



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF M-P-H- LLC

DATE: JUNE 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER.

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a pizza cook. It requests her classification as an unskilled worker under the third-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(iii), 8 U.S.C. § 1153(b)(3)(iii). This employment-based immigrant classification allows U.S. employer to sponsor a foreign national with less than two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that, contrary to U.S. Department of Labor (DOL) instructions, the Beneficiary did not disclose her most recent employment history on the accompanying labor certification.

On appeal, the Petitioner contends that the omission of the Beneficiary's employment was immaterial because the offered position requires no experience.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further consideration consistent with the following opinion.

**I. LAW**

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL approves the labor certification application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

USCIS may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the document. 20 C.F.R. § 656.30(d). A misrepresentation is material if it had a natural tendency to influence the government's decision. *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997) (citing *Kungys v. United States*, 485 U.S. 759, 772

(1988)). Substantial evidence must support invalidation. *See, e.g., Sugule v. Frazier*, 639 F.3d 406, 411 (8th Cir. 2011).

## II. ANALYSIS

### A. The Beneficiary's Omission on the Labor Certification Application Form

In this case, the labor certification application form instructed the Beneficiary to list all of her employment during the three-year period immediately preceding the application's filing, plus any prior experience qualifying her for the offered position. She left this employment history section of the form blank.

In a request for additional evidence (RFE), the Director asked the Petitioner to list all the jobs the Beneficiary ever had. In response, the Petitioner submitted a copy of the Beneficiary's resume. The resume states that a [REDACTED] bridal boutique employed her as general manager for the 10 years immediately preceding the labor application's filing.

Because the Beneficiary did not list her most recent job as the labor application instructed, the Director denied the petition, concluding that the omission "potentially closed a line of inquiry by DOL personnel that was necessary to render an accurate decision regarding the [labor certification] application."

As the Petitioner asserts on appeal, however, the omission of the Beneficiary's employment was immaterial. As the labor application specifies, the offered position of pizza cook requires no experience.<sup>1</sup> Therefore, the record indicates that the omission of the Beneficiary's most recent job did not tend to influence the DOL's labor certification decision.

The record does not support the materiality of the omission of the Beneficiary's employment on the labor certification. We will therefore withdraw the Director's decision.

### B. The Beneficiary's Use of a Recruitment Agency

Although we will withdraw the Director's denial, the record does not establish the validity of the labor certification. Labor certification employers generally cannot "seek or receive payment of any kind for any activity related to obtaining permanent labor certification," including "reimbursement for costs incurred in preparing or filing a permanent labor certification application." 20 C.F.R. § 656.12(b). For purposes of this regulation, labor certification-related activity includes "recruitment activity." DOL, Office of Foreign Labor Certification (OFLC), "OFLC Frequently Asked Questions and Answers," at <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (last visited May 31, 2017). A payment to an employer "undermines the labor certification process by potentially corrupting the search for qualified U.S. workers and creating serious doubt as to whether

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<sup>1</sup> The position also requires no education or training.

the employer is offering a *bona fide* job opportunity and making it available for U.S. workers.” DOL, Final Rule on Labor Certifications for the Permanent Employment of Aliens, 72 Fed. Reg. 27904, 27919 (May 17, 2007).

Here, the Petitioner attested on the labor certification that the company has not “received payment of any kind for the submission of this application.” In response to the Director’s RFE, however, the Beneficiary revealed that she obtained her job offer for the position of pizza cook through a recruitment agency. The Beneficiary stated that a friend “researched and found” the agency, then provided the information to the Beneficiary. The Beneficiary stated: “I was forwarded to an agent who discussed with me the legitimacy of the program and the job positions offered by [the Petitioner].” She said she paid the agency for its services, which included: a consultation; help with preparing visa documentation; and updates on her immigration process.

DOL regulations do not bar the Beneficiary from hiring an agent to assist her in the labor certification process. But the record does not establish the nature of the relationship between the agency and the Petitioner. If the Petitioner received payments or reimbursements from the agency regarding the Beneficiary’s recruitment, the Petitioner may have willfully misrepresented a material fact on the labor certification. *See* 20 C.F.R. § 656.30(d).

The Petitioner acknowledged that it learned of the Beneficiary’s interest in the offered position from the recruitment agency, which provided it with her background information. But counsel stated that the Petitioner “did not hire any recruiter and, therefore, there is no contract between the [P]etitioner and any recruiter.” Counsel’s unsupported assertions, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) (citation omitted).

The record does not establish the Petitioner’s truthful attestation on the labor certification that it received no payment or reimbursement from the agency that recruited the Beneficiary for the offered position. The record therefore does not establish the certification’s validity. As such, we will remand this matter to the Director for further fact-finding.

On remand, the Director should notify the Petitioner of the evidentiary deficiency and afford the company a reasonable opportunity to respond. The Director should ask the Petitioner to provide the names and addresses of the recruitment agency and agent who helped the Beneficiary, and to indicate whether the Petitioner received payments or reimbursement from them. The Director may also request additional evidence regarding the Petitioner’s relationship with the agency and any other potential grounds of denial. Upon the Petitioner’s timely response, the Director should review the entire record and enter a new decision.

### III. CONCLUSION

Because the offered position requires no experience, the omission of the Beneficiary’s most recent employment history on the labor certification did not affect the document’s validity. The Beneficiary’s application for the offered position through a recruitment agency, however, merits

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additional fact-finding to determine whether the Petitioner misrepresented a material fact on the labor certification.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for further consideration consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of M-P-H- LLC*, ID# 350610 (AAO June 14, 2017)