

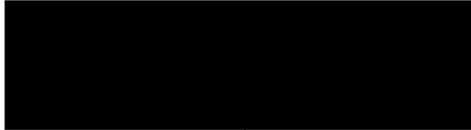
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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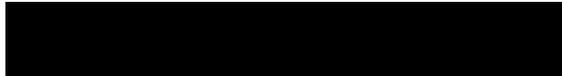
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Date: JUL 06 2011

Office: TEXAS 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On June 1, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on March 7, 2003. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on May 23, 2009 and the petitioner subsequently appealed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by an Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). As noted above, the petition was initially approved in March 2003, but the approval was revoked in May 2009. The director found that the petitioner did not comply with the Department of Labor's (DOL) recruitment requirements and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts. The director also determined that the beneficiary did not have two years work experience as a cook prior to the priority date. The director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, counsel for the petitioner contends that the director improperly revoked the approval of the petition.² The director, according to counsel, erred in not accepting the copies of the advertisements submitted to establish the petitioner's compliance with recruitment. Counsel states that the director's Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petitioner's failure to follow the DOL's recruitment procedures nor did it request the petitioner to present specific evidence to establish its compliance with the DOL's procedures. Thus, counsel indicates that the director's decision to revoke the approval of the petition because the petitioner failed to submit copies of the in-house postings, among other things, was fundamentally unfair because the director had not, in the NOIR, specifically asked the petitioner to present such evidence.

Counsel also asserts that the director's reasoning in revoking the approval of the petition because the petitioner failed to submit recruitment documentation is flawed, since the petitioner is no longer required to retain copies of those recruitment papers or supporting documents including copies of

¹ Section 203(b)(3)(A)(i) of 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.

² The petitioner's current counsel, [REDACTED] will be referred to throughout this decision as counsel. The petitioner's prior counsel, [REDACTED] will be referred to as previous or former counsel.

the in-house postings five (5) years after the date of filing the Form ETA 750, pursuant to the current DOL rule at 20 C.F.R. § 656.10(f).

Further, counsel maintains that the beneficiary is qualified to perform the duties of the position offered and that the petitioner submitted sufficient evidence to demonstrate that the beneficiary worked as a cook in Brazil for more than two (2) years.

Counsel indicates that the director's finding of fraud or willful misrepresentation against the petitioner is not supported by the evidence in the record. According to counsel, the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [REDACTED] filed the petition in the instant proceeding.

Finally, counsel states that the director improperly placed the burden on the petitioner to show that the Form ETA 750 was obtained in accordance with the DOL rules and regulations. Counsel notes that once a petition has been approved, the burden is on USCIS to show that the petition and/or the labor certification were obtained by fraud or through material misrepresentation.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.³

As a procedural matter, the AAO finds that the director erroneously cited 8 C.F.R. § 205.1 as the authority upon which he revoked the approval of the petition. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has neither withdrawn the petition nor gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 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).

The Secretary 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 [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS].** (emphasis added).

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The director generally advised the petitioner in the NOIR that the instant case might involve fraud or misrepresentation since the petition was filed by [REDACTED], who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. With respect to the beneficiary's qualifications, the director specifically indicated that the proffered position required the beneficiary to have a minimum of two years of work experience in the job offered. The director stated that, on the Form ETA 750, part B, signed by the beneficiary on March 29, 2001, he represented that he worked 35 hours a week at a restaurant in Brazil called [REDACTED] as a cook from February 1987 to March 1991. The director further noted that, in support of the petition, the petitioner submitted a sworn statement from [REDACTED] stating that the beneficiary was an employee of her establishment [REDACTED] from "02.01.1987" (February 1, 1987) to "03.01.1991" (March 1, 1991).

In the NOIR, the director pointed out that the business in Brazil [REDACTED] or [REDACTED], based on the CNPJ number on [REDACTED] sworn statement,⁴ was not

⁴ [REDACTED] states in her sworn statement that her business' CNPJ number is [REDACTED]. Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States.

officially registered with the Brazilian government until May 10, 1988 and thus that the beneficiary could not have worked there from February 1, 1987 as stated by the beneficiary and by [REDACTED]

The director also stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since [REDACTED] filed the petition in this case, and because of the noted inconsistencies in the documentation of the beneficiary's qualifications, the director on February 16, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds 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 un rebutted, 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 inconsistencies in the documentation submitted to establish the beneficiary's qualifications, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

On the other hand, the director's decision gave insufficient notice to the petitioner of deficiencies with respect to its failure to follow recruitment procedures. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with the DOL recruitment requirements. The director did not specifically state that the petitioner needed to submit copies of the in-house postings or other evidence to show that it complied with the DOL recruitment procedures. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. See *Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information with respect to the petitioner's failure to follow the DOL's recruitment procedures, the director's finding that the petitioner failed to follow recruitment procedures will be withdrawn.

