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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**



B6

Date: **JUN 15 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On March 8, 2004, the director of the United States Citizenship and Immigration Services (USCIS) Vermont Service Center (VSC), initially approved the Immigrant Petition for Alien Worker, Form I-140, filed by the petitioner. On May 11, 2009, the director of the Texas Service Center (TSC) revoked the approval of the immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the approval of the petition will be withdrawn, and the petition will be remanded to the TSC director for further action, consideration, and the entry of a new decision.

The petitioner is a medical equipment manufacturer.¹ It seeks to permanently employ the beneficiary in the United States as a supervisor 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).² 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 2004, but that approval was revoked later in May 2009. The director found that the petitioner did not follow the Department of Labor (DOL) recruiting requirements and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts. In the Notice of Revocation (NOR) the director left open the issue relating to the beneficiary's past work experience in Brazil, and her qualifications to perform the duties of the position as of the priority date.

On appeal to the AAO, counsel for the petitioner contends that the director improperly revoked the approval of the petition.³ The director's decision to revoke the previously approved petition was erroneous here because, according to counsel, the decision was not made based on good and sufficient cause, as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155.⁴ Counsel claims that the director failed to notify the petitioner of specific problems pertaining to the petition in the instant proceeding. More specifically, counsel states that the director's notice of intent to revoke (NOIR) did not contain specific adverse information relating to

¹ The petitioner's website (<http://www.TeleMedSystems.com>) describes its business as an innovative manufacturer of medical accessory devices which are utilized with the flexible endoscope in the field of Gastroenterology.

² 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.

³ The petitioner's current counsel of record, [REDACTED] will be referred to throughout this decision as counsel. Its former counsel of record, [REDACTED], will be referred to as previous counsel.

⁴ Section 205 of the Act, 8 U.S.C. § 1155, states, "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 him under section 1154 of this title."

the petition or the petitioner in the instant proceeding nor did it request the petitioner to present specific evidence. 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 petitioner had not, in the NOIR, been specifically asked by the director to present such evidence. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel states that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition.

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 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 she has submitted sufficient evidence to demonstrate that she worked in a related field as a supervisor in Brazil for more than two (2) years.

In addition, counsel states that the director erred when he concluded that previous counsel, [REDACTED] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job. Counsel further states that the director erroneously concluded that the petitioner could not sign the Form ETA 750A prior to conducting the recruitment process (by advertising the job in the local newspapers). Counsel contends on appeal that these conclusions were not supported by the evidence of record; on the contrary, counsel states that based on the certification of the Form ETA 750 by the DOL and on the evidence in the record, it can be assumed that the DOL found that the petitioner had conducted the recruitment process in good faith.

Moreover, counsel indicates that the director's finding of fraud or willful misrepresentation against the petitioner is not supported by the evidence. 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 notes that the director erroneously cited 8 C.F.R. § 205.1 as the basis of his authority to revoke the approval of the petition. Counsel argues that since none of the circumstances or conditions covered by that regulation applies to the petitioner in the instant proceeding, the director's decision to revoke the approval of the petition should not be effective.

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.⁵

⁵ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

As a procedural matter, the AAO agrees with counsel that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. 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 not withdrawn the petition; nor has the petitioner 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:

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 him 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

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).

in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of 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. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the notice of intent to revoke (NOIR), the director wrote the following:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel].

The director advised the petitioner in the NOIR that the instant case might involve fraud 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. The director generally questioned the beneficiary's qualifications. The director also specifically 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, 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 in the 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 director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director also did not specifically state that the petitioner needed to submit copies of the in-house postings or other evidence to show that the petitioner 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, the director's decision will be withdrawn. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

The next issue on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, previous counsel submitted the following in response to the NOIR:

- Copies of advertisements published in the [REDACTED] on March 4, 2001; March 11, 2001; March 18, 2001; and March 25, 2001 seeking to recruit supervisors; and
- A copy of the letter dated February 14, 2001 addressed to [REDACTED] from the [REDACTED] [REDACTED] stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon review, 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 posting notice; because the petitioner signed the labor certification application before conducting recruitment; and because previous counsel was impermissibly involved in the recruiting process.

