

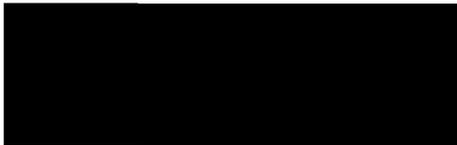
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

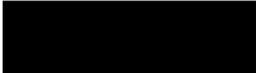
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Date: **NOV 10 2011**

Office: NEBRASKA SERVICE CENTER

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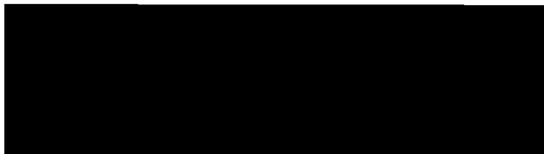
IN RE:

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: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. In connection with an investigation into the beneficiary's qualifications, the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). The director ultimately issued a notice of revocation (NOR) revoking approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is dry cleaners. It seeks to employ the beneficiary permanently in the United States as a supervisor, dry cleaners (dry cleaning manager) pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i) as a skilled worker. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to resolve inconsistencies concerning the beneficiary's employment history and therefore, had not established that the beneficiary is qualified to perform the duties of the proffered position. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On May 26, 2010, the AAO summarily dismissed the appeal. The AAO found that the petitioner failed to identify specifically an erroneous conclusion of law or statement of fact within the appeal. On October 26, 2010, the AAO reopened this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) and granted the petitioner 30 days to submit a brief. The AAO is entering a new decision on this matter. Its previous decision is hereby withdrawn.

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.

The AAO conducts appellate review on a *de novo* basis.¹ The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO

¹ In response to the AAO's request for evidence dated March 29, 2011, counsel requests that this matter be adjudicated on the merits of the director's decision to revoke the approved immigrant visa. Counsel claims that the AAO is acting well beyond the scope of the issues brought forth in the director's notice of intent to revoke. However, the AAO is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security

considers all pertinent evidence in the record, including new evidence properly submitted in response to the NOIR, upon appeal, in response to the AAO's notices of derogatory information (NDI) and request for evidence (RFE).²

In response to the AAO's request for a detailed explanation of the ownership of the petitioning company, counsel claims that the provision of this evidence is beyond the scope of the adjudication of the visa petition at issue herein because an approved labor certification has been issued by DOL and DOL has taken no action to call the veracity of its approved labor certification into question. Counsel further asserts that the AAO has embarked upon a "fishing expedition" in an effort to find anything which could support the revocation of the previously approved petition.

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The regulation at 20 C.F.R. § 656.30(d) provides:

pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. 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).

² 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).

During adjudication of the instant appeal, information has come to light that raises doubts about the petitioner's qualifications to file the petition and the credibility of the claim and evidence the petitioner presented to demonstrate the beneficiary's qualifying experience for the proffered position. The AAO served the petitioner a notice of derogatory information (NDI) on January 28, 2011 and a notice of derogatory information and request for evidence (NDI & RFE) on March 29, 2011. The AAO received the response from the petitioner through counsel on May 17, 2011.

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361.

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides in pertinent part that:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service 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

Therefore, United States Citizenship and Immigration Services (USCIS) has the authority to make a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered, and to determine whether a labor certification shall be invalidated if it finds fraud or willful misrepresentation of a material fact involving the labor certification application.

In the instant case, the record contains evidence that the beneficiary had an ownership interest in the petitioning entity. The AAO appropriately issued the NDI notifying the petitioner of the findings and granted the petitioner 45 days to rebut the information before it renders a new decision pursuant to 8 C.F.R. § 103.2(b)(16)(i). Counsel's assertion is misplaced.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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." 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).

Both *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) held that a NOIR should be 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.

The instant petition was initially approved by the director on December 5, 2007. In connection with results of a review reflecting conflicting statements made in the employment letter submitted on behalf of the beneficiary, the Form ETA 750 and the records, the director served the petitioner with a NOIR on October 9, 2009. The petitioner responded to the NOIR on November 12, 2009. However, in the NOR issued on January 22, 2010, the director determined that the petitioner's responses did not overcome the ground of ineligibility indicated in the NOIR and thus, failed to establish eligibility for the benefit sought. Accordingly the director revoked the approval of the petition.

On appeal, counsel asserts that the director failed to review the entirety of the record which contains abundant evidence of the beneficiary's extensive experience at [REDACTED] in Lima, Peru and [REDACTED] in Apopka, Florida. Counsel also maintains that the inconsistencies in the director's NOIR are scrivener's errors and honest mistakes that do not reflect any substantive conflicts in the record of proceeding.

