U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: FEB 13 2012 Office: TEXAS 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 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On November 22, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on January 20, 2004. However, the Director of the Texas Service Center ("the director") revoked the approval of the immigrant petition on April 30, 2009, and the petitioner subsequently appealed the director's decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cleaning company.[1] It seeks to permanently employ the beneficiary in the United States as a bookkeeper 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).[2] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in January 2004, but the approval was revoked in April 2009. The director found that: (a) the beneficiary did not qualify for the position offered, and (b) the petitioner did not follow the Department of Labor (DOL) recruitment requirements and that it obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause to revoke the approval of the petition. Specifically, counsel states that the director's Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. For instance, counsel indicates that the petitioner's failure to present the copy of the in-house posting was because the director did not specifically request such evidence in the NOIR. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel contends that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence and given a reasonable opportunity to respond, the director cannot revoke the approval of the visa petition.

Counsel further claims that the director's finding of fraud or material misrepresentation against the petitioner, for instance, is not supported by the evidence of record. Counsel states that the

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[1] In the Form I-140 petition and Form ETA 750, the petitioner states that its business type is cleaning company; however, the petitioner's website ([redacted]states that the petitioner is a full service dry cleaner, specializing in cleaning, restoring and preserving wedding gowns, bridal gowns, christening gowns, delicate and antique fabrics (last accessed January 9, 2012).

[2] 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.

director included no specific evidence of fraud or material misrepresentation or information relating to the petitioner, petition, or documents in either the NOIR or the Notice of Revocation (NOR).

On the beneficiary's qualifications for the job offered, counsel states that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary qualifies for the job offered and that he had the requisite work experience as of the priority date. Counsel argues that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by [redacted][3]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.[4]

Though not raised by counsel, as a procedural matter, the AAO finds that the regulation at 8 C.F.R. § 205.1 is not the proper authority to be used to revoke the approval of the petition in this instant proceeding, since that regulation only applies to automatic revocation. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition's approval is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues raised by counsel on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

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[3] Current counsel of record [redacted] will be referred to as counsel throughout this decision. Previous counsel, [redacted], will be referred to as previous or former counsel or by name. Previous counsel, [redacted], will be referred to by name.

[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

However, before the Secretary of Homeland Security can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

> (a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS].

In addition, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceedin

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of 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. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, before revoking the approval of the petition, the director sent a Notice of Intent to Revoke (NOIR) to the petitioner, stating that USCIS had found fraudulent information in many of the employment-based petitions and labor certifications that [redacted] filed. With respect to the instant petition, the director noted that the employment experience letter, which the petitioner had submitted earlier to demonstrate that the beneficiary qualified for the position, did not contain a CNPJ number.[5] For this reason, the director stated that the beneficiary's past

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[5] Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. [redacted] is similar to the federal tax ID or employer ID number in the United States. The director in the Notice of Revocation noted that the U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

employment could not be verified. The director gave the petitioner the opportunity to respond to his concerns about the beneficiary's qualifications. The director also advised the petitioner to submit additional evidence to demonstrate that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR and gave the petitioner notice of the derogatory information specific to the beneficiary's qualifications. The director articulated good and sufficient cause to reopen the proceedings by informing the petitioner that the record raised concerns about the beneficiary's qualifications for the position.

The next issue is whether the director properly concluded that the beneficiary did not qualify for the position offered.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on August 28, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Bookkeeper." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Under direction of office manager, keep financial records; balance checking accounts, accounts payable, receivables, etc., and prepare financial reports, etc." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered or in a related occupation as a manager. On the Form ETA 750, part B, signed by the beneficiary on March 13, 2001, he represented he worked as a bookkeeper for a business in Curitiba, Brazil called [redacted] from June 1995 to July 1997. To show that the beneficiary had the requisite work experience in the job offered before August 28, 2001, the petitioner submitted the following evidence:

- A sworn statement dated February 16, 2001 from [redacted] stating that the beneficiary worked as a bookkeeper at his company [redacted] from June 1995 to July 1997.

