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



U.S. Citizenship
and Immigration
Services

B6

Date: NOV 14 2011

Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On March 8, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on May 2, 2002. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on May 5, 2009, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval to the Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely filed. Following the rejection of the appeal, the petitioner filed a motion to reopen and a motion to reconsider a decision. The motion will be granted, and the appeal will be rejected and remanded for the director to consider as a motion.

On the motion to reopen/reconsider, counsel for the petitioner urges the AAO to reconsider its previous decision and accept the late appeal due to the courier’s delay in delivering the mail. Counsel states that his office mailed the appeal on May 21, 2009, using the U.S. Postal Service Express Mail, which, at the time, the U.S. Postal Service guaranteed that the mail would be delivered by 12:00 noon on May 22, 2009. For unexplained reasons, counsel indicates that the U.S. Postal Service did not deliver the mail until May 26, 2009, two days after the filing deadline, and four days after the date the mail should have been delivered. The following evidence is submitted to demonstrate the veracity of the assertions:

- Copies of the mailing slip and the receipt showing that counsel mailed the appeal via U.S. Postal Service Express Mail and that the package was received by the U.S. Postal Service on May 21, 2009 at around 4:30 pm;
- A copy of the U.S. Postal Service “Track and Confirm” page showing that the package shipped on May 21, 2009 was received on May 26, 2009; and
- Proof of receipt by USCIS (signature of recipient).

Further, counsel notes that there is precedent for allowing a late filing due to failure of a mail courier to deliver a package, in which (a) the appellant used the proper courier, and (b) had the courier performed its service adequately, the filing would have been timely. *See Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005).

The AAO does not have jurisdiction to consider an untimely filed appeal. An untimely appeal may be treated as a motion if it meets applicable requirements specifically set forth at 8 C.F.R. § 103.5(a).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial

decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In this case, the appeal was untimely filed and must be rejected. The motion to reopen/reconsider, however, will be granted, and the appeal will be remanded for the director to consider as a motion.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).² As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on May 2002 by the VSC, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and further found that the petitioner had obtained the approval of the labor certification through fraud or material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the petitioner followed the DOL recruitment procedures in recruiting U.S. workers for the position offered, and that the director's conclusion that the petitioner obtained the approval of the labor certification through fraud or material misrepresentation is unfounded and not based on the evidence submitted, but rather based on innuendo and guilt by association (with [REDACTED]).

Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had the petitioner not followed the DOL recruitment requirements.

Though not raised by counsel, as a procedural matter the director's decision to revoke the approval of the petition under the authority of 8 C.F.R. § 205.1 is erroneous. The regulation at 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

¹ A review of the petitioner's website (<http://www.polcarisbridgwayeinn.com>) shows that the petitioner is a hotel/restaurant (last accessed October 20, 2011).

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

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

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. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director should reconsider the decision under that provision.

In reviewing the motion, the director should first determine whether his office has adequately advised the petitioner of the basis for revocation of approval of the petition.

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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).

This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General*. Any [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 [USCIS]. (emphasis added).

Further, 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.

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

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa

petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

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

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

The director advised the petitioner in the NOIR dated January 9, 2009 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.⁴ The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on January 9, 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.

While the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director 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

⁴ The AAO notes that the DOL approved the labor certification filed on behalf of an alien beneficiary named "Romilde Gomes." The director accepted the substitution of the beneficiary when he adjudicated the petition. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution is permitted.

of derogatory information, the director, upon adjudicating the motion, should reconsider whether to issue a new NOIR, without reinstating the approval of the petition, since the petitioner has not established its eligibility for the preference visa.

The director should also, in adjudicating the motion, consider whether his office has 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's previous counsel [REDACTED] submitted the following evidence:⁵

- A copy of a tear sheet from the *Boston Sunday Herald* advertisement, published on Sunday, January 21, 2001; and Sunday, October 21, 2001;⁶ and
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon review of the evidence submitted, the director noted several deficiencies in the record regarding the recruitment efforts. First, the director indicated that the petitioner failed to submit copies of the in house postings, or alternatively, an affidavit indicating that the petitioner in fact did comply with that internal posting requirement. Second, the director noted that the submission of the copy of the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* showed that [REDACTED] paid for and created the advertisement for the job offered.

