

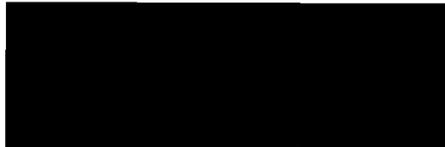
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

**PUBLIC COPY**



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Date: **NOV 28 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 February 23, 2005, 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 March 18, 2005. However, the Director of the Texas Service Center (“the director”) revoked the approval of the immigrant petition on July 22, 2009, and the petitioner subsequently appealed the director’s decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a restaurant.<sup>1</sup> It seeks to permanently employ the beneficiary 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).<sup>2</sup> As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in March 2005, but the approval was revoked in July 2009. The director found that the petitioner did not follow the Department of Labor (DOL) recruitment requirements and that it obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause to revoke the approval of the petition. Specifically, counsel states that the director’s Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. Citing *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988), counsel contends that where the allegations in the NOIR are conclusory, speculative, or irrelevant they do not provide good and sufficient cause and cannot support the issuance of a NOIR. Further, counsel cites *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1988) and states that a NOIR which is based on an unsupported statement, or unsupported presumption is invalid.

Counsel further claims that the director’s finding of fraud or material misrepresentation against the petitioner, for instance, is not supported by the evidence of record. Counsel states that the

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<sup>1</sup> A review of the petitioner’s website ([http://\[REDACTED\]](http://[REDACTED])) shows that [REDACTED] is a trade name for a chain restaurant in the [REDACTED] area. It operates in five states: Connecticut, Massachusetts, Maine, New Hampshire, and Rhode Island. (Last accessed September 19, 2011).

<sup>2</sup> 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.

director included no specific evidence of fraud or material misrepresentation or information relating to the petitioner, petition, or documents in either the NOIR or the Notice of Revocation (NOR). Ultimately, counsel concludes that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

Preliminary, as a procedural matter, the AAO determines that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues raised by counsel on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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).

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

<sup>4</sup> 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).

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

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (emphasis added).

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

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

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

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

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

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

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also

specifically stated that in many of the other petitions filed [REDACTED] the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since [REDACTED] filed the petition in this case, the director on March 25, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director also did not specifically state that the petitioner needed to submit, for instance, copies of the advertisements or other evidence to show that the petitioner complied with the DOL recruitment procedures. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

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

In response to the director's NOIR dated March 25, 2009 Mr. Dvorak (counsel for the petitioner at the time) submitted the following evidence:

- A letter dated April 3, 2009 from [REDACTED] director of [REDACTED] Ltda. ( the beneficiary's former employer in Brazil), who declared that the beneficiary used to work as a cook at [REDACTED] from January 1, 1998 to May 30, 2000;
- A CNPJ printout of [REDACTED] showing that the business was officially registered with the Brazilian authority on 25/09/1990 (September 25, 1990);<sup>5</sup>

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<sup>5</sup> Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ [REDACTED] is similar to the federal tax ID or employer ID number in the United States. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

- A letter dated April 20, 2009 from [REDACTED] (the beneficiary's former employer in Brazil), stating that the beneficiary was its employee from May 15, 1996 to October 30, 1997;
- A CNPJ printout of [REDACTED] showing that the business was officially registered with the Brazilian authority on 09/06/1972 (June 9, 1972);
- A copy of the beneficiary's booklet of employment and social security showing that the beneficiary was employed by [REDACTED] as a cook from January 1, 1998 to May 30, 2000 and by [REDACTED] as a cook from May 15, 1996 to October 30, 1997;
- Pictures of [REDACTED] showing the kitchen, dining area, and the building; and
- A letter from [REDACTED] dated April 13, 2009 stating that the beneficiary currently works as a cook for [REDACTED]

Based on the evidence submitted, the director determined that the petitioner failed to comply with the DOL recruitment requirements, because the petitioner, among other things, failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. The director also noted that the petitioner signed the Form ETA 750 on January 31, 2001, and that the ads ran almost two years after the signing of the ETA 750. For this reason, the director concluded that the petitioner could not have claimed that all recruitment efforts were already completed (and that there was no interested applicant), when the petitioner actually had not yet begun recruiting.