In addition, the petitioner, in response to the director's NOIR, also submitted the following evidence to demonstrate that the beneficiary had the requisite work experience in the job offered:

- A letter dated March 24, 2009 from [redacted] Manager, stating that the beneficiary worked as an accountant from June 1995 to July 1997 at [redacted]. and that his job duties included sending out invoices, making bank deposits, doing payroll, accounting for profits, losses, and expenses, and filing of documents; and
- A copy of the business registration (CNPJ) of [redacted]

Upon review, the director stated that the letter dated March 24, 2009 from [redacted] verifying the beneficiary's employment as an accountant from June 1995 to July 1997 was not sufficient to demonstrate that the beneficiary had the requisite work experience in the job offered as of the priority date. Specifically, the director claimed that the printout of the CNPJ of [redacted] did not refer to the same entity that employed the beneficiary [redacted]

The AAO agrees. The name of the company where the beneficiary stated he worked is [redacted] The name of the company listed on the CNPJ printout is [redacted] It is not clear that [redacted]. is the same company as [redacted] The name, address, and phone number of the company on the initial employment verification letter dated February 16, 2001 are different from those in the subsequent letter dated March 24, 2009. The AAO also notices that the subsequent letter has two letterheads: the top letterhead is [redacted] and underneath it is [redacted]

On appeal, the petitioner stated that the two names – [redacted]. and [redacted] – are interchangeable, since the March 2009 letter contains both names. The petitioner's statement does not address the fact that on the initial letter dated February 16, 2001, only the name of [redacted] was represented. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No independent objective evidence has been submitted to show that [redacted] are one and the same company.

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[6] This document indicates that [redacted] was in business on January 2, 1992.

Further, the AAO observes that the beneficiary, according to his Form G-325 (Biographical Information) that he filed in conjunction with his Application to Register Permanent Residence or Adjust Status (Form I-485), stated that he lived in the city of Criciuma, Santa Carina, Brazil between 1988 and 1998. The business [redacted] is located in the city of Curitiba, Parana, Brazil. It is unlikely that the beneficiary lived in Criciuma, Santa Carina, and worked in Curitiba, Parana.[7] Therefore, the AAO agrees with the director that the beneficiary's work experience as a bookkeeper or accountant in Brazil from June 1995 to July 1997 has not been established.

The next issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner submitted the following evidence in response to the director's NOIR:

- A signed statement dated March 27, 2009 from [redacted], stating that he followed all necessary steps to recruit U.S. workers including placing four advertisements in the newspapers and posting a job announcement at the place of business;
- Copies of the newspaper tear sheets for the position offered, published in the *Boston Herald* for four consecutive Sundays on March 18, March 25, April 1, and April 8, 2001; and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* addressed to [redacted] stating that the job ads would also be posted online on jobfind.com for 30 days.

The director determined that the petitioner failed to comply with the DOL recruitment requirements, because the petitioner, among other things, failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. The director also concluded that either the beneficiary and/or [redacted] participated in the consideration of U.S. applicants for the job by paying for and creating the job advertisement for the job offered. Further, the director found that the Form ETA 750 was signed by the petitioner [redacted] on March 13, 2001 before the first advertisement for the position was placed in the newspapers.

Upon *de novo* review, the AAO disagrees in part with the director's conclusion. First, the director in the NOIR failed to specifically notify the petitioner to submit copies of in-house posting notices to satisfy the DOL recruitment requirements. Additionally, since there was no requirement to keep records of recruitment efforts, the director may not make an adverse finding against the petitioner, if the petitioner claims it no longer has the supporting documentation over

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[7] The distance between Criciuma, Santa Carina, and Curitiba, Parana, according to [redacted] is 361.46 km (or 224.60 miles). According to [redacted] the noted distance is a straight line distance (flying or air distance) between the two locations calculated based on their latitudes and longitudes. This distance may be very much different from the actual travel distance. (Last accessed January 5, 2012).

five years after the labor certification was approved.[8] The AAO acknowledges that before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010). Therefore, the director's conclusion that the petitioner failed to follow the DOL's recruitment procedures because it failed to submit copies of in-house posting notices is withdrawn.

