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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 30 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 October 26, 2001, 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 December 18, 2001. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on June 8, 2009, and the petitioner subsequently appealed the director's decision. On September 22, 2010, the director rejected the appeal as improperly filed in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The decision of the director rejecting the appeal is now before the Administrative Appeals Office (AAO). The director's decision rejecting the appeal is erroneous and will be withdrawn. Procedurally, the AAO, not the director, pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over a properly filed appeal in this case.¹ In addition, the appeal should not have been rejected as counsel of record has submitted a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner and submitted in response to the director's request for a Form G-28.² The appeal, however, cannot be sustained without further information and additional evidence, and therefore, the AAO will remand the matter to the TSC director for further action, consideration, and the entry of a new decision.

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

¹ The regulation at 8 C.F.R. § 103.3(2)(iv) specifically states, "If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

² The appeal (Form I-290B, Notice of Appeal or Motion) was initially filed by the beneficiary on June 23, 2009. On the Form I-290B, under Part 3, Basis for the Appeal or Motion, counsel, among other things, wrote:

██████████ submits this appeal in the capacity of a Petitioner, the benefits of the I-140 petition having moved to him under portability provisions at 204(j) of the INA [the Act] and the May 12, 2005 USCIS Memorandum on Portability and I-140s Petitions.

In a letter dated June 22, 2009, counsel also stated, "I represent ██████████ [the beneficiary] regarding the I-140 Petition filed (by former employer Bertucci's) on his behalf." As noted by the director, USCIS does not accept the beneficiary's authorization of counsel to file the appeal. The beneficiary of a Form I-140 petition is not a party to the proceedings and is not entitled to file the appeal. A review of the record, however, reveals that counsel represented the petitioner in the Form I-140 revocation proceedings. The record also reflects that the petitioner signed a Form G-28 on June 24, 2009 authorizing counsel to file the appeal. While the petitioner signed the Form G-28 for the appeal after the appeal was filed, the record reflects that counsel has continuously represented the petitioner since March 2009 in the revocation proceedings. The petitioner cured the lack of the Form G-28 deficiency on appeal by ultimately submitting the Form G-28 authorizing counsel to represent the petitioner on appeal. Considering that the representation is continuous, the AAO accepts counsel's representation of the petitioner on appeal.

(the Act), 8 U.S.C. § 1153(b)(3)(A)(i).³ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As stated above, the petition was initially approved in December 2001 but its approval was revoked later in June 2009. The director determined that the petitioner did not follow the Department of Labor (DOL) recruitment procedures and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts.

In the Notice of Intent to Revoke (NOIR), the director identified numerous problems including fraud and willful misrepresentation in other I-140 petitions and labor certification applications that the petitioner's former attorney of record, [REDACTED], filed.⁴ Because of these other petitions and since [REDACTED] filed the petition in this case, the director issued a NOIR to the petitioner on February 12, 2009, requesting that the petitioner submit additional evidence to demonstrate that the beneficiary had at least two years of employment experience in the job offered prior to the filing of the labor certification application on April 10, 2001, and that the petitioner complied with all of the DOL recruitment requirements.

In response to the director's NOIR, counsel for the petitioner submitted various documents including sworn statements from the beneficiary and from an accountant of the restaurant where the beneficiary worked in Brazil to show that the beneficiary had the requisite work experience in the job offered before April 10, 2001. The petitioner did not address the director's concern about its compliance with the DOL recruiting requirements.

Upon review of the additional evidence, the director issued a Notice of Revocation (NOR) revoking the approval of the petition. The director determined that the petitioner did not follow the DOL recruitment requirements and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts. The director left open the issue relating to the beneficiary's qualifications for the position offered.

On appeal to the AAO, counsel asserts that the director improperly revoked the petition's approval. The revocation, according to counsel, is solely based upon an alleged failure to follow recruitment requirements and is not supported by any evidence in the record. Further, counsel states that the fact that the DOL previously approved the labor certification showed that both the petitioner and the beneficiary have conformed to and met all of the DOL recruiting requirements. Counsel also indicates that the director's NOIR contains only vague allegations of fraud in other petitions

³ 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.

