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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

[redacted]

B6

Date: FEB 0 1 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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 November 12, 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 December 28, 2002. However, the Director of the Texas Service Center ("the director") revoked the approval of the immigrant petition on June 2, 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 The director's decision will be withdrawn.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.[1] It seeks to permanently employ the beneficiary in the United States as a prep cook pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).[2] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in December 2002, but the approval was revoked in June 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.

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

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

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

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

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

Preliminarily, 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 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).

However, before the Secretary of Homeland Security 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:

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[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> (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 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 February 24, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific

evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director also did not specifically state that the petitioner needed to submit, for instance, copies of the in-house postings or other evidence to show that the petitioner complied with the DOL recruitment procedures. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. Nevertheless, the AAO agrees with the director that the approval of the petition was erroneous, and will return the petition to the director for the issuance of a new NOIR.

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

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner submitted the following evidence in response to the NOIR:

- Copies of the newspapers tear sheets for the position offered, published in the *Boston Herald* for three consecutive days on Tuesday, March 26, 2002; Wednesday, March 27, 2002; and Thursday, March 28, 2002; and
- A copy of the letter dated March 2, 2002 from the Massachusetts DOL addressed to [redacted] that the Application for Employment Certification (Form ETA 750) had been accepted and assigned a priority date of April 26, 2001.[5]

Upon review, the director determined that the petitioner failed to comply with the DOL recruitment requirements, because the petitioner, among other things, failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance.

The AAO disagrees with the director's conclusion. First, as mentioned above, 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. Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.

The AAO 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

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[5] The letter further gave [redacted] instructions on the recruitment requirements.

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). Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures.[6]

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 (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 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) (2001). 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) (2001).

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 authorized [redacted] to file the Form ETA 750, and that [redacted] filed the Form ETA 750 for processing with the local DOL on April 26, 2001. Further, the record shows that the petitioner signed the Form ETA 750 on January 28, 2002 and began recruiting (by placing advertisements in the local newspapers), as instructed by the local DOL, in March 2002. The letter dated March 2, 2002 from the local DOL to [redacted] shows that the local DOL advised the petitioner to begin advertising and accepting resumes.

Based on the evidence submitted and the stated facts above, it appears that the petitioner conducted supervised recruitment. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

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

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 filed the petition in the instant proceeding. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

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

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary 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.[7]

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.

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[7] 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.

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 engaged in material misrepresentation with respect to the recruitment process. Thus, the director's finding of fraud or misrepresentation is withdrawn.

Nevertheless, the petition is currently not approvable as the record does not establish that (a) the beneficiary is qualified to perform the services of the position and (b) the petitioner has the continuing ability to pay the proffered wage from the priority date. For these reasons, the petition will be remanded to the director for issuance of a new NOIR, in accordance with 8 C.F.R. § 205.2(a).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Further, 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).

a. The Beneficiary's Qualifications

The labor certification application was initially filed with a two-year training requirement. Submitted with the Form ETA 750 was a work experience letter dated April 17, 2001 from [redacted] who indicated that the beneficiary worked as a cook and prepared meals for approximately 150 people between May 1995 and April 1998. During the supervised recruitment process, the experience required by the petitioner was reduced to one month.[8] Thus, the experience letter submitted by the beneficiary is relevant.

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[8] The Form ETA 750A reflects that no experience is required after the amendments by the DOL. However, the petitioner under supervised recruitment advertised for the position with a one-month experience requirement. As the petitioner narrowed the search for acceptable candidates to those with one month experience as a prep cook under the supervision of the DOL, the appeal will be adjudicated considering that the petitioner required the candidate in the position to have one month experience as a prep cook.

As stated above, the director sent a Notice of Intent to Revoke (NOIR) to the petitioner on February 24, 2009, generally questioning the beneficiary's past employment/experience. In response to the director's NOIR, the petitioner submitted a sworn statement dated March 10, 2009 from who once again indicated that the beneficiary was a cook for from May 1995 to April 1998.

In reviewing the letter of employment and the sworn statement from the AAO observes that , Brazil. The AAO also notes that according to his Biographic Form (Form G-325) which he filed in conjunction with his Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary lived in , Brazil, between 1984 and May 1999. It is unlikely that the beneficiary lived in Sao Lourenco, Minas Gerais, and worked in Santo Amaro, Sao Paulo.[9]

Whether or not the beneficiary had one month experience as a prep cook before the priority date is material in this case, since the DOL would not have approved the labor certification had it known that the beneficiary was not qualified for the job opportunity at issue.