Based on the evidence submitted, the AAO also finds that the director's conclusion that either the beneficiary and/or [redacted] impermissibly participated in the consideration of U.S. applicants for the job is neither supported by the facts of record nor warranted under the DOL regulations. Although the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2001)[9] specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered, the regulation in place at the time of

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[8] However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record, if any, by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[9] This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010). The regulation at 20 C.F.R. § 656.20(b)(3)(i) (2001) at the time of recruitment stated:

> It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) (2001) at the time of recruitment stated:

> The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

the recruitment in this case allowed beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process. *See* 20 C.F.R. § 656.20(b)(1) (2001).[10]

By itself, the letter dated February 14, 2001 addressed to [redacted] from the *Boston Herald* does not show that [redacted] paid for or impermissibly participated in the consideration of U.S. applicants for the job offered.[11] The record contains no evidence showing that [redacted] either paid for the job advertisement or interviewed or considered candidates for the position. The AAO, therefore, withdraws the director's conclusion that [redacted] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job.

With respect to the copies of the newspaper advertisements, the DOL regulations at the time the labor certification was submitted in 2001 provided for two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2001). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2001). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local DOL office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2001).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

Here, the record shows that the Form ETA 750 was submitted to the DOL for processing on August 28, 2001. The petitioner, based on the evidence submitted above, placed four advertisements on four consecutive Sundays on March 18, March 25, April 1, and April 8, 2001. Based on the evidence submitted and the stated facts above, it appears that the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time.

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[10] This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

[11] No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers. The letter dated February 14, 2001 from the *Boston Sunday Herald* stated that [redacted] placed an order to post the advertisement in the *Boston Herald* newspapers and online at www.jobfind.com for 30 days and provided the cost involved.

Nevertheless, the AAO agrees with the director's conclusion that the recruitment efforts were not conducted properly. As noted by the director in the Notice of Revocation (NOR), the petitioner [redacted] signed the Form ETA 750 labor certification on March 13, 2001 – five days before the petitioner placed the first advertisement in newspapers on Sunday, March 18, 2003. The labor certification application was signed by the petitioner five days before it initially placed the advertisement in the newspapers. The record contains no contemporaneous documentation indicating what recruitment efforts were undertaken. Box 21 of the ETA750A, where the petitioner lists its recruitment efforts prior to submission of the labor certification application, states "Newspaper advertisements, posting, [redacted] word of mouth, etc."

By signing the Form ETA 750, the petitioner essentially stated to the DOL under a penalty of perjury attestation clause that the recruitment effort was complete and yielded no qualified United States workers. The petitioner could not certify to the DOL that no U.S. workers were available, willing, or able to perform the duties of the position on March 13, 2001 when it had not even begun the recruitment process. The statement on section 21 of the Form ETA 750A, describing the petitioner's recruitment efforts could not yet have occurred, as the newspaper advertisements had not yet been published on March 13, 2001 – the date the petitioner signed the Form ETA 750A. Thus, the petitioner's attestation that recruitment had been completed as of February 13, 2001 could not be true.

[redacted] cannot attest through his signature on the Form ETA 750 that recruitment is complete without first conducting the recruitment. The fact that the submitted advertisements were placed by the petitioner for the job opening in the instant proceeding after the petitioner signed the labor certification application raises questions about the extent to which the petitioner, through its premature signature on the Form ETA 750A, may have intentionally misrepresented its recruitment efforts. The petitioner's signature also raises the question about the extent of the petitioner's involvement in the recruiting process and whether previous counsel was actively involved in the interviewing and consideration of job applicants.

Doubt cast on any aspect of the petitioner's evidence 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. at 591-592. It is incumbent upon the petitioner to resolve any inconsistencies in the record by 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. *Id.*

On appeal, counsel for the petitioner states that USCIS may not review the *bona fides* of the recruitment procedures unless there is specific evidence of wrongdoing. In the NOR, the director stated that the petitioner signed the application for labor certification prior to any recruitment being conducted. This is specific evidence of wrongdoing, and remains unaddressed on appeal. The petitioner states, through counsel, that the certification and the petitioner's signature on the Form ETA 750A mean that the job has been and is open to United States workers. The petitioner, however, does not explain its signature on the Form ETA 750 outlining its recruitment

efforts prior to having conducted such efforts. Thus, the AAO finds that the petitioner failed to properly conduct recruitment.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [redacted] filed the petition in the instant proceeding. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or its previous counsel deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, the factual record establishes sufficient irregularities that the petitioner failed to follow the DOL's recruitment procedures. However, there has been insufficient development of the facts to find that the petitioner engaged in fraud or material misrepresentation.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS

is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[12]

Section 204(b) of the Act states, in pertinent part, that:

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

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.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* 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.