On appeal, [REDACTED] of the petitioning company, [REDACTED] who in 2001 signed the Forms ETA 750A and I-140, submitted an affidavit dated June 18, 2009, in which he claimed that he complied with the DOL recruitment requirements. He stated that approximately a year after he became [REDACTED] of the company, he filed two labor certification applications and two immigrant petitions on behalf of two alien beneficiaries, one of whom is the beneficiary in the instant case. In his affidavit, [REDACTED] generally outlined the steps he took to recruit candidates for both positions, including reviewing the contents of the advertisements, advertising the jobs in newspapers, and posting the job opening internally – on the board in the company's cafeteria. He noted in his affidavit that the two petitions were handled by two different attorneys; the beneficiary's case was handled by [REDACTED]. Further, [REDACTED] indicated that even though the two cases were handled by different attorneys, he followed the same procedures with respect to recruitment efforts in both cases. [REDACTED] also claimed in his affidavit that although he did not remember specifically which case the activities pertained to, he remembered reviewing about a dozen job applications, setting up appointments for interviews, interviewing interested applicants, and eventually offering employment to two qualified applicants, who later turned down the offer.⁶

⁶ Counsel in her appellate brief to the AAO wrote that the applicants who turned down the job offer in [REDACTED] (the beneficiary's) case were two qualified Americans workers. Counsel misstates [REDACTED] testimony in that [REDACTED] states in the affidavit that he does not recall whether he offered the beneficiary's job, or the job in the other labor certification application filed at the same time to two qualified workers. Further, as the petitioner did not retain the labor certification application file, the AAO questions how counsel knew that the two applicants who turned down the position were Americans, as [REDACTED] did not specify the nationality or the citizenship of the two potential hires in his affidavit.

In addition, ██████████ stated that he no longer had any records of the recruitment efforts and that he only relied on his own memories about what happened during the recruitment period.

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 questioned why the petitioner signed the labor certification application prior to recruiting for the position. The AAO agrees. 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).

The record reflects that the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time. As noted by the director, however, the petitioner signed the labor certification application on February 26, 2001 – about a week before the petitioner initially placed the

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.

advertisements in newspapers. The petitioner submitted the Form ETA 750 application for labor certification with the DOL on April 30, 2001. The AAO is troubled by the fact that the labor certification application was signed by the petitioner essentially in blank, prior to any recruitment efforts, and that the record contains no contemporaneous documentation indicating what recruitment efforts were undertaken. Box 21 of the Form ETA 750A, where the petitioner before signing the form must identify recruitment efforts, is blank. Counsel's argument on appeal that the petitioner did not violate the attestations of the ETA 750A by signing the application before conducting recruitment fails to address that box 21, which is placed on the ETA 750 to capture and document the recruitment efforts undertaken by the petitioner prior to the filing, was left blank. Further, by seeking a reduction in recruitment, the petitioner on the Form ETA 750 is stating 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 workers are available without first advertising for the position. Similarly, [REDACTED] cannot attest through his signature on the Form ETA 750 that recruitment is complete without first conducting the recruitment.

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. 582, 591-592 (BIA 1988).

The AAO also questions whether the advertisements submitted by previous counsel may be considered as evidence of the petitioner's good faith recruitment in this case. [REDACTED] in his June 18, 2009 affidavit did not identify the advertisements submitted by [REDACTED] in response to the NOIR as those he placed or authorized to be placed for the beneficiary's position; and did not identify jobfind.com as an additional advertising source that it utilized. [REDACTED] affidavit further discredits the Boston Herald advertisements in that he specifically could not distinguish the recruitment efforts undertaken on behalf of the two sponsored beneficiaries.⁸

The AAO finds that the director failed to adequately notify the petitioner with specificity about its failure to follow recruitment procedures. Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures. Nevertheless, the AAO finds sufficient doubt exists about the *bona fides* of the petitioner's pre-filing recruitment efforts to remand the petition to the director for further development of the facts.

The director also found that the letter addressed to [REDACTED] from the [REDACTED] was evidence of [REDACTED] impermissible involvement in the recruiting process because he paid for and created the job advertisement. The director cited an AAO decision, which stated that where an agent or legal representative of an employer paid for and created the job advertisement

⁸ The advertisements were for a "supervisor;" [REDACTED] does not indicate whether the position for the other sponsored beneficiary was also for a supervisor, and when he advertised for the second position.

for the job offered the agent/legal representative may have impermissibly participated in the consideration of U.S. applicants for the job.⁹ The director concluded that because previous counsel was impermissibly involved in the advertising process, the petitioner in this case did not conduct the recruitment process in good faith and obtained the labor certification by fraud or material misrepresentation. The AAO disagrees.

The regulation at 20 C.F.R. § 656.20(b)(1) in place at the time of the recruitment in this case allowed beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process.¹⁰ However, the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered.¹¹

⁹ As noted by counsel, the director failed to provide the citation to the AAO decision. The AAO is not aware of any precedent decision stating that an attorney may not assist the client in preparing and publishing the advertisement for the position during the recruitment phase of a labor certification application. 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). The case relied upon by the director, which he failed to cite, does not appear to be AAO precedent and is not binding.