Beneficiary's Qualifications

The key basis of the director's NOIR is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is March 6, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, Mandany v. Smith*, 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The job qualifications for the certified position of dry cleaning manager are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Supervise and coordinate activities of workers engaged in dry cleaning dry[mis] and pressing various types of apparel and household articles such as drapes, blankets, and linens.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	
High school	
College	0
College Degree Required	
Major Field of Study	

Experience:

Job Offered	2 [years]
(or)	
Related Occupation	

Block 15:
Other Special Requirements

Block 16:
Occupational Title of Person Who
Will Be Alien's Immediate Supervisor: President

Block 17:
Number of Employees
Alien Will Supervise: 0

As set forth above, the proffered position requires two years of experience in the job offered. The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has been working 40 hours per week for [REDACTED] located at [REDACTED] Orlando, Florida 32703 as a sales engineer from February 1998 to the present (i.e. the date he signed the Form ETA 750B on February 3, 2003). He also represented that he worked 40 hours per week for [REDACTED] in Lima, Peru as the president from May 1991 to January 1998. The beneficiary did not list any other employment on that form.

The record of proceeding also contains a Form G-325, Biographic Information Sheet, submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, signed on April 25, 2007 under a section eliciting information about the beneficiary's employment for the last five years, he represented that he worked for the petitioner as a supervisor from November 2001 to the present. In response to questions eliciting information about the beneficiary's last occupation abroad, he provided no information above a warning for knowingly and willfully falsifying or concealing a material fact.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record of proceeding does not reflect consistent, credible information in compliance with this regulation.

a. [REDACTED]

With the initial filing of the petition, the petitioner failed to submit any regulatory-prescribed evidence to establish the beneficiary's qualifying experience. On August 2, 2007, the director issued a request for evidence (RFE) requesting evidence the beneficiary obtained the required experience

before the priority date. In response to the director's RFE, the petitioner submitted an undated letter from [REDACTED] in Lima, Peru with its English translation [REDACTED] experience letter). The English translation of this letter states in pertinent part that:

I, [REDACTED] Peruvian Citizen, [REDACTED] hereby certify that [the beneficiary], bearer of ID [REDACTED] worked for our company from July 15th 1982 to October 30th 1989.

Among the many duties performed by [the beneficiary], I will mention the following:

... ..

Dry Cleaning Supervisor (1985 to 1988)
Supervision and control of the dry cleaning department and its 7 employees.

... ..

While the letter in foreign language bears an original signature, the record does not contain any documentary evidence showing that the company exists and operates, that the signature was from the writer himself, that the writer was the owner of the company, and that the original letter in Portuguese was written by the writer in Peru and mailed to the United States.

In response to the director's August 2, 2007 RFE, the petitioner submitted a letter dated August 31, 2007. The petitioner states that: "[The beneficiary]'s family put him through school with a Laundry business they owned in Lima, Peru for many years. During that time, [the beneficiary] helped his family business even after graduating until the late 80's." According to the petitioner's statement, it seems possible that [REDACTED] in Lima, Peru is a business owned and operated by the beneficiary's family and that the beneficiary helped to run the family business. However, the letter from [REDACTED] does not include any reference to the relationship between the beneficiary and the business.

The letter does not verify the beneficiary's full-time employment as a dry cleaning supervisor and therefore, the AAO cannot determine whether the beneficiary's experience as a dry cleaning supervisor at this company qualifies him to perform the duties of the proffered position set forth on the Form ETA 750. In fact, it is unlikely that the beneficiary's experience was full time as the letter indicates that he was in school at the same time. Therefore, this letter does not meet the regulatory requirements. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). This letter is not supported by the beneficiary's statements on Form ETA 750 and Form G-325A. Item 15, Work Experience, of the Form ETA 750B clearly instructs to list all jobs held during the past three (3) years and also list any other jobs related to the occupation for which the alien is seeking certification as indicated in Item 9. Despite the clear instructions, the beneficiary did not list this alleged job on the Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The beneficiary did not list this job on his Form G-325A as his last occupation abroad as required. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain independent objective evidence to resolve the inconsistency in this matter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* For the reasons discussed above, the AAO will not consider [REDACTED] experience letter as regulatory-prescribed evidence to establish the beneficiary's qualifying experience and therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date with [REDACTED] experience letter.

b. [REDACTED]

The beneficiary claims on the Form ETA 750B that he worked 40 hours per week for [REDACTED] in Lima, Peru as the president from May 1991 to January 1998. No evidence of this employment was provided with the initial filing of the petition. The director noted that the record contains a conflict regarding the location of the claimed past employment that undermined the veracity of the entire record of proceeding. On appeal and in response to the NDI, the petitioner claims that the incorrect information with respect to location was harmless error and does not reflect substantive discrepancies in the record of proceeding. The AAO disagrees.

