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

[redacted]

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DATE: DEC 13 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center (director), revoked the approval of the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a fabrication and sale of marble and granite business. It seeks to permanently employ the beneficiary in the United States as a stone carver. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 20, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the petition concludes that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 upon appeal.[2]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a stone carver.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a stone carver with Coperativa Constructor, in Brasov, Romania, from 1985 until 1987, and as a self-employed stone carver in Cleveland, Ohio from 1997 until the date the application for labor certification was signed, on April 16, 2001. The beneficiary did not provide more precise dates. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter with a certified English translation from [redacted] Chief of Section, Cooperativa Constructorul. The letter bears company letterhead, however, it did not include the address or phone number for the company or the author. The letter states that the company employed the beneficiary as a stone carver from 1985 until 1987. However, the letter does not specify the dates of employment, or state if the job was full-time.

In the director's Notice of Intent to Revoke the approval of the petition, the petitioner was informed that an overseas investigation had taken place which disclosed that: the beneficiary worked for Cooperativa Constructorul from June 16, 1988 to June 1, 1989 as a mason and blacksmith; that Cooperativa Constructorul's records showed the beneficiary had a job description that contradicted that claimed on the labor certification and letter provided by [redacted] and, that no one by the name of [redacted] was employed by Cooperativa Constructorul from 1982 to 1989.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out possible misrepresentations that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

The petitioner responded to the NOIR explaining that a legal assistant made a typographical error on the application for labor certification, erroneously listing the dates as 1985 to 1987. The legal assistant then sent a draft letter to [redacted] which included the job description and dates. [redacted] then hurriedly signed the letter and returned it without noting the discrepancy in the dates. Additional declarations attesting to the beneficiary's experience as a stone carver were also submitted in response to the NOIR. The director found this explanation to be unpersuasive, citing *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988),[3] and found that the inconsistency cast doubt on all aspects of the petition. The director determined that the experience letter from Cooperativa Constructorul was fraudulent and revoked the approval.

On appeal, the petitioner submits a retirement decision issued by the Retirement Commission, documenting [redacted] employment as Chief Department IA BV. Counsel asserts that [redacted] supervised the beneficiary while the beneficiary was employed with Cooperativa Constructorul to construct a new building for a government project in Romania. Counsel also asserts that the beneficiary's memory of the actual dates of employment is not clear and that this could have contributed to the discrepancy in the dates of employment.

The petitioner's explanation fails to explain many discrepancies. First, the petitioner admits to writing the letter and providing dates and content for the signatory. The author of the letter is required to provide his knowledge of the beneficiary's training and experience. In this instance, the letter clearly conflicts with the records maintained by the former employer. Additionally, the petitioner did not attempt to explain why the letter was written by a "Chief of Section" that had never worked for the former employer. Additionally, we note that the letter purporting to be the original is on paper which appears to be the same nature, color, and quality as other documents

[3] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

submitted contemporaneously with the petition. It does not bear any fold marks or indicators of wear that one would expect in a document that has been mailed multiple times and reviewed by multiple persons.

As noted in the director's revocation, on August 1, 2006, the beneficiary was interviewed and admitted that the letter was in fact a fraud, written by his father-in-law. This admission is not addressed on appeal. Based upon the beneficiary's admission, the beneficiary misrepresented his prior work experience in order to meet the requirements of the labor certification.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States, unless the petitioner is able to overcome the findings of the U.S. Consulate investigation. *See* INA Section 212(a)(6)(C), [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 material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position through meeting the experience requirements of the position offered. The job offered requires two years of prior experience as a stone carver. The beneficiary, in listing on Form ETA 750B that he gained this experience with Coperativa Constructor, and signing that form under penalty of perjury, constitutes an act of willful misrepresentation if the beneficiary was not employed in that position. The listing of such experience misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience is a willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the ETA 750 and USCIS's immigrant petition analysis.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By signing Forms ETA 750, and submitting falsified employment verification documents, the beneficiary has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the beneficiary has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that he submitted falsified documents, we enter a finding of knowing misrepresentation. This finding of knowing

misrepresentation shall be considered in any future proceeding where admissibility is an issue.

Notwithstanding the above facts, and the beneficiary's admission, counsel asserts on appeal that:

> I-140 Revocation fails to address information supplied in the Response to the Notice of Intent to Revoke to explain previous information. The determination that the work experience letter was fraudulent was made in error. Further, documentation as to experience as a stone mason both in home country and in the U.S. were not recognized or given sufficient weight.

On appeal, the petitioner also submits additional letters to document the beneficiary's experience as a stone carver in the United States. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The letter from [redacted] Executive Enterprises, states that [redacted] has contracted many granite stone and tile fabrication and installation jobs with the beneficiary since November 1998 to this day. The letter does not mention in what capacity the beneficiary worked or provide any job description. As the letter does not describe the beneficiary's experience, it does not comply with the regulation.

The letter from [redacted] Hearth Homes, states that [redacted] worked from 1998 to 2007 with the beneficiary as a contractor for Salva Stone. The beneficiary did not list Salva Stone as a previous employer on Form ETA 750B. In *Matter of* [redacted]16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The letter from [redacted] Shencon Construction, states that [redacted] worked with the beneficiary through New Stone Age, the claimed successor to the petitioner, for the past eight years.

The letter is dated March 1, 2007 and does not provide specific dates of employment. Therefore, it cannot be determined whether this experience was gained before the priority date in 2001.[4]

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[4] Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA):

> [W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.[4]

In *Delitizer,* BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6) in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions, the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director,[5] the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, between 2003 and 2005 the petitioner filed at least two additional I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

In a Request for Evidence (RFE) issued by the AAO, the petitioner was directed to provide the names, receipt numbers, proffered wages, and date petitions were filed for each beneficiary. The petitioner was informed that failure to provide this information would result in dismissal of the appeal. In response, the petitioner provided a letter which stated no new petitions were filed after 2006. This is not responsive, and fails to provide evidence necessary to conduct an analysis of the petitioner's ability to pay the proffered wage. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Also beyond the decision of the director, New Stone Age, Inc. also failed to establish that it is a successor-in-interest to the entity that filed the labor certification, petition and appeal in the instant matter. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If New Stone Age, Inc. is a different entity than the petitioner/labor

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the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner.

As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). Here, the petitioner has not established the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

[5] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because New Stone Age, Inc. has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer and appellant.

Also beyond the decision of the director, during the adjudication of the appeal, evidence has come to light that the petitioning business in this matter did not continually meet the definition of a U.S. employer pursuant to 8 C.F.R. § 204.5(c) in order to maintain a labor certification under 20 C.F.R. § 656.3, the Department of Labor (DOL) regulations for the definition of a U.S. employer.

Under 20 C.F.R. § 656.3, the Code of Federal Regulations pertaining to the Employment and Training Administration, DOL, specifically under the section related to the labor certification process for permanent employment of aliens in the United States, employer means:

> (1) A person, association, firm or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.
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> (2) Persons who are temporarily in the United States, including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification for permanent employment.

Subsequent to filing the application for labor certification and Form I-140, the petitioning business in this case was sold by the original owner and is now wholly owned by the beneficiary and his wife (who is neither a lawful permanent resident nor a United States citizen). As the owners of the petitioner do not have permanent residence or citizenship, they are "temporarily in the United States" and the labor certification is not currently filed on behalf of a valid employer.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.