In a non-precedent decision dated March 17, 2005, file [REDACTED] 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.

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

¹¹ 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

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 record contains no evidence showing that [REDACTED] either paid for the job advertisement or interviewed or considered candidates for the position. The letter dated February 14, 2001 from the [REDACTED] only stated that [REDACTED] placed an order to post the advertisement in the [REDACTED] newspapers and online at www.jobfind.com for 30 days and provided the cost involved.¹² Under the DOL regulations, the attorney for the beneficiary may not interview or consider job applicants for the position, but are not prohibited from assisting with the advertising process. The AAO, therefore, withdraws the director's conclusions that [REDACTED] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job.¹³

In summary, the director's findings that the petitioner did not comply with recruitment procedures by failing to submit the internal posting notice, failing to properly sign the ETA 750A prior to recruitment, and by allowing previous counsel to be impermissibly involved in recruitment are not supported by the facts of record and/or are legally erroneous, and are withdrawn.

On remand, the director should, in the new NOIR, question the petitioner's specific interactions with [REDACTED] prior to filing the petition; request the petitioner to explain why it signed the Form ETA 750A labor certification application prior to recruiting for the position; why box 21 was left blank prior to filing the application with DOL; how many specific conversations he had with previous counsel prior to previous counsel's filing of the labor certification application; previous counsel's specific instructions with regard to recruitment; what procedures it specifically followed in relation to the interviewing and consideration of applicants; what role [REDACTED] played in the

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.

¹² No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

¹³ A corollary to our finding that the record raises doubts about the petitioner's active involvement in the recruitment process because of [REDACTED] early signing of the Form ETA 750A, is whether and to what extent [REDACTED] was impermissibly involved in the consideration and interviewing of applicants for the position. The record does not establish previous counsel's impermissible involvement in recruitment. On remand, the director should develop a stronger factual record before determining whether previous counsel's role in the recruitment violated the DOL regulations.

recruitment process and in the interviewing and consideration of applicants, if any; to identify whether the advertisements placed by [REDACTED] in the [REDACTED] for a supervisor related to the instant position; to explain what he knows about jobfind.com and why he did not mention this advertisement in his affidavit; and to submit copies of the advertisement placed in jobfind.com, if available. While the AAO acknowledges that the petitioner is not required to keep a copy of the labor certification processes undertaken in this case, the petitioner must resolve inconsistencies with independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or misrepresentation. Counsel asserts that because the DOL approved the labor certification application, that it can be assumed that all DOL recruitment procedures were followed and that the petitioner did not engage in fraud or material misrepresentation. The AAO disagrees with counsel's assumption. If the petitioner or previous counsel 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 its previous counsel 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.¹⁴

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.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation^[2]. – (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

¹⁴ 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.

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 previous counsel engaged in material misrepresentation with respect to the recruitment process.¹⁵ On remand, the director should in his NOIR advise the petitioner that the DOL issued the certification on the premise that the DOL recruitment procedures were followed. If the petitioner or previous counsel submitted false statements or fraudulent documents with respect to the recruiting procedures, e.g. if, for example, the petitioner did not perform the essentials of recruitment such as interviewing and consideration of candidates for the position; or if, for example, upon consideration of the petitioner's response to the new NOIR, the director finds that the petitioner falsified previous counsel's role in the recruitment process, then the director may find that the recruitment procedures were not followed; that the petitioner and/or its counsel engaged in fraud or material misrepresentation and that the labor certification is invalid; and that the beneficiary is inadmissible on the true facts. If the DOL relied upon false or fraudulent documents submitted by the petitioner or previous counsel in determining the application's approval, the resulting labor certification was erroneous and would be subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Further, as a third preference employment-based immigrant, the petitioner was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. If on the true facts the labor certification was obtained through fraud or misrepresentation, and is thus invalid, then the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation relating to the recruitment procedures is material.

If the DOL relied upon false or fraudulent documents submitted by the petitioner or previous counsel, which is not currently reflected by the record of proceedings, then the DOL would have been unable to make a proper investigation of the facts when determining whether the labor certification application should be approved, because the petitioner or its previous counsel would

¹⁵ The current record also does not indicate that the beneficiary engaged in fraud or material misrepresentation in the presentation of her credentials to the petitioner and through the petitioner, to USCIS.

have shut off a line of relevant inquiry. In such a case, if the DOL had known the true facts, it would have denied the employer's labor certification, as the petitioner would not have complied with DOL's recruitment requirements, and there would have been an invalid test of the labor market.¹⁶ In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's or previous counsel's misrepresentation would be material under the second and third inquiries of *Matter of S & B-C-*.

