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



U.S. Citizenship
and Immigration
Services

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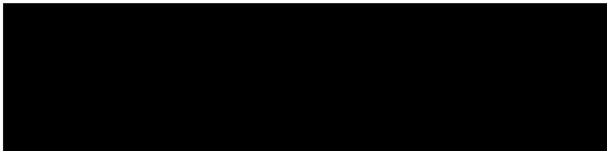
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Date: NOV 03 2011 Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On June 18, 2003, 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 October 15, 2003. However, the Director of the Texas Service Center (“the director”) revoked the approval of the immigrant petition on January 11, 2010, and the petitioner subsequently appealed the director’s decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a restaurant.¹ It seeks to permanently employ the beneficiary in the United States as a salad prep/utility worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).² As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in October 2003, but the approval was revoked in January 2010. The director found that the petitioner did not follow the Department of Labor (DOL) recruitment requirements and that it obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause to revoke the approval of the petition. Specifically, counsel states that the director’s Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. For instance, counsel indicates that the petitioner’s failure to present the copy of the in-house posting was because the director did not specifically request such evidence in the NOIR. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel contends 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 and given a reasonable opportunity to respond, the director cannot revoke the approval of the visa petition.

Counsel further claims that the director’s finding of fraud or material misrepresentation against the petitioner, for instance, is not supported by the evidence of record. Counsel states that the director included no specific evidence of fraud or material misrepresentation or information relating to the petitioner, petition, or documents in either the NOIR or the Notice of Revocation

¹ A review of the petitioner’s website [REDACTED] shows that the petitioner offers services including: dry cleaning, flower delivery, car oil changes, auto detailing and a sundry shop. (last accessed September 7, 2011).

² Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(NOR). Ultimately, counsel concludes that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]

Finally, counsel notes that the director erred when he revoked the petition under the authority of 8 C.F.R. § 205.1. This regulation, according to counsel, only applies to automatic revocation and is therefore the wrong regulation to revoke the petition in the instant proceeding.

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.⁴

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 raised by counsel 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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

³ Current counsel of record, [REDACTED], will be referred to as counsel throughout this decision. Previous counsel, [REDACTED], will be referred to as previous or former counsel or by name. Previous counsel, [REDACTED], will be referred to by name.

⁴ 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).

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

However, before the director can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

(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).

In addition, the regulation at 8 C.F.R. § 103.2(b)(16) states:

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

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *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.

Here, the director wrote in the Notice of Intent to Revoke (NOIR):

The Service [USCIS] 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 former attorney of record, ██████████]

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ 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 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 6, 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 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, for instance, 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 raised 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, the petitioner submitted the following evidence in response to the NOIR:

- Copies of the newspapers tear sheets for the position offered, published in the *Boston Globe* for three consecutive days from Monday, March 11, 2002 to Wednesday, March 13, 2002;
- A copy of the in-house posting;
- Copies of letters dated March 21, 2002 and March 28, 2002 addressed to the petitioner from the local state workforce agency (Massachusetts Division of Employment and Training) instructing the petitioner to call and interview interested applicants;⁵ and
- Copies of letters, emails, and other correspondence addressed to local state workforce agency from the petitioner, identifying the efforts the petitioner had taken to recruit U.S. workers.

⁵ The AAO notes that these letters from the local state workforce agency were addressed to the petitioner's agent — [REDACTED]

Upon review, the director determined that the petitioner failed to comply with the DOL recruitment requirements, because the petitioner, among other things, failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. The director also concluded that the beneficiary and/or [REDACTED] participated in the consideration of U.S. applicants for the job by paying for and creating the job advertisement for the job offered.

On appeal, counsel states that the director erred in concluding that the petitioner did not follow the DOL recruitment procedures and that [REDACTED] paid for and created the job advertisement for the job offered. Critically, counsel notes that [REDACTED] did not represent the petitioner until after recruitment was complete in this case.⁶

Counsel further submits copies of the following evidence:

- A letter dated February 14, 2002 from the petitioner's attorney at the time [REDACTED] concerning recruitment to the Massachusetts Division of Employment and Training (the local state workforce agency) requesting modifications to the job title of the position offered;
- A letter dated February 20, 2002 from the Massachusetts Division of Employment and Training addressed to [REDACTED] informing the petitioner to modify the minimum experience/training requirements and the job description;
- A letter dated February 26, 2002 from [REDACTED] to the Massachusetts Division of Employment and Training acknowledging the modifications required by the local state workforce agency;
- A letter from the Massachusetts Division of Employment and Training dated February 27, 2002 to [REDACTED] indicating that it had received the Form ETA 750 and had assigned a case number and a priority date for the Form ETA 750 submitted; and
- A letter dated March 29, 2002 from [REDACTED] to the petitioner stating that the petitioner needed to review a resume forwarded by the DOL and to forward all efforts of recruitment by May 13, 2002.