The director should reconsider his conclusion. The letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* by itself does not show that [REDACTED] created and paid for the job advertisement or interviewed U.S. candidates. That letter only stated that [REDACTED] placed an order to post the advertisement in the *Boston Herald* newspapers and online at www.jobfind.com for 30 days and provided the cost involved.⁷ It stated nothing about who paid for the advertisement or who interviewed interested applicants. The record contains no evidence showing that the beneficiary or [REDACTED] either paid for the job advertisement or interviewed or considered U.S. candidates for the position.

Under the DOL regulations, the attorney for the beneficiary may not interview or consider job applicants for the position, but are not prohibited from assisting the petitioner throughout the labor

⁵ This evidence was submitted in response to the director's Notice of Intent to Revoke (NOIR) dated January 9, 2009.

⁶ Both tear sheets show that the petitioner was trying to hire cooks.

⁷ No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

certification process, including with the advertising process. See 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2001)⁸ and 20 C.F.R. § 656.20(b)(1) (2001).⁹

Therefore, the director's conclusion that the beneficiary or ██████████ 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 current facts of record.

Further, concerning the petitioner's failure to submit a copy of the in-house posting, the director in the NOIR did not notify the petitioner to specifically submit any copies of the results of the recruitment efforts, including the copy of the in-house posting. As noted above, 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*, *id.*

Additionally, there was no requirement to keep such records. As such, USCIS may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.¹⁰ The AAO

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) at the time of recruitment stated:

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

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

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

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

¹⁰ The AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in

acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Moreover, the DOL at the time the petition was filed accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2003). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Employment Service 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 and 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) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: 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) (2003).

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).

Here, the record reflects that the petitioner signed the Form ETA 750 on January 5, 2001. Based on the evidence submitted, the petitioner first advertised the position on Sunday, January 21, 2001 and then again on October 21, 2001. The Form ETA 750 was filed with the DOL for processing on April 11, 2001. The DOL approved the Form ETA 750 on February 13, 2002.

In a statement dated June 18, 2009 [REDACTED] the owner of [REDACTED] [REDACTED] stated that the company (the petitioner) advertised the available position in local newspapers and posted the opening in the office for all employees to see for over two weeks. He also indicated without further details that he complied with all the government requirements and procedures and that the entire process was legitimate, true, and in accordance with the law.

response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the petitioner's statement in box 21 of the Form ETA 750A, it appears that the petitioner conducted the recruitment under the reduction in recruitment, in that he attested to having completed recruitment by stating in box 21 in response to a question, requesting the petitioner to submit the efforts and the results of recruitment, "Newspaper advertisements, internal posting, word of mouth, and www.jobfind.com."

The evidence submitted in response to the NOIR dated January 9, 2009, however, indicates that the petitioner continued to conduct recruitment well after the Form ETA 750 was filed, which is not in compliance with the DOL labor certification requirements. The ambiguity in the evidence calls into question the *bona fides* of the recruitment process.

On motion, should the director issue a new NOIR, he should request the petitioner to outline what specific steps it took to conduct good faith recruitment, e.g. whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name; ask the petitioner how many candidates were interviewed; and if so, whether and how it conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. The director should specifically ask the petitioner for copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.¹¹

The director should also ask the petitioner to explain why it signed the petition on January 5, 2001 stating that the position had been recruited for, when advertising had not begun. The timing of the petitioner's signature prior to recruitment efforts suggests that prior counsel may have been impermissibly involved in the recruitment effort, for example if the petitioner merely signed the petition and turned the matter over to [REDACTED] to conduct recruitment, interview applicants, or decide not to interview applicants.

On appeal, counsel contends that the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because M [REDACTED] led 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.