The record does not contain any letters from the beneficiary's former or present employers as regulatory-prescribed evidence to establish that the beneficiary possessed at least two years of experience in the job offered prior to the priority date from the employment with other companies, such as [REDACTED] or the petitioner.

The record contains several letters concerning the beneficiary's qualifying experience written by people other than his former employers. In response to the director's November 2, 2007 notice of intent to deny (NOID), the petitioner submitted a letter dated August 26, 2007 from [REDACTED] Winter Park, Florida 32789 ([REDACTED] August 26, 2007 letter).³ This letter states in pertinent part that:

[REDACTED] has been handling our work since my involvement in this business in 1992. Jorge's education, experience, and understanding of biochemistry have proved to be an invaluable asset with regards to material tolerances, spotting concerns and issues of sanitation.

³ Counsel submitted a copy of this letter again in response to the director's NOIR.

As quoted above, this letter does not verify that the beneficiary worked for [REDACTED] it does not include the position the beneficiary filled and duties the beneficiary performed, and it does not indicate the beginning and ending dates of the beneficiary's employment with [REDACTED]. [REDACTED] is not in a position to issue a verification of the beneficiary's employment on behalf of the beneficiary's employer. Therefore, this letter does not meet the regulatory requirements, see 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A), and thus, the AAO will not consider [REDACTED] August 26, 2007 letter as regulatory-prescribed evidence to establish the beneficiary's at least two years of qualifying experience from the alleged employment with [REDACTED].

With respect to the beneficiary's employment with [REDACTED], counsel provided the following documents in the record: a letter dated February 10, 2003 from the petitioner addressed to DOL (the petitioner's February 10, 2003 letter), counsel's letter dated November 11, 2009 in response to the director's NOIR (counsel's response to the NOIR), undated declaration of [REDACTED] undated declaration of the beneficiary, and declaration of [REDACTED].

The petitioner stated in its February 10, 2003 letter that: "[The beneficiary] has been working in the field of dry cleaning as a [sic] president from May 1991 to January 1998 with [REDACTED] in Lima, Peru." This letter is not regulatory-prescribed evidence from the beneficiary's former or current employer to establish the beneficiary's qualifying experience. The letter does not indicate whether the writer is authorized to issue a verification letter for the beneficiary and the record does not contain any documentary evidence showing that the petitioner is the parent company of [REDACTED] or [REDACTED] is the subsidiary or trade name of the petitioner. The letter also provides inconsistent information about the location of employment. Records show that the beneficiary first entered the United States in October 1991 and voluntarily departed in 1998. In an undated declaration submitted in response to the director's NOIR, [REDACTED] on behalf of the petitioner states that the petitioner was aware of the beneficiary's work with [REDACTED] a company owned by [REDACTED] located in Apopka, Florida, from 1991 to 1998. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Despite numerous opportunities to resolve this issue, the record does not contain independent objective evidence to resolve the inconsistency in this matter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Therefore, the petitioner failed to establish that the beneficiary possessed at least two years of experience in the job offered through the employment with [REDACTED] with its February 10, 2003 letter.

Counsel further asserts in his response to the NOIR that the beneficiary worked continuously for [REDACTED] from 1991 through 1998, as evidenced by the supporting statements provided by [REDACTED], the parent company of [REDACTED]. As mentioned before, the record does not contain any evidence to support counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).⁴

Finally, undated declarations of [REDACTED] and the beneficiary, and a declaration of [REDACTED] provided in response to the director's NOIR are not affidavits as they were not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). Statements are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The declarations of Luty Sutton and the beneficiary are not dated.