As discussed below, the director's revocation of the approval of the petition will be affirmed in that the record does not establish the beneficiary's qualifications as of the priority date. Thus, the AAO will not return the petition to the director to correct the notice deficiencies with respect to the petitioner's compliance with recruitment procedures.

The AAO will next review the record to determine whether the beneficiary was qualified to perform the duties of a skilled cook as of the priority date. The petitioner must demonstrate, among other things that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all

of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977),

Here, the name of the job title or the position for which the petitioner sought to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 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).

As noted above, the beneficiary stated under penalty of perjury on the Form ETA 750, part B, that he worked at a restaurant in Brazil called [REDACTED] as a cook from February 1987 to March 1991. In support of the petition, the petitioner submitted a sworn statement from [REDACTED] stating that the beneficiary was an employee of her establishment [REDACTED] from February 1, 1987 to March 1, 1991.

In the NOIR, the director noted that [REDACTED] or [REDACTED] based on the CNPJ number, was not officially registered with the Brazilian government until May 10, 1988. In response to the director's NOIR, the petitioner submitted a signed statement dated March 1, 2009 from [REDACTED]. In her signed statement, [REDACTED] stated that the beneficiary first worked for her former husband's restaurant, [REDACTED], from February 1, 1987 to May 9, 1988, before moving to work for her restaurant, [REDACTED], from May 10, 1988 to March 1, 1991. She attached to her statement CNPJ printouts of [REDACTED] and [REDACTED].

The AAO notes, as did the director in the Notice of Revocation (NOR) – that the sworn statement submitted initially with the petition is inconsistent with the more recent signed and unsworn, statement issued by [REDACTED] in response to the director's NOIR. [REDACTED] fails to explain the reason for the discrepancy between her initial sworn statement and her second statement, when she changed the first year of the beneficiary's employment to her ex-husband's restaurant. Nor did the petitioner submit a statement from the former husband, [REDACTED], stating that the beneficiary worked for his establishment from February 1987 – May 1988. 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).

Further, the beneficiary did not list on the Form ETA 750B that he first worked for the [REDACTED] from February 1, 1987 to May 9, 1988. The petitioner did not submit an explanation from the beneficiary stating why he failed to disclose the first, and distinct, employment in Brazil. The petitioner did not submit a supplemental statement from the beneficiary indicating that he worked for the [REDACTED] from February 1, 1987 to May 9, 1988. As such, the beneficiary's work history is inconsistent with the more recent statement of [REDACTED]. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Given the unresolved inconsistencies with respect to the beneficiary's qualifying employment, the evidence of record submitted to establish that employment is found not credible.⁵ The AAO finds that the petitioner has not established that the beneficiary was qualified for the position as of the date of filing the labor certification, and that the director's revocation of approval of the petition was for good and sufficient cause. The director's decision will be affirmed.

Further, the evidence submitted by [REDACTED] even if it were accepted as credible, does not establish that the beneficiary has the required experience as a cook. 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.

Neither the sworn statement nor the signed statement from [REDACTED] above complies with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), in that neither includes a description of the beneficiary's work experience when he was employed there. As such, the statements do not establish the beneficiary's qualifications as of the priority date. For this additional reason, the beneficiary is not qualified for the position.

The next issue on appeal is whether the director properly concluded that the petitioner failed to comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner submitted copies of the following evidence in response to the director's NOIR:

⁵ Even were the petitioner to argue that the beneficiary's three years of employment with the second employer qualifies him for the position, without regard to the first employer, the AAO finds that the unresolved inconsistencies in [REDACTED]'s testimony undermine the credibility of both of the statements she submitted to establish the beneficiary's qualifying employment. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-592.

- Copies of the advertisements for the position offered published in the *Boston Sunday Herald* on April 1, 2001 and April 22, 2001;⁶ and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon review of the evidence submitted, the director stated in the NOR that the petitioner failed to comply with the DOL recruitment requirements because the petitioner failed to submit copies of the in-house postings. The director also stated that based on the letter submitted from the *Boston Herald*, [REDACTED], not the petitioning employer, paid for and created the job advertisement for the job offered, and thus impermissibly participated in the consideration of U.S. applicants for the job. Further, the director noted that the documents submitted above were in themselves a willful misstatement of material facts, constituting fraud.

The AAO finds that the director erred in faulting the petitioner for failing to submit the in-house posting notice. Before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. See 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. See 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; also see 20 C.F.R. § 656.10(f) (2010). As there was no requirement to keep such records, USCIS may not make an adverse finding against the petitioner because it claims it no longer has the documentation.⁷ The director's finding to the contrary is withdrawn.