⁴ 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.

filed by [REDACTED] and similarities in the description regarding recruitment efforts present in the petitioner's labor certification application and other unrelated applications filed by [REDACTED]. Further, counsel states that the NOIR includes no specific evidence or information relating to the petitioner, petition, or documents in the present case. 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, citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988).

Moreover, counsel states that since the NOIR did not provide a clear explanation of how to resolve the problem with the petition and did not request the petitioner to produce specific evidence to overcome the grounds of revocation, the director's decision to revoke the approval is not based on good and sufficient cause, as required by 8 U.S.C. § 1155, section 205 of the Immigration and Nationality Act (the Act).

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

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:

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). 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).

(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.

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 unrebutted, 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.

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. In the NOIR, 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 the DOL's recruitment procedures. Because of these findings in other cases and since [REDACTED] filed the petition in this case, the director 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 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 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.⁶ The director did not

⁶ The DOL regulations in place at the time of recruitment in this case included a requirement that the employer post notice of the job opening to its employees for ten consecutive days at the job site where the alien will work. 20 C.F.R. § 656.20(g)(1).

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.

As noted above, the specific basis of the director's decision revoking the approval of the petition was the fact that the petitioner had failed to submit copies of the in-house postings. The director did not outline the recruitment procedures in the NOIR, and the record does not contain a description of the DOL recruitment requirements. Since the director did not advise the petitioner about specific recruitment procedures, and did not request the petitioner to submit copies of the in-house postings before the decision was rendered, the director cannot rely on the absence of such information to revoke the approval of the petition. Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures.

Nevertheless, on appeal, the petitioner did not respond to the director's specific finding that it failed to submit the in-house posting notice. Further, the record reflects irregularities in the filing of the labor certification application which raise concerns about the *bona fides* of the Form ETA 750.⁷ The AAO will remand the petition to the director for further development of the facts.

One of the inconsistencies in the record in the labor certification process is that the signature of [REDACTED] on the Form ETA 750A does not appear to match his signatures on the Form I-140 petition and on the original Form G-28 submitted with the petition.⁸ (Copies of these signature pages are attached to this decision).

The regulation at 8 C.F.R. § 103.2(a)(2) states:⁹

⁷ Although the petitioner's [REDACTED] signed the Form G-28 authorizing counsel to file the appeal, he did not submit a statement on behalf of the petitioner defending its recruitment for the position.

⁸ In 2003 [REDACTED] was the [REDACTED] and [REDACTED] of the petitioner. *See*, sec.edgar-online.com/bertuccis-corp/10-k-annual-report/2004/03/29/section17.aspx, accessed by the AAO June 2, 2011. [REDACTED] signatures on the Forms G-28 and I-140 are distinctly rounder, with fewer discernable lower-case letters than on his Form ETA 750A signature.

⁹ The regulation cited at 8 C.F.R. § 103.2(a)(2) was in place at the time of filing and is applicable to the instant case.

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

The DOL required, at the time the labor certification was filed, that the Form ETA750A be signed “by hand and in duplicate.” 20 C.F.R. § 656.20(g)(1). By signing and filing the labor certification application, the petitioner attests, under penalty of perjury, that it has or will conduct a test of the labor market to determine whether U.S. workers are qualified, willing, and available to work in the position as of the filing date of the labor certification.¹⁰ Because of the noted inconsistencies in the signature of Gregory Pastore, the director, should, on remand, give the petitioner the opportunity to explain these discrepancies and to state that it authorized the filing of the labor certification application through the signature of its authorized representative.

In addition to the variance in the signatures of [REDACTED] on the attached Forms G-28, ETA 750A and I-140, the AAO is concerned about other anomalies of record on the labor certification application warranting further factual development. The petitioner’s address on the initial Forms G-28, ETA 750 and I-140 is 791 [REDACTED].¹¹ The AAO questions whether [REDACTED] the petitioner’s [REDACTED] and [REDACTED] would sign the application for labor certification using the address of a restaurant location rather than the corporate headquarters address, particularly as the job location on the Form ETA 750 is unspecified.¹² The AAO also questions whether the petitioner’s [REDACTED] and [REDACTED] would allow the address of the restaurant location to be listed erroneously on all three documents. On appeal, the petitioner’s address both on the Form G-28 and on the letter of support

¹⁰ See, 20 C.F.R. § 656.2, which provided at the time of recruitment in this case 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.