In response to the AAO's March 29, 2011 NDI & RFE, counsel submitted another statement from [REDACTED]. As counsel stated in his response letter, "this statement is the exact same statement as was provided to the director in response to the NOIR but the only difference is that this statement is dated May 12, 2011." While the new statement is dated, it still does not constitute an affidavit as it was not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath.⁵

The beneficiary's declaration is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). While the petitioner claims that [REDACTED] is a company owned by the petitioner, the declaration of [REDACTED] states that the petitioner was aware of the beneficiary's work with [REDACTED] and the beneficiary's work with [REDACTED] in Apopka, Florida, was plainly communicated to [REDACTED]. The petitioner did not issue a verification letter or verify in the declaration that it is the parent company of [REDACTED] or provide any supporting documents. [REDACTED] states in his declaration that "I was clearly aware of [the beneficiary]'s experience with [REDACTED] in Apopka, Florida." However, he does not explain how he was clearly aware of the beneficiary's work experience with [REDACTED]. According to the record, [REDACTED] was just a preparer of the Form ETA 750 in this matter. He is not, and has never been, in a position to verify the beneficiary's work experience as required by the regulation. Therefore, the petitioner failed to establish that the beneficiary possessed

⁴ The AAO specifically asked about corporate structure/affiliation in its RFE, however, the petitioner refused to respond, stating that evidence has been provided in response to the director's alleged inconsistency as it relates to the physical location of [REDACTED] and this evidence provides an adequate basis in the administrative record supporting the conclusion that a scrivener's error was made in the drafting of the ETA 750.

⁵ The petitioner was put on direct notice of the specific requirements of an affidavit in the AAO's NDI and RFE.

at least two years of experience in the job offered from the employment with [REDACTED] with these declarations of [REDACTED] the beneficiary and [REDACTED]

The beneficiary claimed on the Form ETA 750B that he worked for [REDACTED] in Lima, Peru as the president from May 1991 to January 1998. However, as discussed previously, the regulation requires that all the qualifying experience or training must be in the form of letter from current or former employer or trainer. 8 C.F.R. § 204.5(g)(1). The beneficiary's statements on the Form ETA 750 or on any other forms do not meet the regulatory requirements and therefore, cannot be considered as regulatory-prescribed evidence. Furthermore, as the director pointed out in his NOIR, the beneficiary's statement provides inconsistent information regarding his alleged work experience with [REDACTED]. The beneficiary claimed on the Form ETA 750B that [REDACTED] is located in Lima, Peru. In response to the NOIR, counsel submitted declarations of [REDACTED] and [REDACTED] and asserted that the inconsistency on the Form ETA 750 concerning the beneficiary's work experience with [REDACTED] especially the location of the business, occurred due to [REDACTED] typographical error. Counsel did not explicitly claim ineffective assistance from [REDACTED].

A review of recognized organizations and accredited representatives reported in November 2010 by the Executive Office for Immigration Review at http://www.justice.gov/eoir/statspub/raroster_files/%20Recognized%20Organizations%20and%20Accredited%20Representatives.pdf and reported on July 5, 2011 at http://www.justice.gov/eoir/statspub/raroster_files/Accredited%20Representatives.pdf (accessed July 7, 2011), does not mention [REDACTED] or the Office of [REDACTED]. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Instead, [REDACTED] is included on the USCIS List of Individuals who are

⁶ However, ineffective assistance claim requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not contain any evidence to meet these requirements.

NOT Attorneys or Accredited Representatives. The people on this list are NOT eligible to represent applicants or petitioners in matters filed with USCIS. They are on this list because they have falsely claimed to be attorneys when they are not, falsely claimed to be accredited representatives when they are not, or they are notarios or immigration consultants who have been the subject of federal, state or local court action to stop their unauthorized practice of law or theft of fees for legal services they may not lawfully provide.

However, the declarations of [REDACTED] and [REDACTED] use the same language regarding the typographical error which contradicts counsel's assertion. The declaration of [REDACTED] states that: "[The beneficiary]'s work with [REDACTED] in Apopka, Florida, was plainly communicated to [REDACTED] who *likely made a typographical error in indicating on Form ETA 750 that [REDACTED] operated in Lima, Peru.*" The declaration of [REDACTED] also states that: "I was clearly aware of the beneficiary's experience with [REDACTED] in Apopka, Florida, and *likely made a typographical error in indicating on Form ETA 750 that the [REDACTED] in Lima, Peru.*" (emphasis added). The declarations show that the petitioner is not sure or did not claim that the preparer made a typographical error on the business location of [REDACTED] and that the preparer did not admit or acknowledge that he made a typographical error on the location of the business. Both of them use the term "likely made" for the typographical error and also use the same language "may have simply confused the time periods with [the beneficiary]'s previous 7 years of experience in Lima, Peru, with [REDACTED]"

