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

(b)(6)

DATE: APR 0 9 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. ETA Form 9089 remains invalidated based on the petitioner's misrepresentations.

The petitioner describes itself as a dry cleaner and tailor shop. It seeks to permanently employ the beneficiary in the United States as a custom tailor. The petitioner requests classification of the beneficiary as a 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 an ETA Form 9089, Application for Permanent 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 November 13, 2009. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date, and that no *bona fide* job offer existed as the petitioner failed to disclose a family relationship on the labor certification. Based on the failure to disclose the relationship on ETA Form 9089, in C.9, the director invalidated the labor certification, as the failure to disclose was material and would constitute material misrepresentation.

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]

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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.

[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).

Bona Fide Job Offer

As set forth in the director's May 31, 2011, denial, the primary issue in this case is whether the petition was based on a *bona fide* job offer that was available to U.S. workers; specifically, whether an undisclosed pre-existing familial relationship likely affected the labor certification process.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

In order to demonstrate that qualified workers are not available, the petitioner must obtain a labor certification approved by DOL. INA § 203(b)(3)(C). In order to file a labor certification, an employer must have completed regulatory prescribed recruitment efforts in good faith, and the employer must attest to the performance of this recruitment on the labor certification. 20 C.F.R. § 656.17(e)(2) (describing the minimum pre-filing recruitment required for a nonprofessional occupation). Further, the employer must attest that the job opportunity has been and is clearly open to any U.S. worker at the time of filing the labor certification. 20 C.F.R. § 656.10(c)(8). If there is a familial relationship between the labor certification employer's owners, stockholders, officers, incorporators, or partners, the job opportunity may not be *bona fide*, as the job opportunity may not be available to all U.S. workers. 20 C.F.R. 656.17(l) (documenting the evidence required in the case that the labor certification beneficiary may have influence and control over the job opportunity, such as through a familial relationship). The employer must attest on the labor certification as to whether or not a familial relationship exists. 20 C.F.R. § 656.17(a) (employer must file a completed DOL ETA Form 9089, and incomplete applications will be denied); *see* ETA Form 9089, Part C, question 9 (asking "is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?"). The petitioner indicated "no" to question C.9 on the labor certification. The petitioner indicated on Form I-140, Part 4, question 6, that no other immigrant visa petition had been filed by or on behalf of the beneficiary.

USCIS records indicated that the petitioner's president had filed an I-130, Immigrant Petition for Alien Relative, on behalf of the beneficiary, which showed that the president was the beneficiary's brother. The director therefore issued a Request for Evidence (RFE), dated November 19, 2010, in which she requested evidence of the petitioner's recruitment for the position offered, as well as evidence documenting the familial relationship between the beneficiary and the enumerated individuals identified in 20 C.F.R. § 656.10(l). The director also requested evidence documenting any "financial relationship and/or friendship" between the beneficiary and those enumerated individuals. The intent of the director's request was for the petitioner to submit verifiable documentary evidence that a *bona fide* job opportunity exists and was open to qualified U.S. workers pursuant to 20 C.F.R. § 656.10(c)(8).[3] The petitioner responded to the director's RFE through

[3] "Attestations. The employer must certify to the conditions of employment listed below on the

counsel by submitting a letter from counsel, a certificate of family relations "of the stockholders ... and the beneficiary," and the requested evidence of recruitment. Counsel stated, "[t]here is no financial relationship between the stockholders, corporate officers, or incorporators of the petitioning company and the beneficiary other than the employment relationship." In a subsequent paragraph, counsel stated, "[e]ven though the beneficiary has a family relationship with the stockholders of the petitioning company [the specific relationship was not identified by counsel], the employment relationship is valid and the job opportunity is bona fide." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In her decision, the director details the evidence received with the initial filing and in response to her RFE, and discusses at length the *bona fides* of the job offer including the familial relationship and whether the job opportunity was available to U.S. workers. The director determined that the undisclosed familial relationship between the petitioner's president and the beneficiary, as that of brother and sister, was material and purposefully hidden from the DOL in the petitioner's failure to accurately respond to ETA Form 9089, Question C.9. Further, the director found that the job opportunity was not available to U.S. workers. Consequently, the director denied the petition and invalidated the labor certification.