The evidence of record currently does not support the director's finding of fraud or willful misrepresentation in connection with the labor certification process. Nevertheless, the petition, as it currently stands, remains unapprovable, as the record raises questions about the extent to which the petitioner, through its untimely signature on the Form ETA 750A, was actively involved in the recruiting process and whether previous counsel was actively involved in the interviewing and consideration of job applicants.

Therefore, on remand the director may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, provided that the director specifically outlines what the deficiencies are with respect to the particular labor certification, points out how the petitioner or the petitioner's previous counsel engaged in fraud or misrepresentation in the labor certification process, and gives the petitioner the opportunity to respond to the deficiencies in response to the NOIR.

Further, 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, and that the beneficiary is qualified to perform the services of the proposed employment as of the priority date. The petition will be remanded to the director for issuance of a NOIR, in accordance with 8 C.F.R. § 205.2(a).

As noted above, the AAO has *de novo* authority to review the matter properly forwarded by the director. *See Soltane v. DOJ, id.*

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

¹⁶ *See*, 20 C.F.R. § 656.2, which provides that the role of the DOL in the permanent labor certification process is to determine that there are not sufficient United States workers, who are able, willing, qualified and available to take the position at the time of the alien's application and admission to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The DOL executes this role through a test of the labor market where the alien beneficiary will perform the work.

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).

As noted above, the priority date in this case is April 30, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$13.07 per hour, \$457.45 per week, or \$23,787.40 per year (based on a 35-hour work per week).¹⁷ Further, a review of USCIS electronic databases reveals that the petitioner has previously filed one other immigrant petition in 2001. The table below shows the detail of the other petition the petitioner filed in 2001:

Receipt Number	Beneficiary (Last Name, First Name)	Priority Date	Decision	Date Adjusted to LPR:
██████████	██████████	04/26/2001	Approved	05/16/2005

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of both the current beneficiary and ██████████.

The petitioner has already submitted copies of the following relevant evidence to show that it has the continuing ability to pay the proffered wage from April 30, 2001:

- Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002; and
- The beneficiary's Forms W-2 for the years 2000 through 2004 and 2007.

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary and of ██████████. On remand, the director must give the petitioner the opportunity to demonstrate that it has financial resources sufficient to pay the proffered wages of both the beneficiary and ██████████ and if not, whether the totality of the circumstances affecting the petitioning business establishes the petitioner's ability to pay as of the priority date. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Upon review, the record also does not establish that the beneficiary was qualified for the position as of the priority date.

¹⁷ 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 considers 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).

Consistent with the *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), 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.

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner sought to hire is “supervisor.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Under direction of Manufacturing Manager, assist in supervising workers in production of assembling medical supplies, etc.” The DOL classified this job description as a first-line supervisor of production and operating workers under Standard Occupational Classification (SOC) 51-1011.¹⁸

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 set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on February 26, 2001, she represented that she worked 35 hours a week at [REDACTED] as a supervisor from May 1993 to August 1997. To show that the beneficiary had the requisite work experience in the job offered before April 30, 2001, the petitioner submitted the following evidence:

- A sworn statement dated March 1, 2001 from [REDACTED] Partner Manager of [REDACTED] who stated the beneficiary was the manager in charge of medical, hospital, and surgical products from “05/01/1993” (May 1, 1993) to “08/29/1997” (August 29, 1997);
- Another sworn statement dated March 6, 2009 from [REDACTED] who stated that the beneficiary was the manager in charge of medical, hospital, and surgical products from “05/01/1993” (May 1, 1993) to “08/29/1997” (August 29, 1997); and
- A copy of [REDACTED] CNPJ showing that the business is presently active and was officially registered with the Brazilian authority in 1989.

¹⁸ The SOC Code can be accessed on the website at the following website address: <http://www.bls.gov/soc/home.htm>

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) provides:

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.

The two sworn statements from [REDACTED] do not comply with the cited regulation, in that neither sufficiently describes the duties of the position, and thus do not establish that the beneficiary has two years experience as a supervisor of operating workers and production. The letters state that the beneficiary was employed as a manager of the facility and that her responsibilities included control of the medication and of hospital and surgical products, but do not indicate that the facility is a manufacturer, or that the beneficiary supervised workers in production and assembling of medical supplies. The CNPJ printout appears to indicate that the company where the beneficiary worked in Brazil was a pharmacy. On remand, the director should provide the petitioner the opportunity to establish that the beneficiary's work at the [REDACTED] [REDACTED] was the same as the proposed position and thus that as of the priority date, the beneficiary had sufficient experience in the job offered.

The director's conclusion 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. Hence, the director's decision to revoke the approval of the petition is also withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is thus remanded to the director for issuance of a NOIR specifically outlining the defects in the petition, as stated above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.