Even though the beneficiary's statement on Form ETA 750B provided inconsistent information regarding the location of [REDACTED] the record does not contain any reasonable explanation why the petitioner stated in its February 10, 2003 letter addressed to DOL that: "[The beneficiary] has been working in the filed of dry cleaning an as [sic] president from May 1991 to January 1998 with [REDACTED] in Lima, Peru." The petitioner even alleged that [REDACTED] is a company owned by the petitioner. If the beneficiary's former employer were a company owned by the petitioner or the petitioner is the parent company of [REDACTED], it would be impossible for the petitioner to make the same typographical error as the preparer at the time of filing the Form ETA 750 with DOL. The record does not contain any independent objective evidence to resolve this inconsistency. *See Matter of Ho.*

c. Employment with the Petitioner or [REDACTED]

As the director indicated in his decision, the record also contains inconsistent information regarding the beneficiary's most recent or current employment. The beneficiary states on the Form ETA 750 that he worked as a sales engineer for [REDACTED] at [REDACTED] Orlando, Florida from February 1998 to at least February 3, 2003. The record contains a copy of Form ETA 750 filed by [REDACTED] at [REDACTED], Orlando, Florida on behalf of the instant beneficiary in the position of sales engineer with DOL on November 16, 1998 signed by [REDACTED] as the president of [REDACTED], and a copy of an approved Form I-129 H-1B petition [REDACTED] filed by [REDACTED] and approved by the Texas Service Center on April 30, 2001 for the beneficiary for a period

from January 3, 2001 to December 31, 2003. Counsel asserts that there is a typographical error in misspelling the petitioner's name as [REDACTED] on the H-1B petition [REDACTED] however, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The two entities have their own business location and different authorized legal representative to sign the documents on behalf of the company. Further, the record does not contain any explanation on the labor certification application filed by [REDACTED] for the beneficiary in 1998. Therefore, without independent objective evidence, the AAO cannot accept counsel's assertion and recognize that [REDACTED] and the petitioner in this matter are the same entity, and the beneficiary did not provide any explanation how he managed two jobs during the period from November 2001 to December 31, 2003 with the petitioner in Apopka, FL and with [REDACTED] in Orlando, FL. The record does not contain independent objective evidence to resolve this inconsistency between the beneficiary's own statements. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here the petitioner again claims a "typo" on a document and failed to support a statement with other evidence. Not only is this issue relevant to the beneficiary's employment history, but it also serves as yet another inconsistency that undermines the credibility of the record.

Even if the petitioner established that the two entities are the same, the beneficiary's experience as a sales engineer does not qualify him to perform the duties set forth on the Form ETA 750 as a sales manager of dry cleaners. Further, the record does not contain any letter from [REDACTED] as regulatory-prescribed evidence to establish the beneficiary's qualifying experience through this employment. Instead, the beneficiary himself provides inconsistent information regarding his employment for this period on the Form G-325 submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form signed on April 25, 2007, the beneficiary represented that he worked for the petitioner, [REDACTED] Apopka, FL 32703, [REDACTED] from November 2001 to the present. The record contains a copy of an approved H-1B petition [REDACTED] filed by the petitioner on behalf of the beneficiary and approved for a period from December 31, 2003 to November 19, 2004.

However, the petitioner verified that it had employed the beneficiary since 2001 in response to the director's November 2, 2007 NOID and submitted the beneficiary's W-2 forms for 2001 through 2006. These W-2 forms shows that the petitioner, [REDACTED] paid the beneficiary \$14,589.00 in 2001, \$19,800.00 in 2002, \$8,900.00 in

2003, \$15,440.00 in 2004, \$15,100.00 in 2005 and \$6,400.00 in 2006. While the petitioner's statement and these W-2 forms provide further inconsistencies with the beneficiary's statement on the Form ETA 750B that he worked for [REDACTED] as a sales engineer from February 1998 to at least February 3, 2003, the record does not contain any independent objective evidence to resolve this inconsistency. The petitioner did not provide any regulatory-prescribed letter as the beneficiary's former or current employer to establish the beneficiary's work experience with it for the period prior to the priority date. Considering the proffered wage in this matter is \$29,000 per year, the compensation amounts reflected on the W-2 forms for these years do not support that the beneficiary was employed by the petitioner on a full-time basis. The petitioner did not indicate the position in which the beneficiary performed his duties with that company. Therefore, the petitioner also failed to submit regulatory-prescribed evidence to establish the beneficiary's alleged experience through the employment with the petitioning company since 2001.