¹¹ As there was no requirement to keep such records, USCIS may not make an adverse finding against the petitioner if it claims it does not have the documentation. However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

With respect to the director's finding that the petitioner engaged in fraud and/or material misrepresentation, if the petitioner or its previous counsel 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 at this time that the petitioner failed to follow the DOL recruitment procedures. Similarly, there has been insufficient development of the facts to conclude at this time that the petitioner and/or ██████████ engaged in fraud or material misrepresentation.

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

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

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

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

¹² It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found

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

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

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

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

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.

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.

Here, as noted above, the evidence of record currently does not support the director's finding of fraud or willful misrepresentation in connection with the labor certification process. On motion, the director should consider reopening the petition to issue a new NOIR to give the petitioner the opportunity to provide sufficient documentation to show that the recruitment of U.S. workers was conducted in accordance with DOL regulation and policy particularly in light of the signature anomalies outlined above. Further, the petition is not approvable because the record does not contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date. Nor does the record include sufficient evidence to show that the beneficiary is qualified to perform the services of the proposed employment as of the priority date. On motion, the director should consider the issuance of a new NOIR, in accordance with 8 C.F.R. § 205.2(a), based on good and sufficient cause.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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

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

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 11, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.¹³

¹³ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or

In this case, a review of USCIS electronic databases reveals that since 2001 the petitioner has previously filed one other immigrant petition (Form I-140) for an alien beneficiary other than the beneficiary in the instant case. The table below shows the name of the alien beneficiary, his status (whether he is a U.S. Legal Permanent Residence (LPR) or not), and whether the petition filed on his behalf was approved, revoked, or denied:

Receipt Number	Beneficiary's Name (First Name + Last Name)	Filing Date	Decision	Date of the Beneficiary's Adjustment to LPR
[REDACTED]	[REDACTED]	09/26/01	Approved	09/19/07

If the instant petition were the only petition the petitioner filed, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, that is not the case here. In this case, the petitioner has filed one other petition in the past. Unless the petitioner disputes this fact, the petitioner, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but also for the other immigrant visa beneficiary until each beneficiary receives his or her legal permanent residence (LPR).

We acknowledge the receipt of the following evidence:

- A copy of the beneficiary's Form W-2 for 2001.

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until each beneficiary, including the beneficiary in the instant case, received or receives his or her permanent residence.

On remand, the director may issue a NOIR requesting the petitioner to demonstrate the continuing ability to pay the proffered wage from the priority date until the beneficiary ported to work for another similar employment. Therefore, to meet the burden of proving by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date, the director, in the new NOIR, should, at a minimum, request the following additional evidence:

- Copies of the petitioning organization's federal tax returns, annual reports, and/or audited financial statements for the years 2001 through 2010; and
- Copies of the beneficiary's W-2s, 1099-MISCs, paystubs, or other documents that the

more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

- petitioning organization issued to the beneficiary for the years 2002 through 2010; and
- Copies of the other beneficiary's W-2s, 1099-MISCs, paystubs, or other documents that the petitioning organization issued to that beneficiary for the years 2001 through 2007.

Further, in adjudicating the instant appeal, we also observe that the petitioning organization [REDACTED] has been dissolved as of May 31, 2007, and has been replaced by a new entity called [REDACTED].¹⁴ If the petitioning business has been dissolved and is no longer an active business, the petition and its appeal to this office have become moot,¹⁵ in which case, the petition shall be dismissed as moot.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Thus, for instance, if [REDACTED] the new entity – acquired or changed the structure [REDACTED] the new entity must demonstrate that the beneficiary would still be employed as a cook upon the change of structure of the business or the acquisition. In addition, both entities (the predecessor and the successor) must show the ability to pay the proffered wage. Furthermore, the new entity must be able to describe and document the transfer and assumption of the ownership of [REDACTED]. Evidence of transfer of ownership must show that the successor (the new entity) not only purchased assets from the predecessor [REDACTED] but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The new entity as the successor entity must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the

¹⁴ We find this information from the official website of the Secretary of the Commonwealth of Massachusetts: <http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>.