Upon *de novo* review, the AAO finds that the petitioner has established that it followed the DOL supervised recruitment requirements. Before 2005, the DOL regulations allowed employers to conduct two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. See 20 C.F.R. § 656.21 (2002). Under the supervised

⁶ A review of the record reflects that [REDACTED] began representing the petitioner almost one year after [REDACTED] started the labor certification process in April 2001. We observe that the Massachusetts Division of Employment and Training (the local state workforce agency) initially worked with [REDACTED] starting from April 2001 and during the supervised recruitment phase from February 2002 to May 2002, but later, the DOL sent the approval of the labor certification to [REDACTED] March 2003. [REDACTED]'s first appearance before the USCIS was on April 11, 2003 with the submission of the Form G-28 when he filed the Form I-140 petition herein on behalf of the petitioner.

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).

Based on the evidence submitted and the stated facts above, and as noted by counsel, the petitioner conducted supervised recruitment, consistent with the DOL regulations allowed at the time. The AAO further finds that the director erred in faulting the petitioner for failing to submit the in-house posting notice. As indicated above, the in-house notice was provided by the petitioner. Therefore, the director's conclusion that the petitioner failed to follow the DOL's recruitment procedures by failing to post the internal notice is withdrawn.

The director also determined in the Notice of Revocation (NOR) that the recruitment was essentially not conducted in good faith, since, according to the director, the petitioner's previous counsel ([REDACTED]) was involved in the recruitment by paying for and creating the advertisements. According to the director, the evidence submitted in response to the NOIR showed that [REDACTED] was involved in the recruiting process by paying for and creating the job ads. The director cited an AAO decision, [REDACTED] which stated that where an agent or legal representative of an employer paid for and created the job advertisement for the job offered the agent/legal representative may have impermissibly participated in the consideration of U.S. applicants for the job.⁷

The AAO disagrees. Although the DOL regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2002)⁸ specifically prohibited agents or legal representatives of the beneficiaries and the petitioners

⁷ The copy of the decision can be found at <http://www.uscis.gov> under Administrative Decisions, decisions issued in 2005 (File name: [REDACTED])

⁸ 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) (2002) 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

from participating in interviewing or considering applicants for the job offered, the regulation 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. *See* 20 C.F.R. § 656.20(b)(1) (2002).⁹

Further, 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 not supported by the facts of record. The record clearly shows that [REDACTED] was not the petitioner's attorney during the recruitment process. The AAO, therefore, withdraws the director's conclusion that [REDACTED] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job. The AAO finds that there is no evidence that the petitioner failed to follow recruitment requirements.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that 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. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or the beneficiary deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, however, the factual record does not establish that the petitioner failed to follow the DOL's recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or the beneficiary 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

cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) (2002) 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.

⁹ This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

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 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.¹⁰

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

¹⁰ 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.

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. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

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

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

In this case, as noted above, the factual record does not disclose that the petitioner and/or Mr. [REDACTED] or [REDACTED] engaged in material misrepresentation with respect to the recruitment process.¹¹ Thus, the director's finding of fraud or misrepresentation is withdrawn.

Nevertheless, as discussed below, the petitioner and the beneficiary may have misrepresented the beneficiary's qualifications to obtain an immigration benefit. On remand, the director should in the new NOIR advise the petitioner and separately the beneficiary about the discrepancies in the record pertaining to the beneficiary's whereabouts from 1996 to 1998. If the DOL relied upon false or fraudulent documents submitted by the petitioner and/or the beneficiary 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 beneficiary's qualifications for the job offered is material.

If the DOL relied upon false or fraudulent documents submitted by the petitioner or by the beneficiary, which is not currently reflected in 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 the beneficiary 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 beneficiary would not have qualified to perform the duties of the job. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's or the beneficiary's misrepresentation would be material under the second and third inquiries of *Matter of S & B-C-*.

As more fully discussed below, the petition is not approvable as the record suggests that the petitioner and/or the beneficiary may have engaged in fraud or material misrepresentation in order to obtain an immigration benefit. The petition will be remanded in order for the director to issue a new NOIR outlining the concerns expressed in this decision.

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).

¹¹ The current record also does not indicate that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner, to USCIS.

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).

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

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

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

Here, the Form ETA 750 was accepted by the DOL for processing on April 26, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$8.50 per hour or \$17,680 per year. Therefore, the petitioner is required to demonstrate that it has the ability to pay \$8.50 per hour or \$17,680 per year from April 26, 2001 and continuing until the beneficiary receives his legal permanent residence.

