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: JUN 2 5 2013 OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
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:

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 employment-based preference visa petition was initially approved by the Director, California Service Center (the director). In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). In a notice of revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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).

The petitioner describes itself as a delivery services business. It seeks to permanently employ the beneficiary in the United States as an administrative assistant. 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, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is January 21, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner and the beneficiary committed material misrepresentation on the Form ETA 750 because the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the director found that the petitioning business was a sole proprietorship owned by the beneficiary's spouse. The director revoked the approval of the petition and invalidated the labor certification on January 29, 2008.

The record shows that the appeal is properly filed and timely 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

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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.

submitted upon appeal.[2] On appeal, counsel submitted only the Form I-290B, Notice of Appeal or Motion; no additional evidence was included.

Upon reexamination of the petition's approval, the director determined that it had been approved in error and issued a NOIR on November 21, 2007. The NOIR noted that the beneficiary's spouse[3] was the sole proprietor of the petitioning business. Therefore, the director concluded that the job offer was not *bona fide*. The director noted that, while such a relationship to the petitioner is not an automatic disqualification, if the beneficiary's true relationship to the petitioner is not apparent in the labor certification it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361. The director afforded the petitioner thirty days to offer additional evidence or argument in opposition to the proposed revocation.

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 the familial relationship between the petitioner and the beneficiary and possible misrepresentations concerning that relationship, that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

In response to the NOIR, counsel submitted a letter contending that the petitioner and beneficiary did not commit fraud or misrepresentation because they did not conceal their familial relationship on the Form ETA 750 and clearly stated the familial relationship on the Form I-140 immigrant petition by listing as the beneficiary's spouse. In support of these contentions counsel submitted: (1) an affidavit from (2) a copy of the posting notice; (3) copies of resumes submitted in response to the petitioner's advertisement(s); (4) copy of the documentation submitted by the beneficiary in response to advertisement(s); (5) financial documentation; and (6) copies of documentation already in the record.

The director found that, even though the petitioner had been established as a legitimate entity, the petitioner's relationship to the beneficiary was not made clear to the Department of Labor (DOL) and that omission is considered an act of misrepresentation of a material fact. The director found that

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[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).

[3]

the petitioner failed to indicate in its response to the NOIR the legitimate business-related reasons for the petitioner's failure to offer the proffered position to any of the qualified individuals with extensive experience who answered the petitioner's advertisement(s), which reflects the petitioners pre-conceived intent to hire the beneficiary over equally qualified U.S. workers. The director concluded that the petitioner had fraudulently or willfully misrepresented a material fact in that it failed to establish that a *bona fide* job opportunity was clearly open to U.S. workers and on that basis invalidated the labor certification. Accordingly, the director revoked the petition's approval on January 29, 2008, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel contends that the director failed to consider that the proffered position required the ability to speak and write Korean as the petitioner was expanding its business into the Korean market courier team and had many Korean customers. Counsel states that, even though the resumes from U.S. workers who responded to the petitioner's recruitment efforts in conjunction with the filing of the labor certification reflected that they were otherwise qualified for the position, they lacked Korean language skills. Counsel also contends that the petitioner did not intentionally misrepresent the facts in the instant case, as there was no area on which to identify the beneficiary as the petitioner's spouse.

The AAO notes that counsel's statement that the job offer was not open to individuals who did not have Korean language skills imposes additional requirements contrary to the terms of the labor certification and accentuates the fact that the job offer was not *bona fide* from inception, in that it was not clearly open to U.S. workers, and the hiring process was specifically tailored to the beneficiary. Specifically, on the ETA 750A, Part A question 15 allows for other special requirements of the proffered position to be listed. However, in the instant case, the petitioner did not list the ability to speak and write Korean as a special requirement for the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Madany v. Smith*, 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). Further, in the NOIR response, the petitioner failed to provide evidence of its recruitment efforts to indicate that it apprised U.S. workers of any requirement of ability to speak and write Korean to qualify for the proffered position.[4]

The AAO concurs with the director. It is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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[4] In the NOIR response, counsel stated that it was including the advertisements but those were not included. The petitioner did provide what appears to be a posting notice, but this document does not comply with the regulations regarding the posting notice. 20 C.F.R. § 656.20(g)(1).

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[5] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[6] In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as

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[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[6] The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, has stated:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic

attested on Item 22-h of Part A of the Form ETA 750 because the beneficiary had a familial relationship to the petitioning business. The job offer was essentially a form of self-employment and the petitioner intentionally misrepresented the qualifications required for the position.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak,* 14 I& N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be "clearly open to any qualified U.S. worker." It is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself." Therefore, if the petitioning business is owned by the beneficiary's spouse or she has a substantial ownership interest in it, then it is the functional equivalent of self-employment and is not a job offer for someone other than oneself.

Under 20 C.F.R. 626.20(c)(8) 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 1987). 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) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

> The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue." *See* 20 C.F.R. § 656.21. This "good faith search" process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms-the ban on alien self-employment and the bona fide job requirements–make the good faith search process self-enforcing. The prophylactic rules permit the

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> workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, [now USCIS] therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

> Department of Labor to process more than 50,000 permanent labor certification requests each years. . .
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> The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .
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> *Bulk Farms, Inc., v. Martin,* 963 F.2d 1286-1289 (1992).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

> (d) After issuance labor certifications are subject to invalidation by the INS 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 a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.[7]

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien 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. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.[8] The term "willfully" means knowing and intentionally, as

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[7] The current regulation provides: provides in pertinent part:

> (d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

[8] In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration

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.