The director also found that the recruitment was not conducted in good faith since previous counsel was involved in the recruitment by paying for and creating the advertisements. According to the director, the letter addressed to [REDACTED] from the *Boston Herald* was evidence of [REDACTED] impermissible involvement in the recruiting process. The director cited an AAO decision, which stated that where an agent or legal representative of an employer

⁶ Previous counsel submitted the copies of the advertisements with a disclaimer, stating that he obtained the copies of the advertisements from the newspaper archives of the public library, and that the advertisements appeared to relate to the instant proceeding. Previous counsel did not submit a statement from the petitioner verifying that it had conducted recruitment by running the advertisements. Thus, the advertisements have limited probative value in establishing that the petitioner conducted recruitment through advertising.

⁷ However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation.

paid for and created the job advertisement for the job offered the agent/legal representative may have impermissibly participated in the consideration of U.S. applicants for the job.⁸

The AAO disagrees. Although the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2001)⁹ specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered, the regulation at 20 C.F.R. § 656.20(b)(1)¹⁰ in place at the time of the recruitment in this case allowed

⁸ The director referred to a non-precedent decision issued by the AAO on March 17, 2005; file [REDACTED] (the copy of the decision can be accessed online at <http://www.uscis.gov> under “Administrative Decisions – Decisions Issued in 2005, MAR172005 08B6203”). The case relied upon by the director, is not an AAO precedent and is not binding. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, in the case cited by the director, the AAO determined that since the documentation in the record of proceedings showed that the beneficiary and her agent paid for and created the job advertisement for the job offered, it was possible that the beneficiary or her agent participated in the consideration of U.S. applicants for the job and did not conduct the recruitment in good faith. The AAO specifically noted that it did not make an adverse finding against the petitioner with respect to this possibility, as the petitioner had not had the opportunity to address the issue. Thus, the AAO decision noted by the director is not persuasive in the instant proceeding.

⁹ This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010). The regulation at 20 C.F.R. § 656.20(b)(3)(i) at the time of recruitment stated:

It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien’s agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien’s agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer’s representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) at the time of recruitment stated:

The employer’s representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

¹⁰ This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process.

The director's conclusion that [REDACTED] paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job is neither supported by the facts of record nor warranted under the DOL regulations. The letter dated February 14, 2001 from the *Boston Sunday Herald* only stated that [REDACTED] placed an order to post the advertisement in the *Boston Herald* newspapers and online at www.jobfind.com for 30 days and provided the cost involved.¹¹ There is no evidence in the record that shows that [REDACTED] either paid for the job advertisement or interviewed or considered candidates for the position. The AAO, therefore, withdraws the director's conclusion that [REDACTED] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job.

Before 2005, the DOL regulations provided for two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local DOL office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

If the advertisements submitted by [REDACTED] are accepted as evidence of the petitioner's recruitment in the instant proceeding, the record reflects that the petitioner would have placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time. The AAO notes, however, that the petitioner would have signed the labor certification application before conducting the recruitment. The record shows that the petitioner signed the labor certification application on March 29, 2001 – two days before the advertisement on April 1, 2001 and three weeks before the advertisement on April 22, 2001. The petitioner on the Form ETA 750A states to the DOL under a penalty of perjury attestation clause that the recruitment effort is complete and yielded no qualified United States workers. The petitioner cannot make the statement that no qualified

¹¹ No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

workers are available without first advertising for the position. Similarly, the petitioner cannot attest through his or her signature on the Form ETA 750 that recruitment is complete without first conducting the recruitment. If the submitted advertisements were placed by the petitioner for the job opening in the instant proceeding, the AAO is troubled that the labor certification application would have been signed by the petitioner prior to any recruitment efforts, raising questions about the extent to which the petitioner, through its untimely signature on the Form ETA 750A, may have been actively involved in the recruiting process and whether previous counsel was actively involved in the interviewing and consideration of job applicants.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. at 591-592.

While the petitioner's untimely signature on the Form ETA 750A is troubling, because the appeal will be dismissed on other grounds, the AAO will not remand the petition to the director for further development of the facts relating to the petitioner's recruitment efforts.

In summary, based on the current record, the director's findings that the petitioner did not comply with recruitment procedures by failing to submit the internal posting notice and by allowing ██████████ ██████████ to be impermissibly involved in recruitment are not supported by the facts of record and/or are legally erroneous, and are withdrawn.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or misrepresentation. Counsel asserts that the director's finding of fraud or willful misrepresentation against the petitioner is not supported by the evidence in the record and that the director revoked the approval of the petition simply because ██████████ filed the petition in the instant proceeding. The AAO disagrees with counsel's assumption. If the petitioner or ██████████ deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. For the reasons discussed above, the AAO finds that the record does not currently reflect sufficient facts upon which the director can conclude that the petitioner failed to follow recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or ██████████ engaged in fraud or material misrepresentation.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Immigration and Nationality Act (the Act) provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false

statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹²

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

¹² It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date 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). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – 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."