In this case, a review of USCIS records reveals that the petitioner has previously filed 14 immigrant petitions, including one for the beneficiary in the instant proceeding, since 2001. The table below shows the details of the other petitions the petitioner has filed since 2001:

Receipt Number	Beneficiary (First Name Last Name)	Priority Date	Decision	Date Adjusted to LPR:
[REDACTED]	[REDACTED]	03/22/2001	Revoked ¹²	-
[REDACTED]	[REDACTED]	-	Revoked ¹³	-
[REDACTED]	[REDACTED]	04/09/2001	Approved	04/16/2004
[REDACTED]	[REDACTED]	-	NOIR ¹⁴	-
[REDACTED]	[REDACTED]	-	Revoked ¹⁵	-

¹² Revoked as of February 17, 2011.

¹³ Revoked as of October 19, 2010.

¹⁴ A NOIR was sent on February 22, 2011.

¹⁵ Revoked as of June 2, 2009.

	04/12/2001	Approved	07/24/2004
	-	Revoked ¹⁶	-
	04/17/2001	Approved	11/30/2004
	04/18/2001	Approved	-
	04/26/2001	Revoked ¹⁸	-
	11/07/2002		
	11/12/2002	Revoked ¹⁹	-
	01/17/2003	Approved	09/10/2007
	10/08/2003	Approved	-

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 the current beneficiary and also of all other beneficiaries listed above from the date of filing each respective labor certification application until the date the beneficiary obtains lawful permanent residence, or until the other beneficiaries obtain permanent residence or had their petition's approval revoked.

The petitioner has already submitted the following evidence to show that it has the continuing ability to pay the proffered wage from April 26, 2001:

- The beneficiary's Forms W-2 for the years 2002 and 2007;²⁰
- Several copies of paystubs issued by the petitioner to the beneficiary in August, September, and October 2008;
- A statement dated February 28, 2001 from [REDACTED] Human Resource Manager, who stated that the petitioning organization employed approximately 550 people; and
- A copy of the first page of the Form WR-1 Employer's Quarterly Report of Wages Paid for the year 2001.²¹

¹⁶ Revoked as of June 7, 2010.

¹⁷ This is the beneficiary in the instant case.

¹⁸ Revoked as of January 11, 2010.

¹⁹ Revoked as of November 17, 2010.

²⁰ The AAO notes that the petitioner paid in excess of the proffered wage to the beneficiary in 2007.

²¹ According to the Form WR-1, the petitioner employed 470 people as of March 2001. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given the record as a whole and the fact that the petitioner has filed multiple employment-based petitions, as described above, and that several of the petitions' approval have been revoked,

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 all of the beneficiaries from the priority date.

On remand, the director should issue a NOIR requiring the petitioner to demonstrate financial resources in the form of annual reports, federal tax returns, or audited financial statements sufficient to pay the proffered wages of the beneficiary and of all of the other beneficiaries from the priority date and continuing until the beneficiary receives his legal permanent residence, or until the other beneficiaries obtain permanent residence or had their petitions' approval revoked. 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).

Further, the AAO finds that the record does not reflect that the beneficiary was qualified for the position in the job offered as a salad prep/utility worker as of the priority date.

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, as noted earlier, was filed and accepted for processing by the DOL on April 26, 2001. The name of the job title or the position for which the petitioner seeks to hire is “salad prep/utility.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Wash, clean, & prepare vegetables for salad bar & set-up. Breakdown of salad bar, washing bowls, utensils, etc.

The DOL classified this job description as a food preparation worker under O*Net-SOC (Occupational Information Network/Standard Occupational Classification) code 35-2021.²² Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of three months of work experience in a related occupation.

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

USCIS will not exercise its discretion to accept this type of evidence. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiaries it is seeking to employ.

²² The O*Net-SOC Code can be accessed at <http://www.onetonline.org/>

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 three months of work experience in a related occupation. On the Form ETA 750, part B, signed by the beneficiary on April 19, 2001, he represented he worked 40 hours a week as a cook at "Maria Aparecida Saar Garcia & Filhos Ltda." from June 1996 to July 1998. To show that the beneficiary had the requisite work experience in the job offered before April 26, 2001, the petitioner originally submitted the following evidence:

- A sworn statement dated April 6, 2001 from [REDACTED] who stated the beneficiary worked as a cook at [REDACTED] Ltda. from June 1996 to July 1998; and
- A copy of [REDACTED]'s CNPJ showing that the business was officially registered with the Brazilian authorities on "05/07/1988" (July 5, 1988).²³

In response to the director's NOIR, the petitioner submitted the following evidence to demonstrate that the beneficiary had the requisite work experience in a related occupation:

- A signed statement dated February 17, 2009 from the beneficiary stating that he worked as a cook at [REDACTED] located at [REDACTED] from June 1996 to July 1998.