Part C.9 of the ETA Form 9089 accompanying the petition asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner responded "no" to this question. This is in fact not true, and the record now contains a "Certificate of Family Relations" for the beneficiary, as well as a "Certificate of Family Relations" for the president of the petitioner, both of which indicate that the beneficiary and the president are siblings as they share the same mother and father. The record also contains the petitioner's Articles of Incorporation which indicate the petitioner is a close corporation with two directors, the petitioner's president and the president's spouse, both of whom reside at the same address. Therefore, the beneficiary is related by blood to one of the petitioner's two directors, and the petitioner's other director is the beneficiary's sister-in-law. The record contains a report from the office of the Texas Comptroller of Public Accounts, dated June 23, 2011, indicating that there continue to be only the two directors indicated above, the beneficiary's brother and the beneficiary's sister-in-law.

Under 20 C.F.R. §§ 656.10(c)(8), 656.17(l), and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*,

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Application for Permanent Employment Certification under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application." 20 C.F.R. §656.10(c). The condition at issue to which the petitioner did attest states: "[t]he job opportunity has been and is clearly open to any U.S. worker." *Id.* at § 656.10(c)(8).

00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (labor certification application denied for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The petitioner should have disclosed the familial relationships between the beneficiary and the petitioner's two directors to the DOL. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The burden rests on the employer to provide clear evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA October 15, 1987).

The DOL applies a totality of circumstances test to ascertain whether a *bona fide* job offer exists with respect to the alien's potential inappropriate control over a job offer. The DOL considers multiple factors including whether the alien: (a) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. *See Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991) (*en banc*).

The DOL adopted the holding in *Modular Container's* through the regulation at 20 C.F.R. § 656.17(l), which states the following:

> Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e. the job is available to all U.S. workers. . .[4]

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[4] If a petitioning business marks "yes" in response to Part C.9 of the ETA Form 9089, which specifically asks if the employer is a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or if there is a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien, DOL would request the following documentation from the petitioner to assess the relationship further:

(1) Articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
(2) A list of all corporate/company officers and shareholder/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
(3) The financial history of the corporation/company/partnership, including the total investment

A DOL appellate decision applied *Modular Container's* holding and 20 C.F.R. § 656.17(l) and denied certification of a labor certification application where an alien was the 100% owner of the company. *See ATI Consultores*, 07-INA-64 (BALCA Feb. 11, 2008).

The DOL's regulatory criteria and interpretive case law are informative about the circumstances under which the DOL denies or revokes approval of labor certification applications based on familial, social, or financial relationships. Critically, however, the regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [U.S. Citizenship and Immigration Services (USCIS)] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Thus, USCIS properly examines the issue as well when documentation submitted for immigration benefits reveals familial, social, or financial relationships concealed before the DOL that may have impacted the *bona fide* nature of the job offer during the labor certification process.

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the alien or petitioner willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term "willfully" means knowing 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). To be considered material, the misrepresentation must be one which "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 Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

Misrepresentation. A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991).

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in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary;

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) Documentation of any family relationship between the employees and the alien if the alien is one of 10 or fewer employees.

In the instant case, ETA Form 9089 was submitted to DOL after marking Part C.9 "no," thereby attesting that there was no familial relationship between the enumerated individuals and the beneficiary. This tends to cut off a line of inquiry before the DOL that may have led to an audit or closer review of the labor certification employer's recruitment, the beneficiary's influence and control over the job opportunity, and the *bona fide* nature of the job opportunity. Further, Form I-140 was submitted to USCIS containing false information; as the director noted in her decision, the petitioner marked "no" on the I-140, Part 4, Question 6, which asks, "has an immigrant visa petition ever been filed by or on behalf of [the beneficiary]?" The petitioner indicated that an immigrant visa petition had not been filed on behalf of the beneficiary, despite there being a family-based immigrant visa petition pending before USCIS filed by the petitioner's president on behalf of the beneficiary. The submission of the ETA Form 9089 and Form I-140 containing false information constitutes material misrepresentations to a government official.