On appeal, counsel for the petitioner submits the following evidence to demonstrate that the petitioner fully complied with the DOL recruitment requirements and that the beneficiary possessed the requisite work experience in the job offered before the priority date:

- Copies of the newspaper tear sheets for the position offered, published in the *Boston Sunday Herald* on the following days and dates: Sunday, January 28, 2001; Sunday, February 4, 2001; Sunday, February 25, 2001; and Sunday, March 4, 2001;<sup>7</sup> and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* addressed to Mr. [REDACTED] stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon *de novo* review, the AAO finds that director erred in faulting the petitioner for failing to submit the in-house posting notice. As stated earlier, the director in the NOIR did not specifically notify the petitioner to submit copies of the in-house postings to show that it complied with the DOL recruitment procedures. Without specifying or making available

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<sup>6</sup> [REDACTED] in response to the NOIR, stated that the beneficiary had ported from her I-140 employer to [REDACTED] pursuant to 204(j) of the Act. The AAO will not address the portability issues here, as they are only relevant in the adjudication of the Application to Register Permanent Residence or Adjust Status (Form I-485).

<sup>7</sup> The AAO notes that all of the ads state, "Cooks."

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.*

Second, contrary to the director's conclusion, the advertisement was not run almost two years after the petitioner signed the Form ETA 750. The record shows that the petitioner signed the Form ETA 750 on January 31, 2001. Based on the evidence submitted above, the petitioner advertised the position in the newspaper (*the Boston Herald*) on January 28, 2001; February 4, 2001; February 25, 2001; and March 4, 2001 – within a few days/weeks before and after the petitioner signed the Form ETA 750.

Additionally, the AAO acknowledges that before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010). Therefore, since there was no requirement to keep recruitment records at the time the petitioner applied for labor certification with the DOL in February 2001, USCIS may not make an adverse finding against the petitioner, if, for instance, the petitioner claims it no longer has the documentation.<sup>8</sup>

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [REDACTED] filed the petition in the instant proceeding. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or 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 currently establish at this time that the petitioner failed to follow the DOL's recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or [REDACTED] 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

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<sup>8</sup> 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.

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.<sup>9</sup>

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

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<sup>9</sup> It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

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

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

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

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

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

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

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

In this case, as noted above, the factual record does not disclose that the petitioner and/or [REDACTED] engaged in material misrepresentation with respect to the recruitment process.<sup>10</sup> On remand, the director should in his or her NOIR advise the petitioner that the DOL issued the certification on the premise that the DOL recruitment procedures were followed. If the petitioner or [REDACTED] submitted false statements or fraudulent documents with respect to the recruiting procedures, e.g. if, for example, the petitioner did not perform the essentials of recruitment such as interviewing and consideration of candidates for the position; or if, for example, upon consideration of the petitioner's response to the new NOIR, the director finds that the petitioner falsified Mr. [REDACTED] role in the recruitment process, then the director may find that the recruitment procedures were not followed; that the petitioner and/or its counsel engaged in fraud or material misrepresentation and that the labor certification is invalid; and that the beneficiary is inadmissible on the true facts. Similarly, if the DOL relied upon false or fraudulent documents submitted by the petitioner or previous counsel in determining the application's approval, the resulting labor certification was erroneous and would be subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Further, as a third preference employment-based immigrant, the petitioner was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. If on the true facts the labor certification was obtained through fraud or misrepresentation, and is thus invalid, then the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation relating to the recruitment procedures is material.

If the DOL relied upon false or fraudulent documents submitted by the petitioner or Mr. [REDACTED] or by the beneficiary, which is not currently reflected in the record of proceedings, then the DOL would have been unable to make a proper investigation of the facts when determining whether the labor certification application should be approved, because the petitioner or its previous counsel, or the beneficiary would have shut off a line of relevant inquiry. In such a case, if the DOL had known the true facts, it would have denied the employer's labor certification, as the petitioner would not have complied with DOL's recruitment requirements, and there would have been an invalid test of the labor market or the beneficiary would not have qualified to perform the duties of the job.<sup>11</sup> In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's or previous counsel's,

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<sup>10</sup> The current record also does not indicate that the beneficiary engaged in fraud or material misrepresentation in the presentation of her credentials to the petitioner and through the petitioner, to USCIS.