Furthermore, the petitioner's statement that the beneficiary worked for it since 2001 is also inconsistent with evidence in the record. USCIS records show that the petitioner had approved H-1B petitions for the beneficiary for the periods from February 31, 1998 to December 31, 2000⁷ and from December 31, 2003 to November 19, 2004,⁸ however, the beneficiary's H-1B status was approved for a period from January 3, 2001 to December 31, 2003 on the H-1B petition filed by [REDACTED].⁹ As previously discussed, the record does not contain independent objective evidence showing that [REDACTED] is the same entity as the petitioner. The record does not contain any reasonable explanation as to how the petitioner employed the beneficiary under another company's H-1B petition during the three years from January 3, 2001 to December 31, 2003. Further, the amounts reflected on the beneficiary's W-2 forms also raise doubts that the petitioner complied with H-1B regulations with respect to the full-time employment conditions and prevailing wage rate. Therefore, the petitioner failed to establish the beneficiary's qualifying experience through the employment with the petitioner or [REDACTED], by submitting a regulatory-prescribed letter from the beneficiary's employer, and also failed to resolve the inconsistencies in the record concerning the beneficiary's employment with the petitioner or [REDACTED] for the period from 2001 to the priority date with independent objective evidence.

Upon a careful review and discussion above, the AAO finds that the director correctly determined that the petitioner failed to establish the beneficiary's requisite two years of experience in the job offered with regulatory-prescribed evidence in this case and that the petitioner failed to resolve inconsistencies regarding the beneficiary's employment history with independent objective evidence, and thus, the petition was approved in error. The director had good and sufficient cause to issue the NOIR under section 205 of the Act. The director also appropriately concluded that the approval of the petition was revoked after reviewing and considering all new evidence submitted in response to

[REDACTED]

[REDACTED]

[REDACTED]

the NOIR. The AAO concurs with the director's conclusion that the experience letters submitted in the record could not be considered as regulatory-prescribed evidence to establish the beneficiary's qualifications. See *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). The court in *Matter of Ho* held that the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. Therefore, counsel's assertion on appeal that the director did not have good and sufficient cause to revoke the approval of the petition is misplaced.

In adjudication of the instant appeal, the AAO finds that the record does not contain regulatory-prescribed evidence to establish the beneficiary's qualifying experience and the inconsistencies in the record remain unresolved. This office served the petitioner with a NDI on January 28, 2011 and NDI & RFE on March 29, 2011 respectively. We notified the petitioner that evidence in the record, such as the [REDACTED] August 26, 2007 letter, the [REDACTED] experience letter and the three declarations, are insufficient to establish the beneficiary's qualifications and resolve the inconsistencies in the record. In these notices, the AAO also requested the petitioner to submit new or additional evidence, especially properly executed affidavits, documentary evidence to establish that [REDACTED] is the petitioner's subsidiary, trade name or affiliate, or both are the same entity, and lease agreement to prove the business location. Counsel submitted the same statement from [REDACTED] but dated May 12, 2011. Counsel also stated that the petitioner communicated with [REDACTED] in reference to providing an updated statement and has thus far been unable to obtain this statement. He also stated that if the petitioner is provided with an updated statement from [REDACTED] it will be forwarded to the AAO. Counsel dated his letter May 14, 2011, however, as of this date, several months later, the AAO has not received any updated statement from [REDACTED]. Counsel did not submit any new or additional evidence to establish the beneficiary's qualifications requested in the AAO's notices. The AAO clearly warned in the notices that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition, see 8 C.F.R. § 103.2(b)(14). The petitioner's failure to submit these documents cannot be excused. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, the petition must be denied, the director's revocation of the approval of the petition must be affirmed and the appeal must be dismissed because the petitioner failed to establish the beneficiary's qualifications with regulatory-prescribed evidence.

Bona Fide of Job Offer

Beyond the director's decision of revocation, the AAO has identified an additional ground of ineligibility which raises a doubt whether the petitioner's job offer to the beneficiary was a *bona fide* one at the time of filing the labor certification application and has been so since then. 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).

a. Inconsistency between the job offered and filled by the beneficiary under H-1B status