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 determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut 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.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In this case, as noted above, the factual record does not disclose that the petitioner and/or [REDACTED] engaged in material misrepresentation with respect to the recruitment process. As the petition's approval will remain revoked on other grounds, the AAO will not remand the petition to the director for further development of the facts upon which the director could make any finding of fraud and/or material misrepresentation, if warranted. Absent such a factual record, the director's finding of fraud and misrepresentation must be withdrawn.

Beyond the decision of the director, the petition is currently not approvable, as the record does not establish that the petitioner has the continuing ability to pay the proffered wage from the priority date.

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).

As a threshold issue, the AAO notes that the identity of the petitioning employer is not clearly established by the record. The Form ETA 750 labor certification application and the Form I-140 petition were filed by [REDACTED], with an address of [REDACTED]. The petitioner listed its federal tax identification number (EIN) as [REDACTED]. The beneficiary's Internal Revenue Service (IRS) Form W-2 for 2001 listed his employer's name as [REDACTED], with an address of [REDACTED] and an EIN of [REDACTED]. The 2001 Form 1065 Tax Return of Partnership Income has the same address and EIN number as the beneficiary's 2001 Form W-2, which is different from that on the petition.¹³ In response to the NOIR, the petitioner submitted a letter on the letterhead of [REDACTED] dated February 26, 2009 offering continuing support for the Form I-140 petition. The letter indicates that the beneficiary has been employed by [REDACTED] since 1994. The record does not establish the relationship of these three separate entities.¹⁴ Without evidence that one of the two [REDACTED] is a successor-in-interest to the other, the petitioner would have to submit the tax returns, or proof of wages paid to the beneficiary, by the [REDACTED] with an EIN number of [REDACTED] the petitioning entity.¹⁵

¹³ The Form 1065 indicates that [REDACTED], with an EIN of [REDACTED] (the employing entity) is a domestic limited partnership. A limited partnership (LP) consists of one or more general partners and one or more limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment.

¹⁴ The record reflects that [REDACTED] is actively involved in several restaurants, including the petitioner. The record of proceeding does not establish who is a general partner or a limited partner of The [REDACTED] or whether the assets of [REDACTED] or [REDACTED] Enterprises could be considered in the determination of the petitioner's ability to pay the proffered wage.

¹⁵ USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour, \$439.95 per week, or \$22,877.40 per year (based on a 35-hour work per week).¹⁶

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to demonstrate that it has the continuing ability to pay the proffered wage from April 30, 2001 until the beneficiary receives legal permanent residence.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary any wage. The record contains a copy of the beneficiary's Form W-2 for 2001 indicating that a [REDACTED] other than the petitioner, under

petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

¹⁶ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

the EIN of [REDACTED], paid the beneficiary \$10,206.33 in 2001.¹⁷ Thus, the petitioner has not paid any wages to the beneficiary.

Further, the record, contains only a complete copy of the federal tax return of a separate [REDACTED] [REDACTED] for the year 2001, filed on IRS Forms 1065, U.S. Return of Partnership Income under the EIN of [REDACTED]. No evidence (i.e. federal tax returns, annual statements, or audited financial statements for the petitioner, under the EIN of [REDACTED], from years 2001 and forward) is found in the record to show that the petitioner has the continuing ability to pay the proffered wage from 2001 forward. Further, as noted above, the record does not establish that the employing [REDACTED] is a successor-in-interest to the petitioning [REDACTED] and that the tax records of [REDACTED], EIN [REDACTED] may be considered to establish the petitioner's ability to pay. The record does not establish the petitioner's ability to pay the proffered wage from 2001 forward. For this additional reason, the petition's approval may not be reinstated.

The director's finding that the petitioner did not comply with the DOL recruitment procedures and that it obtained the labor certification by fraud or material misrepresentation is withdrawn. The approval of the petition, however, may not be reinstated, as the evidence of record does not establish that the beneficiary is qualified to perform the services of the proffered position as of the priority date. The record also does not establish that the petitioner has the ability to pay the proffered wage to the beneficiary.

The appeal will be dismissed and the petition's approval shall remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation of the approval of the petition.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

¹⁷ The 2001 Form W-2 of the petitioner indicates that the beneficiary was paid \$2445 in Social Security tips from the [REDACTED] employer. The proffered job is for a cook. The beneficiary's tip earnings suggest that the beneficiary may instead be employed as a waiter, casting doubt on the *bona fides* of the position as a cook. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-592.