<sup>11</sup> *See*, 20 C.F.R. § 656.2, which provides that the role of the DOL in the permanent labor certification process is to determine that there are not sufficient United States workers, who are able, willing, qualified and available to take the position at the time of the alien's application and admission to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The DOL executes this role through a test of the labor market where the alien beneficiary will perform the work.

or the beneficiary's misrepresentation would be material under the second and third inquiries of *Matter of S & B-C*.

The evidence of record currently does not have a sufficiently developed factual record to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process or the presentation of the beneficiary's credentials. Thus, the director's finding of fraud or misrepresentation is withdrawn.

In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation against the petitioner.

Nevertheless, the AAO does not reinstate the approval of the petition, as there are anomalies in the recruitment process which cast doubt on the *bona fides* of the recruitment. Before 2005, the DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. See 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. See 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. See 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. See 20 C.F.R. §§ 656.21(i)-(k).

In this case, it appears that the petitioner conducted the recruitment under the reduction in recruitment process. Three out of four advertisements placed in the newspaper (*Boston Sunday Herald*) for cooks were placed before the date of filing of the Form ETA 750. In addition, at box 21 of the Form ETA 750, part A, the petitioner indicated that recruitment had been conducted by "newspaper advertisements, internet, word of mouth, etc."

However, there are anomalies in the recruitment process. A review of the record reveals that the petitioner signed the Form ETA 750 on January 31, 2001. By signing the Form ETA 750, the petitioner essentially stated under penalty of perjury that the recruitment was complete. If the petitioner conducted the recruitment under the reduction in recruitment procedures, the petitioner must have completed the recruitment efforts and declared that its efforts to recruit U.S. workers yielded no result by January 31, 2001 (the date the petitioner signed the Form ETA 750). Based on

the evidence submitted, the petitioner placed three other advertisements after it signed the Form ETA 750 on January 31, 2001.<sup>12</sup>

The petitioner's signature on the Form ETA 750 on January 31, 2001 increases the likelihood that the DOL's recruitment procedures were not followed and that the petitioner or [REDACTED] (the attorney who represented the petitioner in filing the Form I-140) may have been impermissibly involved in the recruiting process, if the petitioner, for instance, merely signed the Form ETA 750 and let Mr. [REDACTED] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates, and/or making the decision on whether to refer recruits to the petitioner). 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Regardless of the ambiguity concerning the recruitment process, the AAO does not affirm the director's finding that the recruitment procedures were not followed, as the record has not been sufficiently developed to support that finding. In addition, the petitioner has not been specifically notified of the derogatory information involving the recruitment process, as outlined above.

On remand, the director should in the new NOIR request the petitioner to outline the 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; if any, whether and how it conducted interviews and determined that no other U.S. candidate was eligible for the position; 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.<sup>13</sup> The director should also request the petitioner to explain why the Form ETA 750 was signed on January 31, 2001 before the recruitment efforts were completed, in the context of its recruitment efforts and in the context of its certification that all procedures had been completed as of the date of signing.

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<sup>12</sup> Those three advertisements were placed in *Boston Sunday Herald* on February 4, 2001; February 25, 2001; and March 4, 2001.

<sup>13</sup> As noted above, there was no requirement to keep such records. As such, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. Nevertheless, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, on remand, the director should question the petitioner's specific recruitment actions that were related to the beneficiary in this instant proceeding; request the petitioner to address whether it complied specifically with 20 C.F.R. § 656.21, such as whether it kept documentation of recruitment sources, where such documentation was kept in the office, and to whom he submitted such documentation.<sup>14</sup> The director should also request the petitioner to describe its interactions with [REDACTED] prior to filing the petition; how many specific conversations the petitioner had with [REDACTED] prior to the filing of the labor certification application; [REDACTED] specific instructions with regard to recruitment; what role Mr. [REDACTED] played in the recruitment process and in the interviewing and consideration of applicants, if any; to identify whether the advertisements placed by Mr. [REDACTED] in the *Boston Herald* for cooks related to the instant position; to explain what the recruiting manager [REDACTED] knew about jobfind.com; and to submit copies of the advertisement placed in jobfind.com, if available.