¹¹ The petition listed the wrong address of the [REDACTED]. The [REDACTED], See, [REDACTED], accessed June 2, 2011.

¹² The ETA 750A lists at number 7, for the address where the beneficiary will work, “various unanticipated sites throughout MA.”

dated March 10, 2009, signed by [REDACTED] the petitioner's [REDACTED] [REDACTED] is [REDACTED], which is the petitioner's corporate headquarters.¹³ Also of record is a letter from [REDACTED] signed by [REDACTED] dated August 12, 2004, confirming the beneficiary's employment at that location as of the date of the letter, another restaurant location.¹⁴

Another anomaly on the approved Form ETA 750A is a handwritten notation that the address where the beneficiary would work is "various unanticipated sites throughout Massachusetts."¹⁵ The handwritten notation was not an amendment approved by the DOL, which initials and date-stamps all amendments. The notation does not indicate when it was added or by whom.

On remand, the director should issue a new NOIR requesting the petitioner to explain: the discrepancies in [REDACTED] signatures on the Form ETA 750 and the Forms G-28 and I-140; why the labor certification application was filed using the address of a restaurant location rather than the corporate address; why the labor certification application was filed using a restaurant location that was not identified as the address where the beneficiary would work; and why the address of the same restaurant location was listed as [REDACTED] and not [REDACTED]. The petitioner's response should be detailed and specific and be signed by an employee with personal knowledge of the facts and authority to represent the petitioner in these matters.

The director should also in the new NOIR request the petitioner to explain when the handwritten notation was added to the Form ETA 750, by whom, and why, and further request the petitioner to submit copies of any correspondence to and from DOL in relation to its request that the work location will be in multiple locations in Massachusetts.

The DOL regulation at 20 C.F.R. § 656.21 required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable,

¹³ See, Bloomberg Business Week, <http://investing.businessweek.com>, accessed by the AAO June 2, 2011.

¹⁴ This address was also a [REDACTED]. The location closed in 2008. See, www.loopnet.com/Listing/15499007/39-45-Stanhope-Street-Boston-MA, accessed June 2, 2011.

¹⁵ The policy of the DOL in 2001 was to allow an employer to state that the employment would be at unanticipated sites in lieu of giving the specific work address. In this instance, the question of where to file the labor certification application within the state was important, because it dictated the prevailing wage determination and influence where the labor market test is performed. In Field Memorandum No. 48-94 (May 16, 1994) § 10, the Employment and Training Administration stated that "[a]pplications involving job opportunities which require the Alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located." The mere business presence of an employer in a different metropolitan statistical area (MSA) was not, in itself, sufficient reason for departing from that policy.

good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers. If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.¹⁶

The record reflects that the petitioner placed the advertisements prior to submitting the labor certification, consistent with the reduction in recruitment process which was allowed at the time. Box 21 of the ETA750A, where the petitioner lists its recruitment efforts prior to submission of the labor certification application, states "Newspaper advertisements, internal postings, word of mouth and www.jobfind.com."

On remand, the director should in the new NOIR request the petitioner to outline what specific steps it took to conduct good faith recruitment, e.g. whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name; ask the petitioner how many candidates were interviewed; and if so, whether and how it conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. The director should specifically ask the petitioner for copies of the advertisements and the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.¹⁷

¹⁶ 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).

¹⁷ As there was no requirement to keep such records, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. 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. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO further finds that the petition cannot be approved, as the record does not reflect that the beneficiary qualifies for the position offered.

Consistent with *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 was filed and accepted for processing by the DOL on April 10, 2001. 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 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, he represented that he worked 35 hours a week at [REDACTED] as a cook from December 1997 to February 2000.

To show that the beneficiary had the requisite work experience in the job offered before April 10, 2001, the petitioner submitted the following evidence:

- An affidavit from [REDACTED] stating that the beneficiary was a cook from 12/22/1997 (December 22, 1997) to 02/15/2000 (February 15, 2000);
- A sworn statement of the beneficiary stating that he was a cook with [REDACTED] for almost five years before coming to the United States;
- A copy of the business registration of [REDACTED] showing that the business was officially registered with the Brazilian authority on May 22, 1995 and remains active as of today;¹⁸ and

¹⁸ A search of the Brazilian business registration website reveals that [REDACTED] is presently an active business. The website can be accessed at the following website address:

- A sworn statement issued by an accountant of [REDACTED] [REDACTED] stating that [REDACTED] had been suspended from doing business as of July 2001.

