(b)(6)

**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**

DATE: MAY 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

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,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with 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 dry cleaner. It seeks to permanently employ the beneficiary in the United States as an alteration 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 a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 17, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum three years of experience required to perform the offered position by the priority date.

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

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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:

EXPERIENCE: Three (3) years in the job offered or in the related occupation of garment sewing/repair work.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a production supervisor and garment maker with [redacted] in Seoul, Korea from February 1995 until October 2002. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

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

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*See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record contains an experience letter from , President, on letterhead stating that the company employed the beneficiary as a team section manager from February 1995 until October 2002. On November 18, 2008, the director approved the petition based on the evidence provided by the petitioner of the beneficiary's work experience. On December 7, 2010, the director revoked the approval of the instant petition based on derogatory information received during the course of the adjudication of the beneficiary's Form I-485. Specifically, the director found that the beneficiary had completed her nonimmigrant visa application in the summer of 2002 indicating that she was a housewife, that she was not employed, and that her last three jobs were in a school. The director concluded that it was more likely than not that the beneficiary willfully misrepresented her work experience on the petition in order to gain an immigrant worker visa.

On appeal, counsel asserts that the director's decision was based on unreasonable and incorrect assumptions. Counsel states that the employment experience letter and Form ETA 750 provide sufficient evidentiary weight to establish the beneficiary's qualifying work experience. Counsel states that any evidence on Department of State (DOS) and USCIS forms indicating that the beneficiary possessed no qualifying work experience was a mistake and an oversight when completing the forms.

The record reflects the following;

- In July 2002, the beneficiary signed and affirmed under penalty of perjury that all of the information in a DOS Nonimmigrant Visa Application was correct. That application states that the beneficiary's present occupation is a housewife and that she had no current occupation. She stated that her previous employment was for a university, a girl's high school, and a middle school.
- In February 2004, the beneficiary signed and affirmed under penalty of perjury on the Form ETA 750B that she had experience as a production supervisor and garment maker with in Seoul, Korea from February 1995 until October 2002.
- In August 2007, the beneficiary failed to note her last employment abroad on the Form G-325A submitted in connection with the Form I-485 adjustment of status application and signed under penalty of perjury.
- In October 2008, a letter from President of states that the beneficiary was employed by from February 1995 to October 2002.
- In April 2009, the beneficiary appeared before a USCIS officer and was interviewed in connection with the Form I-485 adjustment of status application. During the interview, the beneficiary claimed to work for her husband's dry cleaning business, but would prefer to work for the petitioner because it is a larger company than her husband's.[3]

[3] On the Form I-140 petition, the petitioner claimed to employ one worker. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

- On appeal, the petitioner submitted a second letter from dated November 3, 2010, repeating that the beneficiary worked as the team lead for the production team, sewing/repair section from January 1, 1995 to October 31, 2002, but that the beneficiary was on a 6 month leave of absence from May 1, 2002 and that when she did not return on October 31, 2002 the company considered her resigned. The letter also states that the company did not receive any communication from the United States Department of State or USCIS concerning the beneficiary's employment.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

The AAO finds that the petitioner has not overcome the inconsistencies in the record noted by the director. The petitioner asserts that the beneficiary's nonimmigrant visa form was filled out by a travel agent. The beneficiary nevertheless signed the application under a penalty of perjury. The beneficiary's disavowal of knowledge of the contents of the application cannot be sustained in light of her admission of willingly signing the form. Specifically, her failure to apprise herself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve her of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales,* 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente,* 982 F.2d 156, 159 (5th Cir. 1993). To allow the beneficiary to absolve herself of responsibility by simply claiming that she had no knowledge or participation in a matter where she provided all the supporting documents and signed the document would have serious negative consequences for USCIS and the administration of the nation's immigration laws.

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reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, the second letter from stating that the beneficiary was on a leave of absence for 6 months is not consistent with any other evidence of record and is also not supported by independent objective evidence. Without further explanation, the evidence submitted on appeal creates further inconsistencies. For example, on appeal, the petitioner submits the beneficiary's payroll record that indicates "layoff" dated February 2, 2002, and on the same line lists that the beneficiary was on "leave of absence" with a salary at 50% of her base salary.[4] Further, if the beneficiary was receiving 50% of her salary and intended to return to work at the end of a leave of absence at the time she filled out her nonimmigrant visa application, she would not be considered unemployed. The fact that the petitioner waited until the appeal to indicate that the beneficiary was on a leave of absence in response to the noted inconsistency on the nonimmigrant application form also weakens the probative value of the evidence submitted on appeal. Without further explanation, and/or contemporaneous documents the AAO finds that the petitioner has not submitted sufficient evidence to resolve the inconsistencies in the record concerning the beneficiary's qualifying employment.

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. It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO finds that the petitioner has not submitted independent objective evidence to resolve the noted inconsistencies. Thus, the record does not establish that the beneficiary has the qualifying work experience required by the labor certification and that she is qualified for the position.

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).

Beyond the decision of the director, it is also concluded that 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, it appears from the evidence in the record that the beneficiary's husband is related to one of the petitioner's owners and that the petitioner and the beneficiary's spouse have been involved in a business partnership since the petitioner opened for business. This is evidenced by the petitioner's 2004, 2005, and 2006 IRS income tax forms and a sworn statement given by one of the petitioner's owners.[5]

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[4] A layoff generally refers to termination of employment rather than a paid leave of absence.

[5] We also question whether the petitioner has established a continuing need for a full-time alteration tailor. On July 26, 2010, USCIS conducted a site visit of the petitioner's work location. related to a USCIS officer that her business was slow and that she only employed the beneficiary on an "on-call" basis because business was slow and that she only employed one other person, a

Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner must demonstrate that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 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." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Based on the relationship between the petitioner's shareholder and the beneficiary's husband, the petitioner has failed to establish that the instant petition is based on a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

The appeal will be dismissed 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.

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