On appeal to the AAO, the petitioner submits the following additional evidence to demonstrate that the beneficiary had the requisite work experience in a related occupation:

- A sworn statement dated February 1, 2010 from [REDACTED] (un-translated);²⁴ and
- A sworn statement dated February 18, 2010 from the beneficiary, who described and explained where he grew up in Brazil; why he moved from [REDACTED]

²³ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ ([REDACTED]) is similar to the federal tax ID or employer ID number in the United States. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

²⁴ Because the petitioner failed to submit certified translations of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

[REDACTED], in 1996; how he first got a job at [REDACTED] upon moving from Belo Horizonte, MG; what his job duties were over there, why he came to and stayed in the U.S.; and how he got a job with the petitioner starting in 1999.

In adjudicating the appeal, the AAO observes that the beneficiary failed to list his employment in Brazil with [REDACTED] on his Biographic Information (Form G-325), filed in connection with his Form I-485 (Application to Register Permanent Residence or Adjust Status). In that form, the beneficiary also failed to list his last occupation abroad. Further, the beneficiary, according to his Form G-325 lived in the city of Belo Horizonte, Minas Gerais from the day he was born in 1973 until the day he left Brazil in April 1999.

However, according to the Form ETA 750B and the sworn statement dated April 6, 2001 from [REDACTED] the restaurant where the beneficiary claimed that he worked in Brazil was located in the city of Tarumirim, Minas Gerais. This is a material inconsistency in the record, and based on the information stated above, it does not appear likely that the beneficiary lived in [REDACTED], and worked in Tarumirim, Minas Gerais, between June 1996 and July 1998.²⁵

Moreover, the AAO notes that the sworn statement dated April 6, 2001 from [REDACTED] does not comply with the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A), in that it does not have a description of the training received or the experience of the beneficiary. Merely stating that the beneficiary was a cook without further explaining her job duties and responsibilities is not sufficient in this proceeding. Further, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On remand, the director should issue a NOIR to the petitioner and a Notice of Derogatory Information/Request for Evidence (NDI/RFE) to the beneficiary separately requesting each to submit independent objective evidence to demonstrate the veracity of the beneficiary's statements that he lived and worked for Maria Aparecida Saar Garcia & Filhos Ltda. in Tarumirim, MG between 1996 and 1998.²⁶ The director may request the petitioner and the

²⁵ The distance between the city of [REDACTED], is about 214 km (roughly 113 miles).

²⁶ Alien beneficiaries do not normally have standing in administrative proceedings. See *Matter of Sano*, 19 I. & N. Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. See *Matter of Ho*, 19 I. & N. Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. See *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); see also *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth

beneficiary to submit, for instance, the beneficiary's booklet of employment and social security, copies of pay stubs, payroll records, tax documents, or financial statements or other evidence from the beneficiary's past employer in Brazil, a revised letter from the beneficiary's past employer in Brazil including a specific description of duties performed by the beneficiary in accordance with 8 C.F.R. § 204.5(g)(1), and/or a copy of a government-issued identification card reflecting where the beneficiary lived and worked between 1996 and 1998.

Further, on remand the director may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, specifically with respect to the presentation of the beneficiary's credentials,²⁷ provided that the director specifically outlines what the deficiencies are and gives to the petitioner and the beneficiary the opportunity to respond to the specific deficiencies discussed in the NOIR or the NDI/RFE.

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) to the petitioner and an NDI/RFE to the beneficiary, specifically outlining the inconsistencies in the record pertaining to where the beneficiary lived and worked in Brazil between 1996 and 1998 and the lack of evidence of the beneficiary's qualifications and of the petitioner's ability to pay, as discussed above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner and the beneficiary a reasonable opportunity to respond. Upon review and consideration of any 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 reinstate the approval of the petition at this time. Because the petition is not approvable, the petition is remanded to the director for the issuance of a NOIR and a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.

Amendment.”). However, since a fraud finding affects an alien's admissibility, USCIS will permit the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I. & N. Dec. 533, 536 (BIA 1988). Therefore, the beneficiary should be provided separate notice, and the response by the beneficiary will be considered herein.

²⁷ A finding of fraud and/or misrepresentation may be justified if the petitioner and/or the beneficiary submitted false or fraudulent documents with respect to proving the beneficiary's qualifications.