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 AAO notes that [REDACTED] sworn statement is inconsistent with the copy of the business registration. [REDACTED] stated that [REDACTED] business status had been suspended as of July 2001. However, according to the business registration information, [REDACTED] remains an active business today. In the event that the record contains a document inconsistent with other evidence of record, it is incumbent on the petitioner to resolve such inconsistencies in the record by independent objective evidence. In this case, the documentation proving the beneficiary's qualifications for the position is internally inconsistent, casting doubt on the remainder of the evidence of the beneficiary's qualifications. No evidence of record resolves this inconsistency. *Matter of Ho*, 19 I&N Dec. at 591-592.

On remand, in the NOIR the director should advise the petitioner and the beneficiary about the derogatory evidence, and give them each the opportunity to respond to and explain the discrepancy between [REDACTED] statement that the business was inactive after July 2001, while its business registration indicates that the business is still active today.

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 both the petitioner and the beneficiary conformed to and followed all DOL recruitment procedures. The AAO disagrees. If the petitioner or the beneficiary deceived the DOL in the recruitment and adjudication 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.¹⁹

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

¹⁹ 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 has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

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. – (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 failed to follow the recruitment procedures of the DOL. 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 submitted false statements or fraudulent documents with respect to the recruiting procedures, e.g. if, for example, the petitioner did not sign the Form ETA 750A or did not perform the essentials of recruitment such as interviewing and consideration of candidates for the position; then the director may find that the recruitment procedures were not followed; that the petitioner 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 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, 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 would 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. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner'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, because of the discrepancies in [REDACTED] signatures and other cited irregularities, authorized the filing of the Form ETA 750 and about whether it was actively involved in the recruiting process.

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 may have 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.

In this case, on remand, the director should also in its NOIR advise the petitioner that the DOL issued the certification on the premise that the alien beneficiary was qualified for the job opportunity. If the beneficiary is found to not qualify for the job because of the submission of false or fraudulent documents, the resulting labor certification was erroneous and would be subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the petitioner was required to establish that the beneficiary met the petitioner's minimum work experience requirements. *Compare* 8 C.F.R. § 204.5(g) *with* § 204.5(1)(1)(3)(ii)(B). 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 beneficiary is not qualified to perform the duties of the position as of the

priority date, he is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his credentials was material.

The director should also issue a Notice of Derogatory Information (NDI) to the beneficiary at the same time it issues the NOIR to the petitioner, advising him of the inconsistencies in the record concerning his qualifications as a cook as of the priority date; outlining the specific factual grounds that indicate that the beneficiary may have misrepresented the true facts; and advising the beneficiary of the consequences of fraud or material misrepresentation as outlined above. The director should give the beneficiary a reasonable period of time to respond to the notice of derogatory information.

Nor does the record reflect that the petitioner has the ability to pay.²⁰ 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, as noted above, the record shows that the Form ETA 750 was received for processing on April 10, 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).²¹

²⁰ 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).

²¹ 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).

USCIS records reflect that the petitioner has previously filed 21 other immigrant petitions in the past.²² The table below shows the details of the 21 petitions that have been previously filed:

Receipt Number	Beneficiary (Last Name, First Name)	Priority Date	Decision	Date Adjusted to LPR:
		04/09/2001	NOIR ²³	N/A
		07/12/2000	Approved	Pending
		04/17/2001	Approved	06/19/2007
		01/12/1998	Approved	Pending
		N/A	Approved ²⁴	N/A
		04/30/2001	Approved	04/03/2007
		01/05/1998	Approved	01/16/2002
		04/26/2001	Approved	02/08/2011
		04/16/2001	Approved	12/16/2004
		03/08/2001	Approved	07/13/2004
		04/17/2001	Approved	Pending
		01/05/1998	Approved	Pending
		04/30/2001	Approved	10/23/2007
		04/26/2001	Approved	10/19/2004
		04/23/2001	Approved	03/06/2006
		04/20/2001	Approved	09/27/2007
		04/05/2001	Approved	Pending
		04/25/2001	Approved	11/10/2009
		04/17/2001	Approved	09/26/2007
		04/20/2001	Approved	Pending
		04/23/2001	Approved ²⁵	N/A

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is not only required to establish the ability to pay the proffered wage of the current beneficiary but also of the beneficiaries whose names are listed above from the respective priority date of each petition through such time when the beneficiary obtains permanent residence.