The director also 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 (Mr. [REDACTED]) 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 in a case of reduction in recruitment, or if the petitioner's agent/counsel impermissibly participated in the consideration of U.S. applicants for the job (by interviewing the prospective applicants).

The AAO also notes that the petition is currently not approvable, since the record does not establish that the petitioner has the continuing ability to pay the proffered wage from the priority date. The petition will be remanded to the director for issuance of a new NOIR, in accordance with 8 C.F.R. § 205.2(a), for this additional reason.

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<sup>14</sup> The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers. The petitioner in the instant case could not simply submit random copies of the newspaper advertisement to demonstrate that it had conducted the recruitment requirements in accordance with the DOL procedures.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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

Here, as noted earlier the Form ETA 750 was accepted by the DOL for processing on February 28, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour per week work schedule). Therefore, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is required to demonstrate that it has the ability to pay \$12.57 per hour or \$22,877.40 per year from February 28, 2001 and continuing until the beneficiary receives her legal permanent residence.

In this case, a review of USCIS electronic databases reveals that the petitioner has previously filed 40 other immigrant petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant case since 2001.<sup>15</sup> The table below shows the names of the alien beneficiaries, their status (whether they are U.S. Legal Permanent Residence (LPR) or not), and whether the petition filed on their behalf was approved, revoked, or denied:

<i>No.</i>	<i>Receipt Number</i>	<i>Beneficiary's Name (First Name + Last Name)</i>	<i>Filing Date</i>	<i>Decision</i>	<i>Date of the Beneficiary's Adjustment to LPR</i>
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<sup>15</sup> We note that some of the employers filing the petitions have different addresses and names (i.e. [redacted] from the one in this case. Unless disputed (and supported by concrete evidence), we will continue to assume that the petitions, as listed in the table above, were all filed by the same organization.

1.		06/26/01	Denied <sup>16</sup>	N/A
2.		08/21/01	Approved	02/11/04
3.		08/21/01	Approved	N/A
4.		09/12/01	Revoked <sup>17</sup>	N/A
5.		09/12/01	Approved	07/17/03
6.		09/17/01	Approved	10/19/07
7.		10/01/01	Approved	10/08/03
8.		11/05/01	Approved	08/08/03
9.		11/13/01	Revoked <sup>18</sup>	N/A
10.		11/20/01	Approved	N/A
11.		11/24/01	Approved	N/A
12.		12/13/01	Denied <sup>19</sup>	N/A
13.		01/03/02	Approved	06/13/05
14.		01/16/02	Approved	N/A
15.		01/29/02	Revoked <sup>20</sup>	N/A
16.		01/31/02	Denied <sup>21</sup>	N/A
17.		02/27/02	Approved	11/02/04
18.		02/27/02	Approved	06/03/04
19.		03/06/02	Revoked <sup>22</sup>	N/A
20.		03/12/02	Approved	09/21/04
21.		04/17/02	Revoked <sup>23</sup>	N/A
22.		04/18/02	Approved	02/04/05
23.		04/19/02	Approved	06/10/05
24.		04/30/02	Approved	N/A
25.		06/06/02	Approved	09/07/07
26.		06/22/02	Approved	01/31/08
27.		06/25/02	Approved	N/A
28.		08/27/02	Approved	10/28/09
29.		09/10/02	Approved	09/05/07
30.		09/12/02	Approved <sup>24</sup>	N/A
31.		09/25/02	Approved	12/08/10
32.		09/25/02	Revoked <sup>25</sup>	N/A

<sup>16</sup> Denied as of 01/28/2002.

<sup>17</sup> Revoked as of 04/24/2009.

<sup>18</sup> Revoked as of 06/29/2009.

<sup>19</sup> Denied as of 05/27/2003.

<sup>20</sup> Revoked as of 05/11/2009.