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

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.

In this case, as noted above, while the irregularities in the recruitment procedures lead the AAO to conclude that the petitioner did not properly follow recruitment procedures, the factual record does not disclose that the petitioner engaged in material misrepresentation with respect to the recruitment process.

If the petitioner or [redacted] submitted false statements or fraudulent documents with respect to the recruiting procedures, e.g. if, for example, the petitioner did not perform the essentials of recruitment such as interviewing and consideration of candidates for the position; or, if the beneficiary fabricated his work experience in Brazil, then the director could have found fraud or material misrepresentation. If the DOL relied upon false or fraudulent documents submitted by the petitioner or previous counsel in determining the application's approval, the resulting labor certification was erroneous and would be subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Further, as a third preference employment-based immigrant, the petitioner was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. If on the true facts the labor certification was obtained through fraud or misrepresentation, and is thus invalid, then the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation relating to the recruitment procedures is material.

If the DOL relied upon false or fraudulent documents, then the DOL would have been unable to make a proper investigation of the facts when determining whether the labor certification application should be approved, because the petitioner or its previous counsel, or the beneficiary would have shut off a line of relevant inquiry. In such a case, if the DOL had known the true facts, it would have denied the employer's labor certification, as the petitioner would not have complied with DOL's recruitment requirements, and there would have been an invalid test of the labor market or the beneficiary would not have qualified to perform the duties of the job.[13] In

[13] *See*, 20 C.F.R. § 656.2, which provides that the role of the DOL in the permanent labor certification process is to determine that there are not sufficient United States workers, who are able, willing, qualified and available to take the position at the time of the alien's application and admission to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The DOL executes this role through a test of the labor market where the alien beneficiary will perform the work.

other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's, previous counsel's, or the beneficiary's misrepresentation would be material under the second and third inquiries of *Matter of S & B-C-*.

The director was correct to review the facts of record to determine whether the wrongdoing constitute fraud or material misrepresentation. However, the evidence of record currently does not support the director's finding of fraud or willful misrepresentation in connection with the labor certification process. Thus, the director's finding of fraud or misrepresentation is withdrawn.

In addition, the petition is not approvable because the record does not contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date.

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).

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted above, the priority date in this case is August 28, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is $12.48 per hour or $22,713.60 per year (based on a 35-hour work per week).[14]

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[14] The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DoL Field Memo No. [redacted]

A review of USCIS electronic databases reveals that the petitioner has previously filed two other immigrant petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant case since the priority date. The table below shows the names of the alien beneficiaries, their status (whether they are U.S. Legal Permanent Residence (LPR) or not), and whether the petitions filed on their behalf were approved, revoked, or denied:

Receipt Number	*Beneficiary (Last Name)*	*Filing Date*	*Decision*	*Date of the Alien Beneficiary's Adjustment to LPR*
[redacted]				

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of the current beneficiary and also of all other beneficiaries listed above from the date of filing each respective labor certification application until the date each of them obtains lawful permanent residence.

The petitioner has already submitted copies of the following evidence to show that it has the continuing ability to pay the proffered wage from August 28, 2001:

- The beneficiary's Form W-2 for 2001.[15]

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary and of the other beneficiaries from the priority date until each of them either obtains legal permanent residence or ports to another similar employment, pursuant to section 204(j) of the Act.[16] For this additional reason, the petition may not be approved.

In summary, the director's decision to revoke the approval of the petition is affirmed. The appeal will be dismissed for the above stated reasons, with each considered as an independent

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[15] The W-2 shows that the beneficiary earned $31,787.77 in 2001, more than $22,713.60 per year (the proffered wage).

[16] In response to the director's NOIR dated March 9, 2009, [redacted] stated that the beneficiary no longer worked for the petitioner and had ported to work for another employer. The record contains a letter dated March 18, 2009 from [redacted] stating that the beneficiary works as a full-time bookkeeper for [redacted] On the subject of porting, the AAO finds that where the approval of the Form I-140 petition is revoked for good and sufficient cause, as has been in this case, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

and alternative basis for denial. As noted earlier, 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. The approval of the petition remains revoked.