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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 3 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal, concluded that the beneficiary and the petitioner had willfully misrepresented material facts, and invalidated the Form ETA 750, Application for Alien Employment Certification. The petitioner filed the instant motion to reconsider the AAO's decision. The motion will be dismissed.

The petitioner describes itself as a self-service gas station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750 (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is February 9, 2004.[1]

The director's decision denying the petition concluded that the petitioner failed to establish its continuing ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2).[2]

The AAO dismissed the petitioner's appeal of the director's decision. Beyond the decision of the director,[3] the AAO also concluded that the petitioner failed to establish that the beneficiary met the experience requirements of the offered position as forth on the Form ETA 750, made a material misrepresentation finding, and invalidated the labor certification pursuant to pursuant to its invalidation authority at 20 C.F.R. § 656.31(d)(2004).

The petitioner filed a motion to reconsider the AAO finding of material misrepresentation.

In order for the petition to be approved, the petitioner must establish, *inter alia*, that the beneficiary satisfied all of the requirements of the offered position set forth on the labor certification by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*,

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[1] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[2] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

[3] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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).

16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). According to the Form ETA 750, the offered position requires three years of experience as a manager of a self-service gas station.

Part B of the Form ETA 750, signed by the beneficiary under penalty of perjury, states that he was employed as the manager of a self-service gas station, Uganda. The labor certification states that the beneficiary worked 40 hours per week, from August 1998 through July 2002. It is based on this experience that the beneficiary claims to meet the minimum requirements of the labor certification.

The petition contained a letter stating that it is from the managing director of in Uganda. The letter states that the beneficiary was employed as a store manager at the gas station from August 21, 1998 through July 28, 2002. The letterhead has a logo, although the logo appears pixelated, as if it were copied from a low resolution file. The letter states that the beneficiary would open the business every morning and close the business every evening.

The record also contains a letter dated April 4, 2002 from also located in Uganda. The letter appears to have been submitted in support of one or more nonimmigrant visa applications filed with the U.S. consular section in Uganda in 2002. The letter states that the beneficiary was an "Indian Expatriate" working in Uganda and that he had a valid entry/work permit up to December 18, 2002. The letter also states that the beneficiary was employed by the company and that his "annual privilege leave" had been sanctioned by the company. The letter states that the beneficiary's travel expenses would be borne by the company. The declarant stated that since the beneficiary had "a good, confirmed job in our company" that he was expected to return to his job after his two to three weeks of vacation in Great Britain and the United States.

The record also contains two Forms DS-156, Nonimmigrant Visa Application, dated April 4, 2002 and May 16, 2002, which the beneficiary signed under penalty of perjury. The Forms DS-156 state at Part 15-16 that the beneficiary had been employed as a chief accountant for located in Uganda, since October 2000. At Part 12 of the application, in the space provided to list his last two employers, the beneficiary stated that he had been employed as a chief accountant at from 1998 to 2000. He also listed an employment experience in India from 1993 to 1997. The applications do not mention any employment at despite specifically instructing the disclosure of such employment.

The record contains a copy of the beneficiary's passport, which was stamped by in 1998 and 1999 at pages six and seven. The stamps state that the beneficiary was authorized to work for during that period. In 2000 and 2001 at pages 10 and 11, the immigration stamp indicates that the beneficiary entered into Uganda for employment with There is no stamp for employment with

In summary, the beneficiary claims to have been employed from 1998 to 2002 at on a full-time basis. However, this employment was not listed on his nonimmigrant visa application form or indicated on his passport. In addition, Part B of the beneficiary's Form ETA 750 lists his full-time employment with but does not mention his employment at [4]

During the adjudication of the appeal, the AAO issued a Notice of Derogatory Information (NDI) which informed the petitioner that the record of proceeding contained inconsistent information with regards to the beneficiary's qualifications.[5] The NDI requested independent objective evidence to resolve the discrepancies and to establish that the beneficiary had the requisite work experience. The NDI suggested the submission of copies of pay stubs, payroll records, cancelled checks, corporate tax records or financial statements, employee wage and tax forms and/or any other relevant documentation pertaining to the beneficiary's claimed employment with

In response to the NDI, Counsel asserted that the apparent inconsistencies in the beneficiary's employment experience are explained by the fact that he held two full-time jobs at the same time. As is noted above, the beneficiary only had a valid entry/work permit as an "Indian Expatriate" to work for not multiple employers. Counsel does not explain this discrepancy.