<sup>21</sup> Denied as of 06/24/2002. A second petition on behalf of this beneficiary was filed on 08/13/2003; the petition remains unadjudicated.

<sup>22</sup> Revoked as of 02/27/2009.

<sup>23</sup> Revoked as of 07/13/2009.

<sup>24</sup> The approval of the petition is currently under review; a Notice of Intent to Revoke was sent to the employer filing the Form I-140 on June 1, 2009.

33.	[REDACTED]	10/16/02	Revoked <sup>26</sup>	N/A
34.	[REDACTED]	11/06/02	Revoked <sup>27</sup>	N/A
35.	[REDACTED]	08/01/03	Approved	N/A
36.	[REDACTED]	09/23/03	Approved	06/19/07
37.	[REDACTED]	10/06/03	Approved	04/08/08
38.	[REDACTED]	02/23/04	Approved	03/20/08
39.	[REDACTED]	05/20/04	Revoked <sup>28</sup>	N/A
40.	[REDACTED]	01/28/05	Approved	03/14/06

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 multiple petitions in the past. Unless the petitioner successfully 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 *for all* of the other immigrant visa beneficiaries until each beneficiary receives his or her legal permanent residence (LPR).

We acknowledge the receipt of the following evidence:

- A copy of a paycheck dated June 17, 2005 issued to the beneficiary in the amount of \$267.33;
- Various internet printouts on a company called [REDACTED] Inc.” downloaded from the following website addresses: [REDACTED]
- A list of business locations, as shown at [REDACTED] with the following hand notation: “168 restaurants.”

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. The various internet printouts showing the basic financial information (gross sales and revenue in 2003) for [REDACTED]’s Holdings Corporations, Inc. cannot be accepted as evidence of the petitioner’s ability to pay *unless* the petitioner demonstrates by preponderance of the evidence that [REDACTED]’s Holdings Corporations, Inc. was the employer that originally filed the petition on behalf of the beneficiary in 2001.

The AAO notes that the IRS Tax number 33-0506681 which [REDACTED] listed on the Form I-140 does not belong to any for-profit organization in the U.S.<sup>29</sup> Further, a search in the

<sup>25</sup> Revoked as of 03/25/2009.

<sup>26</sup> Revoked as of 03/25/2009.

<sup>27</sup> Revoked as of 02/11/2009.

<sup>28</sup> Revoked as of 03/20/2009.

<sup>29</sup> This office used Lexis Nexis database to search the IRS Tax number.

website of the [REDACTED] Department of State, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>) reveals that there are five entities located at [REDACTED] (the location which was listed on the Form I-140): [REDACTED] Acquisition Corp. (ID number [REDACTED]) Franchising Corp. (ID number [REDACTED]) [REDACTED] (ID number [REDACTED]); [REDACTED] Card Services Inc. (ID number [REDACTED]). It is not clear from the evidence of record, which of these five entities originally filed the petition on behalf of the beneficiary in the instant case.

On remand, the director should issue a NOIR requiring the petitioner to clarify and/or explain which of the five entities listed above filed the petition. The director should also request the petitioner to demonstrate the continuing ability to pay the proffered wage from the priority date. 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:

- A statement explaining the nature of the petitioner's business (whether it is independently owned and run by a franchisee, or a branch of one of the five entities mentioned above);
- Copies of the petitioning organization's federal tax returns, annual reports, and/or audited financial statements for the years 2001 through 2010;
- Copies of the approved labor certifications that the petitioning organization filed on behalf of those beneficiaries, as listed in the table above; and
- Copies of the W-2s, 1099-MISCs, paystubs, or other documents that the petitioning organization issued to all of the beneficiaries, as shown above.

In summary, the director's findings that the petitioner failed to follow the DOL recruitment requirements and that the petitioner obtained the approval of the labor certification by fraud or willful misrepresentation are both withdrawn. The approval of the petition, however, may not be reinstated under the facts of the record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) specifically outlining the inconsistencies in the record pertaining to the recruitment requirements and the lack of evidence of the petitioner's ability to pay, as discussed above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond.

Upon review and consideration of any response, the director shall enter a new decision.

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