¹⁵ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Concerning the beneficiary's qualifications for the position, the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before 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.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 11, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all kinds of dishes." The DOL determined that the job description and title are consistent with the DOT (Dictionary of Occupational Titles) job code 313.361-014, Cook (hotel and restaurant).¹⁶ Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on October 23, 2001, he represented that he worked 35 hours a week at a restaurant in Brazil called [REDACTED] as a cook from February 1995 to October 1997. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment from Maximines de Oliveira Prado, Owner, stating that the beneficiary worked at [REDACTED] from February 1995 to October 1997.

In response to the director's Notice of Intent to Revoke (NOIR) dated January 9, 2009, counsel for the petitioner at the time [REDACTED] submitted the following evidence:

¹⁶ The DOT job code can be accessed online at <http://www.occupationalinfo.org/> (last accessed October 20, 2011).

- A letter of employment dated February 17, 2009 from [REDACTED] the owner of [REDACTED] (the new entity) stating that the beneficiary has been working as a cook for the petitioner since April 1998; and
- A letter dated February 17, 2009 from the beneficiary stating that he did work for [REDACTED] as a cook from February 1995 to October 1997, and that he could no longer contact the establishment and believed the business had closed.

In adjudicating the appeal, the AAO finds several problems in the record pertaining to the beneficiary's alleged prior employment as a cook in Brazil. On the Form ETA 750, part B, we note that the beneficiary did not list his employment with the petitioner.¹⁷ Further, On the Form G-325, the beneficiary did not list any employment under a section eliciting information about his last occupation abroad. Additionally, none of the evidence submitted to prove that the beneficiary had at least two years work experience as a cook before April 11, 2001 complies with 8 C.F.R. § 204.5(g)(1).¹⁸ The letter of employment from [REDACTED] Owner, does not include the address (location) of the business and a specific description of the duties performed.¹⁹

On remand, the director may request the following evidence pursuant to 8 C.F.R. § 103.2(b)(8)(iv):

- Copies of the beneficiary's Forms W-2, 1099-MISC, paystubs, payroll records, or other evidence to show that Bridgeway Inn has been employing the beneficiary since 1998; and
- Copies of the beneficiary's paystubs, payroll records, tax documents, or financial statements or other evidence, i.e. Brazilian booklet of employment and social security, to show that the beneficiary was employed at [REDACTED] from February 1995 to October 1997; or
- A copy of a government-issued identification card reflecting where the beneficiary lived and worked between 1995 and 1997.

¹⁷ The Form ETA 750B specifically instructs the beneficiary to "[l]ist all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."

¹⁸ The regulation at 8 C.F.R. § 204.5(g)(1), in pertinent part, states:

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. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

¹⁹ Simply stating that the beneficiary worked as a cook does not establish the reliability of the assertions.

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, provided that the director specifically outlines what the deficiencies are with respect to the labor certification, points out how the petitioner or the petitioner's previous counsel () may have engaged in fraud or misrepresentation in the labor certification process, and gives the petitioner the opportunity to respond to the specific deficiencies in response to the NOIR. For instance, a finding of fraud and/or misrepresentation may be justified if the petitioner intentionally and knowingly submitted the Form ETA 750 before the recruitment efforts were completed, if the petitioner's agent/counsel impermissibly participated in the consideration of U.S. applicants for the job (by interviewing the prospective applicants), or if the petitioner did not authorize the filing of the labor certification application and the petition through its signature and the petitioner intentionally and knowingly failed to disclose such information, and such omission was material to the approval of the labor certification.

In summary, the director's decision to revoke the approval of the petition is remanded for consideration as a motion. Although the director erred in concluding that the initial labor certification application was not obtained in accordance with DOL law and procedure, the approval of the petition, however, may not be reinstated under the facts of record. On remand, should the director find that a new NOIR should be issued the director should specifically outline the inconsistencies in the record pertaining to the anomalies in the recruitment process as discussed above, where the beneficiary lived and worked in Brazil between 1996 and 1998 and the lack of evidence of the petitioner's ability to pay. 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 motion is granted. The appeal is rejected and remanded for the director to consider as a motion.