The NDI response also contained an affidavit from who testifies that, from June 1998 to April 2001, the affiant was the manager of stores for the in Uganda, and that the beneficiary was employed by area during that period of time. The letter further states that the affiant knew that the beneficiary worked at different jobs during that time. The petitioner also submitted copies of the beneficiary's bank statements dated January 2001 and February 2002. Although counsel claims that the bank statements reflect deposits of paychecks received from and there is no indication from the bank statements that the deposits are from any particular payor. Therefore, the AAO is unable to conclude whether any deposits on the two bank statements are attributable to

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[4] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

[5] If an adverse decision will be based on derogatory information of which the petitioner is unaware, the petitioner shall be advised of this fact and offered an opportunity to rebut the information and present information in its own behalf before the decision is rendered. 8 C.F.R. § 103.2(b)(16)(i).

In summary, the AAO requested the petitioner to provide independent objective evidence of the beneficiary's employment in order to resolve multiple inconsistencies in the record of proceeding, and the petitioner failed to do so.[6]

The AAO decision dismissing the appeal concluded that the petitioner failed to establish its ability to pay the proffered wage and that the beneficiary possessed the required experience for the offered position. The decision found that the beneficiary misrepresented his employment experience, which constituted the willful misrepresentation of a material fact.[7] The AAO also invalidated the labor certification pursuant to its invalidation authority.

Counsel timely filed the instant motion to reconsider the AAO decision. Counsel's brief reiterates the claim that the beneficiary was concurrently employed in full-time positions by and that additional evidence of the

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[6] Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[7] Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "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 to the United States or other benefit provided under this Act." *See* section 212(a)(6)(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(c).

The term "willfully" in the statute has been interpreted to mean "knowingly 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) ("knowledge of the falsity of a representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary").

Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*. A material issue in this case is whether or not the beneficiary has the required experience for the offered position.

A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (AG 1961).

employment with is not available because such records are not available in Uganda. Counsel also claims that the beneficiary's failure to disclose this additional employment on the nonimmigrant visa application was not material.[8]

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In this instant case, the motion to reconsider does not meet the applicable requirements. While counsel's brief cites to federal and administrative decisions, these decisions were previously considered by the AAO in its decision dismissing the appeal. Counsel's brief claims that the beneficiary was in fact employed by and that the beneficiary's failure to disclose this employment on his nonimmigrant visa application forms does not constitute willful misrepresentation during the nonimmigrant visa application processes. However, counsel provides no additional evidence of the first claim, and the second claim does not address the AAO's conclusions in its decision dismissing the appeal.

Instead, the AAO concluded that the only documentary evidence of the beneficiary's claimed employment on the labor certification with is two experience letters purportedly from persons with firsthand knowledge of the beneficiary's employment at [9] There is no independent, objective evidence of the beneficiary's claimed employment with prior to the labor certification process (when the beneficiary required that type of experience in order to qualify for the offered position). The beneficiary did not mention this employment on two nonimmigrant visa applications when the form's instructions said to do so. It is also noted that including this employment would have been advantageous to the beneficiary because the additional employer would have been evidence of stronger economic ties to Uganda. The beneficiary's passport stamps do not indicate that he was employed by The beneficiary did not include his experience with on the labor certification. The petitioner has had multiple opportunities to

[8] The AAO decision does not conclude that the beneficiary made a misrepresentation on his nonimmigrant visa application.

[9] The submitted bank statements do not indicate that any deposits were paychecks.

submit documentary evidence of his employment with but states that no documentation exists. The AAO concluded that it was not credible that the beneficiary worked a second full-time position while working as a chief accountant with and would fail to mention this employment on his nonimmigrant visa applications while describing his previous employment in Uganda and India. The AAO also noted that the supporting letter from indicates that his position with that company allowed him to travel at the company's expense and that he had earned "annual privilege leave" permitting the supposed vacation abroad. The AAO concluded that it was not credible that the beneficiary – a chief accountant for a paint company enjoying perks and benefits – would have simultaneously worked full-time as a store and gas station manager, opening and closing the store every day, and would have failed to mention this fact when applying for his nonimmigrant visa. Taken together, the AAO concluded that not only did the evidence in the record fail to establish the beneficiary's claimed employment with but the number and nature of the inconsistencies are sufficient to conclude that the beneficiary misrepresented this employment to the DOL and USCIS.

Further, since the beneficiary relies solely on this claimed experience to meet the minimum requirements of the offered position, this claimed experience is material to the petition. Additionally, the inclusion of this experience on the Form ETA 750 and the submission of two letters purportedly corroborating the experience are sufficient to conclude that the misrepresentation was material.

Therefore, even if the AAO granted the motion to reconsider, it would have affirmed its finding that the instant petition and underlying labor certification contained a willful misrepresentation of a material fact.

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 motion to reconsider is dismissed and the prior decisions of the AAO and the director remain undisturbed.