Willful. In a letter dated June 24, 2011, counsel asserts that, "it was an unintended mistake by marking the incorrect answer to the question" on Form I-140, and that Part C.9 of the labor certification "was marked incorrectly by mistake." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nor do they explain how similar mistakes were repeated on the labor certification in November 2009 and again on the I-140 in June 2010; the labor certification and I-140 petition were both completed with the assistance of counsel. The petitioner was obligated to read and certify that the information provided in both the labor certification and I-140 were true and correct, under penalty of perjury. A failure to apprise oneself of the contents of these documents before signing them is generally not recognized as a defense to misrepresentation. *See, e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)). Therefore, by providing false information on the labor certification and again on Form I-140, the petitioner has made misrepresentations to DOL and to USCIS that it knew were false.

Further, the petitioner had counsel for both the labor certification and the I-140, and the same counsel now represents the petitioner on appeal. The AAO notes that counsel also represented the beneficiary's husband and the petitioner's president in the filing of a Form I-129, Petition for Nonimmigrant Worker, in E-2 Treaty Investor nonimmigrant classification, on behalf of the beneficiary's husband[5] in June 2009, approximately five (5) months before the filing of the labor

[5] Counsel indicates that, like the petitioner, the E-2 investment entity is wholly owned and operated by the same two individuals, the petitioner's president and his spouse. Thus, the beneficiary's spouse's E-2 nonimmigrant visa is itself evidence of another relationship, a dual familial and financial relationship connecting the beneficiary's spouse to her brother and to her sister-in-law, the petitioner's two directors. Further, that visa classification provided the beneficiary with nonimmigrant status and work authorization in the U.S.; the beneficiary utilized said work authorization to begin employment with the petitioner. This financial relationship between the beneficiary's spouse and the beneficiary's brother and sister-in-law should have been disclosed to DOL and to USCIS, as the beneficiary's spouse was an investor in another dry cleaning business owned and operated by the same directors as the petitioner, and operating under the same trade name

certification at issue. Counsel also prepared and filed a Form I-539, Application to Change Nonimmigrant Status, on behalf of the beneficiary based on that filing. Further, counsel also represented the beneficiary in filing a Form I-130, Immigrant Petition for Alien Relative, based on her familial relationship to the petitioner's president, her brother, in August 2009, approximately three (3) months before the filing of the labor certification at issue. Counsel has offered no explanation as to the manner or reason for these mistakes, which were made shortly after counsel advised these parties and prepared interrelated applications on their behalf. Therefore, the information in the record and in USCIS databases indicates that counsel was aware of the family and financial relationships between the petitioner's directors, the beneficiary, and the beneficiary's spouse. However, in Part M., "Declaration of Preparer," counsel indicates that he prepared the labor certification and that he certified that he "prepared this application at the direct request of the employer listed in Section C and that to the best of my knowledge the information contained herein is true and correct."[6] At the time of the labor certification's filing, counsel would have had direct knowledge of the familial relationship between the beneficiary and the petitioner's president, as counsel prepared and filed the I-130 relative petition involving their familial relationship just three (3) months prior to the filing of the labor certification. The I-130 relative petition was filed in the same month that the petitioner first placed its job order for this labor certification with the State Workforce Agency, and one (1) month prior to the petitioner placing advertisements for the position offered. Therefore, it appears that counsel for the petitioner had recent, direct knowledge of the petitioner's familial relationship to the beneficiary, and of the financial relationship between the beneficiary, her spouse, and the petitioner's directors, at the time that the petitioner was conducting its regulatory prescribed recruitment and labor market test for the position, and at the time of preparing and filing the labor certification. As counsel provides no explanation as to how this alleged mistake occurred on the labor certification, which was again repeated on Form I-140, and that there exists information in the record documenting counsel's recent direct knowledge of the familial relationship, it appears that both the petitioner and counsel were aware that the familial relationship between the petitioner and the beneficiary should have been disclosed to DOL. Further, that the petitioner's president was filing a family-based immigrant petition for the beneficiary at the same time the petitioner was conducting recruitment for a labor certification naming the beneficiary, suggests that the job opportunity was not open to all U.S. workers; this aspect will be discussed in more detail, below.

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used by the petitioner. The AAO notes that this familial and financial relationship between the beneficiary's husband and the beneficiary's brother, and sister-in-law, was not disclosed to DOL or to USCIS.