While the instant petition was filed for classification under a skilled worker category which requires two years of experience as minimum qualification, the petitioner claims to have been employing the beneficiary in the proffered position since 1998 under H-1B status. USCIS records show that the beneficiary had three H-1B petitions approved. Among them, one petition was filed by [REDACTED] and approved for a period from January 3, 2001 to December 31, 2003. The petitioner also claims that [REDACTED] is the same entity as the petitioner. The beneficiary's W-2 forms for 2001 through 2006 were all issued by the petitioner. The H-1B status is allocated to an alien who is coming temporarily to the United States to perform services in a specialty occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation. See sections 101(a)(15)(H) and 214(i)(1) of the Act. However, the record does not contain any documentary evidence or reasonable explanation how the proffered position became a skilled worker position requiring at least two years of experience when the instant immigrant petition was filed, while it has been a specialty occupation which requires a bachelor's degree as minimum requirements at the petitioning entity. Therefore, the AAO specifically requested in the NDI & RFE dated March 29, 2011 that the petitioner submit a complete copy of the I-129 nonimmigrant petitions for the beneficiary with explanation how the proffered position becomes a skilled worker position while the petitioner has consistently filed H-1B petitions on behalf of the instant beneficiary as a professional position for more than seven years. However, counsel refused to provide the requested documents and an explanation to establish that the petitioner's job offer to the beneficiary as a skilled worker was a realistic and *bona fide* one on the priority date and continues to the present. Therefore, the AAO finds that the petitioner failed to demonstrate that its job offer was a realistic and *bona fide* one in this respect.

b. Failure to establish that the beneficiary has enough employees to supervise

The Form ETA 750 offers a job as a dry cleaning manager and Item 13 describes the job duties as to supervise and coordinate activities of workers engaged in dry cleaning and pressing various types of apparel and household articles such as drapes, blankets, and linens. Supervising employees is a very important part for a supervisory or managerial position. However, the petitioner indicated on item 17 of the Form ETA 750A that the beneficiary will not supervise any employees. This inconsistency causes a doubt whether the petitioner had a supervisory position existing and open to U.S. citizens when it filed the labor certification application. In the RFE dated August 2, 2007, the director questioned whether the petitioner with three employees needs a supervisor for such a small workforce. In response to the director's RFE, the petitioner informed the director that the petitioner had four employees and the beneficiary will be actually supervising all the four employees instead of three. The instant immigrant petition was filed on May 2, 2007. The petitioner claimed on the Form I-140 that it employed three workers then. The record does not contain any explanation or evidence showing that the petitioner hired an additional employee during the three months. The petitioner checked the box that the position is not a new position on the form and also claims that it has been

employing the beneficiary in the proffered position. However, the petitioner did not provide an explanation as to how the petitioner has four employees including the beneficiary and the beneficiary will also supervise four employees in the proffered position. The record contains the petitioner's audited financial statements for 2003 through 2006. The audited financial statements show that the petitioner paid salaries of \$8,900 in 2003, \$15,440 in 2004, \$15,100 in 2005 and \$6,400 in 2007. The total amounts of salaries the petitioner paid to its employees do not support the petitioner's claim that it ever had three or more employees on its payroll. The salaries reflected on the financial statements exactly match with amounts reflected on the beneficiary's W-2 forms for 2003 through 2006. Therefore, the evidence in the record demonstrates that the petitioner had only the beneficiary as an employee during the years 2003 through 2006 and the evidence does not support the petitioner's statement that the beneficiary will supervise four employees in the proffered position. The petitioner failed to establish that the job offer to the beneficiary as a supervisor was realistic and bona fide in 2003 and continues through 2006 because it failed to demonstrate that it ever had four employees other than the beneficiary himself to be supervised by the beneficiary.

c. Failure to verify the ownership relationship between the petitioner and the beneficiary

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for a position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In his September 12, 2007 RFE, the director requested additional evidence of the beneficiary's financial and personal relationship with the petitioner and the petitioner's owner, [REDACTED]. In response, the petitioner submitted a letter from [REDACTED] explaining the beneficiary's relationship and copies of corporate documents filed with the State of Florida. According to the letter dated October 22, 2007 from [REDACTED] and the copies of annual reports filed with the State of Florida, the petitioner was founded on December 18, 1991 and named [REDACTED] by the beneficiary and [REDACTED] after a few years, both the beneficiary and [REDACTED] sold their interest in the corporation; and [REDACTED] hired the beneficiary back to help care for the business. The petitioner's annual report for 2001 was filed by the beneficiary, and the annual reports for 2005 through 2007 were filed by [REDACTED] but the petitioner did not file annual reports for 2002 through 2004. The director determined that the submitted evidence did not completely resolve concerns regarding the relationship between [REDACTED] and the beneficiary and therefore, issued the November 2, 2007 NOID based on this ground. In response, the petitioner submitted recruitment documentation including the job posting newspaper advertisements,

recruitment report, the beneficiary's W-2 forms for 2001 through 2006, the [REDACTED] August 26, 2007 letter and a copy of Form 1099 for 2006.