²² The number of petitions that the petitioner has filed in the past is more than 21; however, we do not count those petitions that were approved before April 10, 2001 and those beneficiaries whose status had been adjusted to legal permanent residence (LPR) before the priority date.

²³ The NOIR was sent on 11/10/2010.

²⁴ The approval of the petition was revoked as of July 14, 2009.

²⁵ The approval of the petition was revoked as of June 2, 2009.

The record contains no relevant evidence (i.e. federal tax returns, annual statements, or audited financial statements) to show that the petitioner has the capability to pay the proffered wage of all the beneficiaries, however.

The beneficiary stated in his Biographic Information (Form G-325), which he submitted in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485), that he started to work for the petitioner in 2000. Further, the beneficiary stated in his affidavit dated March 11, 2009 that he was employed by the petitioner as a cook for almost five (5) years and that he left the petitioner in April 2007. The record only contains a copy of the beneficiary's Form W-2 for the year 2007, which shows that he received \$4,575.47 from the petitioner in 2007.

Therefore, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that the petitioner is making a realistic job offer and that the petitioner has the continuing ability to pay the proffered wage from the priority date, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 the other sponsored beneficiaries. On remand, the director must give the petitioner the opportunity to demonstrate that it has financial resources sufficient to pay the proffered wages of all of the beneficiaries; 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).

Finally, the record contains a letter dated March 10, 2009 from the petitioner's vice-president of human resources indicating that the beneficiary left his permanent position with the petitioner on April 4, 2007.²⁶ As the petition remains unapproved at this time, the petitioner must intend to employ the beneficiary. The director should request the petitioner in the NOIR to provide an original letter that it intends to employ the beneficiary. If not, the petition is moot but would not prevent a determination of fraud or misrepresentation.

On appeal, counsel states that the beneficiary is no longer with the petitioning employer, but that as his approved Form I-140 and Form I-485 adjustment of status application have been pending for more than 180 days, he was entitled to port to a different employer doing the same or a similar job, and that his application to adjust status should survive the revocation of approval of the underlying Form I-140 petition.

Section 204(a)(1)(F) of the Immigration and Nationality Act (Act) provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under

²⁶ The letter states that the beneficiary briefly returned to his job as a cook from August 9, 2007 – September 4, 2007.

section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification.”

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313); section 204(j) of the Act, 8 U.S.C. §1154(j) amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers²⁷ if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(j) of the Act prescribes that “A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers.” The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term “valid,” as used in section 204(j) of the Act, refers to an approved visa petition.

Although section 204(j) of the Act, 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary’s application for adjustment of status has been filed and remained adjudicated for 180 days, the petition must have been “valid” to begin with if it is to “remain valid with respect to a new job.”

²⁷ This is often called “porting.”

Matter of Al Wazzan, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An unadjudicated immigrant visa petition is not made “valid” merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff’s argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff’s interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*²⁸

On remand, upon consideration of the petitioner’s response to the new NOIR, if the director determines that the Form I-140 petition should be revoked for good and sufficient cause, the beneficiary may not invoke AC21’s I-140 portability provisions pursuant to section 204(j). In that case, any claim by the beneficiary that he may continue with his application to adjust status to permanent residence by virtue of having ported to the same or a similar job, must be denied as there would not be a valid, approved petition underlying that request.

The director’s decision 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. The petition is remanded to the director for the issuance of a NOIR to the petitioner and an NDI to the beneficiary, giving each the opportunity to respond to the notice. The director may advise

²⁸ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

the petitioner that if it chooses to withdraw the Form I-140 petition, such withdrawal may not prevent a finding of fraud and the invalidation of the labor certification. Upon consideration of the responses, if any, and the evidence of record, the director should issue a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for the issuance of a NOIR to the petitioner and a notice of derogatory information to the beneficiary, and a new, detailed decision consistent with above, which if adverse to the petitioner shall be certified to the AAO for review.