[6] The record is silent as to why counsel did not complete and sign Part 9 of Form I-140, which requires that the person who prepared the form sign and attest that the application was prepared based on "all information of which [the preparer] has knowledge," which would include the knowledge that an immigrant petition had been filed on behalf of the beneficiary by the petitioner's president. However, the record does contain a fully executed Form G-28, Notice of Appearance of as Attorney, dated June 2, 2010. Thus, it appears from the record that counsel did prepare Form I-140.

Although counsel states that the false statements were an "unintended mistake," it is beyond speculation that the petitioner, beneficiary, and counsel had knowledge of the falsity of the representations made on the labor certification and Form I-140 through their attestation to and execution of the labor certification and Form I-140. The petitioner provided a letter in support of Form I-140, dated June 2, 2010, at which time he could have disclosed his familial relationship to the beneficiary and the alleged mistake on the labor certification, and the financial relationship with the beneficiary's spouse; however, no such revelation was made at that time. Counsel also provided a letter, dated June 11, 2010, accompanying Form I-140; again, counsel did not apprise USCIS of the mistake on the labor certification, nor did counsel apprise USCIS of the familial relationship between the petitioner's president and the beneficiary, nor did counsel apprise USCIS of the pending immigrant petition filed by the petitioner's president on behalf of his sister, the beneficiary, which was prepared by counsel, nor did counsel apprise USCIS of the financial relationship between the petitioner's directors and the beneficiary's spouse.[7]

Materiality. The answers to C.9 on ETA Form 9089 and to Part 4, Question 6 on Form I-140 are material to the beneficiary's eligibility for the immigrant benefit sought. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). In the context of a visa petition, a misrepresented fact is material if the misrepresentation shuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of the visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

In the case of a labor certification, the misrepresentation of the beneficiary's relationship to the petitioner's two shareholders, who are her brother and sister-in-law, shut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This fact is directly material to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C-*, 9 I&N Dec. at 447. This misrepresentation is inarguably material, as it is precisely the type of information DOL seeks to

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[7] Counsel further did not seek to amend ETA Form 9089 or notify DOL of any unintended error and only raised the claim of "inadvertent error" subsequent to the director's invalidation of ETA Form 9089. This late raised claim casts doubt on the veracity of the purported mistake. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

> 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.

DOL regulations, effective for labor certifications submitted after July 16, 2007, do not provide for amendment or modification in the permanent labor certification process. 20 C.F.R. § 656.11(b). The rule continues DOL's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

know before approving a labor certification, or determine whether closer review is required and it is information specifically requested by question C.9 on the labor certification, to which the petitioner must attest under penalty of perjury.

As the director noted in her denial, USCIS reasonably questions the *bona fides* of the position offered. In addition to the undisclosed relationships, the petitioner also did not establish that the job opportunity is available to all U.S. workers. *See* 20 C.F.R. § 656.10(c)(8). The petitioner must conduct its recruitment in good faith. *See* 20 C.F.R. § 656.17(e). In response to the petitioner's advertising for the position offered, the petitioner received a resume from a person currently employed as a tailor for [redacted] with 15 years of experience. Counsel stated that the applicant desired a salary higher than the proffered wage, "therefore, he was not considered for the offered position." Counsel indicated that "the applicants mentioned above were not notified in any way since no one met the requirements nor met the wage preference." From the record, it is unclear whether DOL audited the labor certification and reviewed the petitioner's recruitment and basis for rejecting candidates, prior to certifying ETA Form 9089. 20 C.F.R. §§ 656.17(g) (the petitioner must be able to demonstrate that any U.S. workers rejected were so rejected for lawful job related reasons); § 656.10(c)(9) (the employer must certify that "U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons"). The employer attested in N.9 of the ETA From 9089 that any U.S. workers rejected were so rejected for lawful job-related reasons. To conduct recruitment in good faith, an employer "must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications." *East Tennessee State University*, 2010-PER-38, slip op. at 12 n.ll, 2011 (Bd. Alien Lab. Cert. App.), WL 1532314 (Apr. 18, 2011) (quoting *Compression, Inc.*, 2002-INA-102, slip op. at 10-11 (Aug. 27, 2003)). From the record, it does not appear that DOL has had an opportunity to determine whether the petitioner properly rejected this applicant for having a "desired salary" which the petitioner assumed would prevent the applicant from accepting the position offered at the proffered wage.