The AAO finds that the response to the director's NOID does not verify the ownership relationship between the petitioner and the beneficiary. The evidence submitted in response is still unclear as to whether and when the beneficiary sold all his interests in the corporation. The fact that the beneficiary did not file the annual reports on behalf of the petitioner since 2002 itself does not establish that the beneficiary no longer has an ownership interest in the petitioning corporation. In addition, the copy of the Form 1099 submitted in response to the director's NOID shows that in 2006 the beneficiary still obtained compensation and 1099 forms on behalf of the petitioner. The submitted recruitment documentation demonstrates that the petitioner conducted the required recruitment efforts as all other applications, however, the recruitment document does not verify whether the beneficiary had an ownership interest in the petitioning corporation as of the priority date and fails to demonstrate that DOL was aware of such relationship between the petitioner and the beneficiary if any. Therefore, the director initially approved the petition in error because the petitioner failed to resolve the possible continuing ownership interest in the petitioning corporation and also failed to submit verifiable evidence that DOL was cognizant of that relationship when it certified the instant labor certification.

In the March 29, 2011 NDI & RFE, the AAO requested the petitioner to submit the sale and purchase agreement signed by the beneficiary by which the beneficiary delivered all his interests, rights or obligations in the petitioning corporation, and the petitioner's federal tax returns with all schedules and attachments for 2003 through the present and also verify whether there is a familiar relationship between the beneficiary including his family members and [REDACTED] her family members or any other shareholders or owners and their family members. These documents would demonstrate the petitioner's organizational structure, ownership and shareholders and further illustrate whether the beneficiary had an ownership interest in the petitioning corporation at any stage of the labor certification application and immigrant petition processing. Without these documents, the AAO cannot conclude that the petitioner has established that the job offer the petitioner extended to the beneficiary was a realistic and bona fide one at the time of filing the labor certification and continue to the present. If the beneficiary had an ownership interest in the petitioner, the job offer is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*. However, counsel claimed that the provision of the evidence is beyond the scope of the adjudication of the visa petition because an approved labor certification has been issued by DOL and DOL has taken no action to call the veracity of its approved labor certification into question.

However, DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien

is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

This office notes that the director did not discuss the petitioner's failure to clarify the relationship between the petitioner and the beneficiary and further failure to establish the bona fide of the job offer as another reason to revoke the approval of the petition. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner's failure to submit the evidence requested in the AAO's RFE cannot be excused. The appeal must be also dismissed on this ground. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). The AAO will dismiss the appeal on the ground of the petitioner's failure to verify the relationship between the petitioner and the beneficiary because the petitioner refused to submit a meaningful response to the line of inquiry set forth in the AAO's RFE.

Finding of misrepresentation and invalidation of the labor certification application

A Form ETA 750 is subject to invalidation by USCIS if it is determined that a willful misrepresentation of a material fact was made in the labor certification application. See 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

The beneficiary's qualifications and the existence of a *bona fide* job offer are material facts relevant to eligibility for approval of a labor certification application and an immigrant petition. The petitioner has failed to establish that the job offered to the beneficiary is a skilled worker despite the fact that the beneficiary has been working in the proffered position in H-1B status for past seven years. The petitioner has failed to establish that the petitioner had sufficient employees for the beneficiary to supervise in the proffered supervisory position. The petitioner has failed to verify the relationship between the petitioner and the beneficiary. Therefore, the petitioner failed to establish that the job offer to the beneficiary is realistic.

The AAO finds that by concealing his employment history in the United States and abroad and providing false statements about the beneficiary's employment, the beneficiary has sought to procure an immigration benefit through willful misrepresentation of material facts. Any finding of willful misrepresentation as a result shall be considered in any future proceeding where admissibility is an issue. Accordingly, we will invalidate the Form ETA 750 (P05202-38105) pursuant to 20 C.F.R. § 656.30(d).

The petition must be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The AAO finds that the director had good and sufficient cause to issue the NOIR and upon receipt of the response to revoke the approval of the petition under section 205 of the Act. The AAO also finds additional good and sufficient cause to revoke the approval of the petition under section 205 of the Act. Accordingly, the instant appeal will be dismissed and the director's revocation will be affirmed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.

FURTHER ORDER: The AAO finds that the petitioner willfully misled DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's misrepresentation.

FURTHER ORDER: The AAO further finds that the beneficiary knowingly misrepresented a material fact about his qualifications for the proffered position in an effort to procure a benefit under the Act and the implementing regulations.