of prior work experience in the job offered and that the beneficiary had at least two years of experience in the job offered prior to March 8, 1999. When the finding by the [redacted] in New Delhi, India, of [redacted] and the beneficiary's employment there came out and was revealed to the petitioner, the petitioner was instructed to produce specific independent objective evidence, such as a letter of appointment, a contract of employment, an experience/employment certificate, salary certificates, pay slips, and/or an employment relieving letter. The director also stated that any evidence of employment must be corroborated by the following evidence: registers in Form B/C/D or E pursuant to the Labour Laws Act, 1988; wage slips in accordance to Minimum Wages Rules, 1950; copies of payroll; and attendance register.

The petitioner failed to submit any of the evidence mentioned above, however. Instead the petitioner provided numerous letters and statements from the beneficiary's former co-workers, friends, and customers. On appeal to this office, the petitioner produced two letters from [redacted] who allegedly is one of the owners of [redacted] These letters and statements, even when they are taken as a whole, are not sufficient to demonstrate that the beneficiary had

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requirements for the position, *see* 20 C.F.R. § 656.17, and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

[11] *See* 9 FAM § 40.63 N6.3.

the prerequisite qualifications as of March 8, 1999. None of them is considered independent objective evidence.

The evidence in the record additionally shows that the beneficiary worked for the petitioner in 2002.[12] As noted above, the labor certification regulations provide that the employer must not have hired workers with less training or experience for jobs similar (or substantially comparable) to the job at issue in the labor certification application. *See* 20 C.F.R. § 656.17(i)(2). Based on the evidence in the record, the beneficiary most likely had lower qualifications than he claimed he had as of March 8, 1999, and the petitioner, therefore, has violated the actual minimum requirement provision when it hired the beneficiary in 2002. The petition cannot be approved for this additional reason.

As for the second issue, we find that the petitioner has knowingly misrepresented the beneficiary's qualifications to obtain the approval of the labor certification and the now revoked Form I-140.

As noted earlier, the director, before issuing his decision, had specifically requested the petitioner to provide independent objective evidence to show that he worked as a cook from September 1991 to April 1997. The beneficiary failed to submit any of the evidence specifically requested, however. Such evidence is material because, if it were provided, it would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The beneficiary's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner's failure to produce any of the evidence requested also tends to show that it has deliberately concealed and misrepresented some facts about the beneficiary's prior work experience between 1991 and 1997. In addition, the beneficiary certified on the Form ETA 750 that he worked as a cook for at least two years. The DOL approved the labor certification application. The approval of the labor certification, in turn, led VSC director to eventually approve the Form I-140 petition. The labor certification and immigrant visa petition would not have been approved; however, had the DOL and VSC director known about the finding by the [redacted] in New Delhi, India, concerning [redacted] and the beneficiary's alleged employment there.

The Secretary of Homeland Security may revoke the approval of the petition "for what he deems to be good and sufficient cause." Section 205 of the Act; 8 U.S.C. § 1155. The Board of Immigration Appeals has held that this requires that the USCIS director issue a notice, specifying the evidence in the record that would have warranted a denial and that, following the issuance of the notice, this evidence remain unexplained and unrebutted. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988); *see also Matter of Arias*, 19 I&N Dec. 568, 569-70 (BIA 1988; *see also*

[12] The Forms W-2 reflects that the beneficiary received from the petitioner the following amounts: $5,535.20 in 2002, $7,400 in 2003, and $8,325 in 2004. It is not clear when he was hired in 2002, however.

Matter of Ho, 19 I&N Dec. 582, 589-90 (BIA 1988) (holding that USCIS must produce some evidence from the record to establish cause for revocation) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)). The petitioner must be informed of derogatory information USCIS believes would have warranted a denial and provided with an opportunity to inspect, respond to, and rebut the specific evidence USCIS alleges is contained in the record. 8 C.F.R. § 103.2(b)(16)(i); *see Matter of Estime* at 451.

As stated above, the director, before revoking the petition, issued a NOIR, specifically advising the petitioner to provide independent objective evidence to demonstrate that the beneficiary was employed as a cook in India between September 1991 and April 1997. No such evidence has been submitted, however. The allegations of fraud remain unrebutted.

Further, the regulation at 8 C.F.R. § 103.2(b)(14) states:

> Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

Hence, the director's request for such independent objective evidence is authorized by regulation and is reasonable. For the reasons above, the decision to revoke the petition is based on good and sufficient cause.

All other issues involving the petitioner's ability to pay and the beneficiary's intent to work full-time for the petitioner are moot and will not be discussed further since the petitioner is no longer an active business.[13]

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.

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[13] In his notice of revocation (NOR), the director determined that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage beginning on March 8, 1999 (the priority date). Specifically, the director found that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's wage from 2001 to 2007. In addition, the director noted that the petitioner had filed four other immigrant visa petitions since the priority date and had obtained approvals for these petitions. Considering the multiple petitions that the petitioner had filed since the priority date, the director concluded that the petitioner could not possibly pay the wage of the current beneficiary and of other beneficiaries. On appeal, the petitioner fails to produce additional evidence to demonstrate the continuing ability to pay. The AAO agrees with the director's conclusion that the petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date. The appeal would be dismissed for this reason also.

ORDER: The appeal is dismissed as moot and the director's decision to revoke the immigrant visa petition is affirmed, with a separate finding of fraud against the petitioner.

FURTHER ORDER: The AAO finds that the petitioner knowingly misrepresented a material fact to procure a benefit under the Act and the implementing regulations. The alien employment certification, Form ETA 750, ETA case number [redacted] filed by the petitioner is invalidated.