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401,406 (Comm. 1986).

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company amounts to the 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.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng,* 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that 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. An alien may be found inadmissible 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). 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

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officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956).

determination that he be excluded. *Matter of S & B-C,* 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut 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.

The petitioner's misrepresentation as to the beneficiary's relationship to the company and the Korean language requirements cut off potential lines of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, 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.

The petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). 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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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).

As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona fide* job offer existed based on the undisclosed relationship between the beneficiary and the petitioner and the undisclosed Korean language requirements, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact and the labor certification remains invalidated based on willful misrepresentation of a material fact. In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition on this basis.

Beyond the decision of the director, during the adjudication of this proceeding, evidence has come to light that the petitioning business has closed. The petitioning business was incorporated by the sole proprietor on February 7, 2007, under the name [redacted] and the incorporated business was dissolved on December 5, 2008. *See* California Secretary of State official website. If the petitioning business is not a viable, active business in the only location given where the job will be located, the petition and its appeal to this office have become moot.[9]

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[9] Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-

In response to a notice of intent to dismiss and notice of derogatory information (NOID/NDI) issued by the AAO on April 30, 2013, counsel admits that the petitioner is no longer in business, but contends that subsequent incarnations of the business[10] are successors-in-interest. In support of his contentions, counsel submits a Fictitious Business Name Statement (FBNS) indicating that assumed the fictitious business name of on March 3, 2009; a FBNS indicating that assumed the fictitious business name of on September 28, 2011; a letter, dated May 31, 2013, from stating that he is the president and owner of which is known as , a business willing and able to hire the beneficiary in the same proffered position as the instant labor certification; and other financial documentation which will be discussed further below.

have failed to establish that they are successors-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). are different entities than the petitioner/labor 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. 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, 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.

Federal Employment Identification Numbers (FEIN) for differ from the FEIN of the petitioner. Incorporation records reflect that was incorporated on October 8, 2008 by and is now a suspended entity and that was incorporated on November 10, 2010 by and is now a suspended entity. *See* California Secretary of State official website: http://kepler.sos.ca.gov/ (accessed June 12, 2013). Accordingly, the petition must also be denied because have failed to establish that they are successors-in-interest to the petitioner/labor certification employer and appellant. Even if had established that they were successors-in-

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based preference case.

interest, both entities are suspended and are not viable, active businesses, rendering the petition and its appeal to this office moot. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

It is further noted that, beyond the decision of the director, the petitioner has failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on December 21, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was the most recent return available. However, the record only contains a Schedule C for the sole proprietor for the year 2006 and does not any contain annual reports, federal tax returns, or audited financial statements for that year. Additionally, the sole proprietor has failed to provide a list of his monthly household expenses for 2004 through 2006.[12]

Further, as discussed in the AAO's NOID/NDI, according to USCIS records, the petitioner has filed one other I-140 petition on behalf of another beneficiary. 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). The evidence in the record does not document the priority date, proffered wage or wages paid to the other beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. 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.

Concerning the beneficiary's qualifications, as discussed in the AAO's NOID/NDI, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to

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[12] In response to the AAO's NOID/NDI counsel submits federal tax records for ; however, the AAO cannot accept these financial documents as evidence of the ability to pay the proffered wage as these entities have not established that they are successors-in-interest to the petitioner. Additionally, even if the AAO accepted the financial documents for , the petitioner would still need to establish the petitioner's ability to pay the proffered wage in 2004 through the date on which a successor-in-interest was established.

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 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).

In the instant case, the labor certification states that the offered position requires two (2) years of High School education plus two (2) years of experience in the proffered position or two (2) years of experience in the related occupation of secretary/executive secretary. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a secretary for , Seoul, Korea, from January 1994 until November 1997.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a certificate of employment from president, stating that employed the beneficiary as a secretary from February 1, 1994 until November 30, 1997. We first note that the dates of employment in the letter are inconsistent with the dates provided by the beneficiary on the ETA 750B. *See Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, the letter does not meet the requirements of the regulation, as it does not describe the duties in detail. *See* 8 C.F.R. § 204.5(l)(3). Moreover, the certificate of employment is not on company letterhead and the information contained on the certificate about the location and president of the company does not comport with publicly available information about 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. at 591-92.

In response to the AAO's NOID/NDI, counsel submits an experience letter, dated May 28, 2013, from . letterhead, indicating that no longer exists and stating that the beneficiary was employed by for a period of four years as a secretary. While the new experience letter does provide sufficient detail regarding the beneficiary's duties as a secretary, it does not meet the other requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) in that the letter is not provided by the qualified employer, the letter fails to provide specific dates of employment, it fails to provide the address of the employing company and is inconsistent as to the length of time over which the beneficiary was employed by the qualifying employer. *See Matter of Ho,* 19 I&N Dec. at 591-92.

Further, the petitioner failed to establish the need for secondary evidence with any documentary evidence of the qualifying employer's closing; and it does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2). The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 appeal is dismissed with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The AAO finds that the petitioner's job offer was not *bona fide* based on the beneficiary's undisclosed relationship to the petitioner and the petitioner's imposition of additional requirements not stated on the labor certification, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number is invalidated.