Given the familial relationship between the parties, that the position may not have been clearly open to U.S. workers, and that the petitioner's president was sponsoring the beneficiary for a family-based immigrant visa during the recruitment phase of the labor certification process, it is more likely than not that a *bona fide* job opportunity available to all qualified U.S. workers never existed. The AAO accordingly affirms the director's finding that the petitioner sought to procure a visa or other documentation on the beneficiary's behalf by willful misrepresentation of a material fact, and that the job opportunity was not available to all U.S. workers. Therefore, the director's invalidation of the labor certification is affirmed.

Beneficiary's Qualifications for the Position Offered

Even if the AAO did not affirm the invalidation of the labor certification, the petitioner has not established that the beneficiary is qualified for the position offered. 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).

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 has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None required.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a custom tailor in Kyungju, South Korea, from January 5, 2003, until January 10, 2008. No other work 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 petitioner did not provide regulatory required evidence of the beneficiary's work experience, therefore, the director requested this evidence. In response to the director's RFE, the petitioner provided an experience letter in Korean, with a translation, dated December 6, 2010, from the

president[8] of on letterhead stating that the company employed the beneficiary as a custom tailor and cutter from January 5, 2003, until January 10, 2008. However, the letter does not state if the job was full-time or part-time. The record also contains a "career certification" written in Korean, and a translation, issued by the president of which mirrors the pertinent information in the employer's letter. The translation of the employer's letter and the translation of the career certification do not contain a translator's certificate, therefore, they do not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Therefore, the letter and certificate provided cannot be accepted, and do not document the required two (2) years of experience required on the labor certification. Therefore, the petitioner has not established that the beneficiary possessed the required experience as of the priority date.

Further, as the director discussed in her decision, the beneficiary was issued a nonimmigrant visa in B-1/B-2 classification on November 10, 2008, at which time she indicated she was the president of a restaurant corporation named This employment experience was not listed on the labor certification, which requires that the beneficiary list all employment within the three (3) years preceding the filing of the labor certification. This casts doubt on the veracity of the information provided by the beneficiary on the labor certification. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

> 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.

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[8] The AAO notes that the president of and the beneficiary possess the same surname. Given the undisclosed familial relationships at issue with the labor certification and this I-140 petition, it appears that the beneficiary's experience documentation may have been issued by a someone with a familial relationship to the beneficiary, which casts doubts on the veracity of the experience claimed by the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("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."). In any further filings, the petitioner must provide independent, objective evidence of the beneficiary's employment experience in the position offered. *Id.* at 591-92 ("[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.")

On appeal, the petitioner has provided a "Certificate of Close of Business," which was issued in both Korean and English, dated February 25, 2009, indicating that the beneficiary was the representative of a company named [redacted] which commenced business on February 28, 2008, and closed on February 11, 2009. There is an inconsistency between the corporation name provided by the beneficiary, and the corporation listed on the certificate provided by the petitioner. *Matter of Ho*, 19 I&N at 591-592 states:

> [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel asserts that the beneficiary's restaurant was "formally known as [redacted] however, the petitioner has provided no explanation or evidence indicating why the beneficiary would list the name of her own restaurant incorrectly on her visa application as [redacted] as opposed to [redacted] The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the certificate provided indicates that the beneficiary is the representative of [redacted] not the owner or president. Therefore, the record contains inconsistencies which have not been resolved by the petitioner on appeal. While this experience is not relevant to the position offered, as it is relevant to the issue of credibility, in any further filings, the petitioner should provide independent, objective evidence that the beneficiary was the president of [redacted] including her dates of employment in said position. *See Matter of Ho*, 19 I&N at 591-592.

The AAO affirms the director's decision that the petitioner willfully misrepresented a material fact involving a labor certification, which subjects the labor certification to invalidation by USCIS pursuant to 20 C.F.R. 656.30(d). The AAO affirms the director's decision that the job opportunity was not available to all U.S. workers. Further, 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.

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.

ORDER: The appeal is dismissed.

FURTHER ORDER: The labor certification remains invalidated with a finding of willful misrepresentation against the petitioner.