As noted above in discussing whether a misrepresentation is material, if the petitioner misrepresented the beneficiary's past work experience by submitting a fraudulent work experience letter or sworn statement, the DOL would have been unable to make a proper investigation of the facts when determining certification because the fraudulent submission shut off a line of relevant inquiry.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).[10] USCIS may also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).[11]

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[9] The distance between Maringa, Parana, and Londrina, Parana, according to http://www.distancecalculator.globefeed.com, is 239.77 km (or 148.99 miles). The estimate road distance can be around 275.74 km (or 171.34 miles). (Last accessed January 25, 2012).

[10] The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the

On remand, the director should issue a new Notice of Intent to Revoke (NOIR) and inform the petitioner about the derogatory information regarding where the beneficiary lived and worked between 1995 and 1998, and give the petitioner a reasonable period of time to respond. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, the director should advise the petitioner to submit independent objective evidence, such as 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 had the experience in the job offered or in the related occupation before the priority date and that he qualifies for the job. The director should give the petitioner a reasonable period of time to respond.

Upon consideration of the response, the director may consider whether the documentation submitted by the petitioner of the beneficiary's work experience was fraudulent or a misrepresentation of a material fact in accordance with the discussion above. The director may

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beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

[11] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

invalidate the labor certification if he finds fraud or material misrepresentation involving the labor certification.

b. The Petitioner's Ability to Pay

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

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

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

Here, the Form ETA 750 was accepted by the DOL for processing on April 26, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is $9.00 per hour or $18,720 per year (based on a 40-hour work per week). Therefore, the petitioner is required to demonstrate that it has the ability to pay $9 per hour or $18,720 per year from April 26, 2001 and continuing until the beneficiary receives his legal permanent residence.

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

Receipt Number	Beneficiary (Last Name)	Priority Date	Decision	Date Adjusted to LPR:
[redacted]		03/22/2001	Revoked[12]	-
		-	Revoked[13]	-
		04/09/2001	Approved	04/16/2004
		-	NOIR[14]	
		-	Revoked[16]	-
		04/12/2001	Approved	07/24/2004

[12] Revoked as of February 17, 2011.
[13] Revoked as of October 19, 2010.
[14] A NOIR was sent on February 22, 2011.
[15] This is the beneficiary in the instant proceeding.
[16] Revoked as of June 2, 2009.

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

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of not only the current beneficiary but also of all other beneficiaries listed above from the date of filing each respective labor certification application until the date the beneficiary obtains lawful permanent residence, or until the other beneficiaries obtain permanent residence or until their respective petitions' approvals were revoked.

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

- The beneficiary's Forms W-2 for the years 2001 and 2007;[20]
- A statement dated February 28, 2001 from Manager, who stated that the petitioning organization employed approximately 550 people; and
- A copy of the first page of the Form WR-1 Employer's Quarterly Report of Wages Paid for the year 2001.[21]

[17] Revoked as of June 7, 2010.
[18] Revoked as of January 11, 2010.
[19] Revoked as of November 17, 2010.
[20] The AAO notes that the petitioner paid the beneficiary $16,141.77 in 2001 ($2,578.23 less than the proffered wage).

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

The statement by is not from a Financial Officer of the petitioner. In addition, given the record as a whole and the fact that the petitioner has filed multiple employment-based petitions, as described above, and that several of the petitions' approval have been revoked, USCIS will not exercise its discretion to accept this type of evidence. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiaries it is seeking to employ. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary in this case and of all of the beneficiaries from the priority date.

On remand, the director should issue a NOIR requiring the petitioner to demonstrate financial resources in the form of annual reports, federal tax returns, or audited financial statements sufficient to pay the proffered wages of the beneficiary and of all of the other beneficiaries from the priority date and continuing until the beneficiary receives his legal permanent residence, and until the other beneficiaries obtain permanent residence or until their petitions' approvals were revoked. The totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) to the petitioner, specifically advising the petitioner to establish the beneficiary's qualifications to perform the duties of the petition as of the priority date and to demonstrate the ability to pay, as discussed above. The director may pursue revocation of the petition based upon fraud and/or willful misrepresentation as discussed above and as appropriate. 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 reinstate the approval of the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a NOIR and new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.