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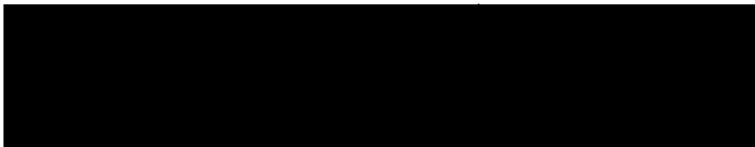
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



Date: **FEB 17 2012**

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On August 27, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on December 1, 2003. However, the Director of the Texas Service Center ("the director") revoked the approval of the immigrant petition on May 12, 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 Greek restaurant. It seeks to permanently employ the beneficiary in the United States as a food service supervisor, O*Net-SOC job code 35-1012 (First-Line Supervisors of Food Preparation and Serving Workers), 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).¹ 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 2003, but the approval was revoked in May 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. The director also questioned the beneficiary's work experience in Brazil. 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 states that the director's decision to revoke the approval of the petitioner is erroneous, and that the decision is not based upon the evidence in the record. First, 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 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). Additionally, counsel indicates that the U.S. DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements. In conclusion, counsel requests that the director's decision to revoke the approval of the petition be reversed.

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

¹ 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.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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:

(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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, Mr. Dvorak].

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by [REDACTED] who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by [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 January 9, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

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, counsel for the petitioner at the time, [REDACTED] 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 eight consecutive days from Sunday, January 5, 2003 to Sunday, January 12, 2003 and on Sunday, January 19, 2003; and
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon review, 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. Further, the director stated that the submission of the copy of the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* showed that [REDACTED] paid for and created the advertisement for the job offered. In summary, the director indicated that the documents submitted in response to the NOIR were in themselves a willful misstatement of material facts, constituting fraud.

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.³

At the time the petitioner filed the labor certification application with the DOL for processing in February 2003, employers were not required to maintain any records documenting the labor

³ 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.

certification process once the labor certification had been approved by the DOL. See 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. See 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; also see 20 C.F.R. § 656.10(f) (2010). Thus, the AAO will withdraw the director's finding that the petitioner failed to follow recruitment procedures based on its failure to submit recruitment documents.

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 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) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. See 20 C.F.R. §§ 656.21(g)-(h) (2003).

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

Here, the record reflects that the petitioner advertised the position on the *Boston Herald* newspaper for eight consecutive days from January 5, 2003 to January 12, 2003 and on January 19, 2003. The record also shows that the petitioner filed the Form ETA 750 with the DOL on February 25, 2003. Based on the evidence submitted and the stated facts above, the petitioner conducted all of the advertising for the position before filing the Form ETA 750 with the DOL for processing, consistent with the reduction in recruitment process which was allowed at the time.

The AAO does not find that the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* is relevant, as the date is two years prior to the recruitment conducted in this case. Rather, it appears that the [REDACTED] mistakenly submitted the letter into the present record. Even if the letter were relevant to the recruitment in this case, the letter only stated that [REDACTED] placed an order to post the advertisement in the *Boston Herald* newspapers and online at www.jobfind.com for 30 days and provided the cost involved.⁴ It stated nothing about who paid for the advertisement or who interviewed interested applicants. The record contains no evidence

⁴ No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

showing that the beneficiary or [REDACTED] either paid for the job advertisement or interviewed or considered U.S. candidates for the position.

Under the DOL regulations, the attorney for the beneficiary may not interview or consider job applicants for the position, but is not prohibited from assisting the petitioner throughout the labor certification process, including with the advertising process. See 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2003)⁵ and 20 C.F.R. § 656.20(b)(1) (2003).⁶ For all these reasons, the director's conclusion that the beneficiary or [REDACTED] paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job is not supported by the current facts of record.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel 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 statement. 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.

⁵ This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010). The regulation at 20 C.F.R. § 656.20(b)(3)(i) at the time of recruitment stated:

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

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

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

⁶ This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

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:

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.

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

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

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

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

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

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

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

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 (1) the petitioner followed the DOL's procedures in recruiting U.S. workers, (2) the beneficiary is qualified to perform the services of the position and (3) 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).

1. Recruitment Efforts

The DOL regulation at 20 C.F.R. § 656.21 (2003) 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. If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

In adjudicating the appeal, the AAO notes that the record contains an anomaly. The record reflects that the petitioner signed the Form ETA 750 before it completed or even began the recruitment efforts.⁸ This suggests that [REDACTED] (the attorney who represented the petitioner in filing the Form I-140 petition) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, signed the Form ETA 750 and let [REDACTED] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates or deciding whether to refer any applicants to the petitioner for consideration).

⁸ The AAO notes that the petitioner [REDACTED] signed the Form ETA 750 on December 31, 2002. By signing the Form ETA 750, the petitioner stated under penalty of perjury that the recruitment was complete. However, as noted above the recruitment efforts started on January 5, 2003 when the petitioner first placed the advertisement in the *Boston Herald*.

On remand, the director should in the new NOIR request the petitioner to explain why [REDACTED] signed the Form ETA 750 before he advertised the position in the newspaper and further outline what specific steps the petitioner took to conduct good faith recruitment, e.g. other than the advertisements in the *Boston Herald* from January 5, 2003 to January 12, 2003 and on January 19, 2003; whether and how the company advertised in a newspaper of general circulation, and identifying the recruitment source by name; ask the petitioner how many candidates were interviewed; and if any, whether and how the petitioner conducted interviews and determined that no other U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker; and whether and for how long the company posted an in-house posting notice recruiting for the position. The director should specifically ask the petitioner for copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.⁹

The director should consider the sworn statements which [REDACTED] has submitted to demonstrate that the petitioner followed the DOL recruiting requirements. In sworn statements dated June 9 and June 17, 2009, [REDACTED] stated that the company (the petitioner) complied with all Department of Labor's recruiting requirements, that the company advertised the available position in the *Boston Herald* and in the business premises for ten business days, and that the business had been actively recruiting for the position for quite some time and did not receive any application. [REDACTED] also indicated that he did not keep a photocopy of any of the recruitment efforts. The director should request such a statement from [REDACTED] who appears to have been involved in the recruitment process. The director should ask [REDACTED] to attest to his position at the restaurant in 2003 during the recruitment and to explain his authority to recruit workers in 2003 and his personal involvement in the recruiting.

USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i). If the petitioner cannot submit primary evidence and detail the reasons why not, the director may accept secondary evidence.

2. The Beneficiary's Qualifications

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL as of the priority date.

⁹ As noted above, before 2005 there was no requirement to keep recruitment records once the Form ETA 750 had been certified by the DOL.

Here, the Form ETA 750 was accepted by the DOL for processing on February 25, 2003. The name of the job title or the position for which the petitioner sought to hire is "Food Service Supervisor" whose duties were described as follows:

Supervise workers in serving food to customers & cleanliness of kitchen & dining areas. Train workers, set up work schedules.

Under item numbers 14 of the Form ETA 750, part A, the petitioner indicated that an applicant must have, at a minimum, two years of experience in the job offered or two years in a related occupation as a cook.

The beneficiary set forth his credentials on part B of the Form ETA 750 labor certification and signed his name on December 31, 2002, under a declaration that the contents of the form are true and correct under the penalty of perjury. On item number 15, eliciting information of the beneficiary's work experience, the beneficiary represented that he worked 40 hours a week as a cook for a restaurant in Goiania, Brazil, called [REDACTED] from January, 1990 to December 1993. Under the job description, the beneficiary stated, "I was responsible for preparing all types of meals, fish, rice, pasta, sauces."

Along with the petition and the approved Form ETA 750 labor certification the petitioner submitted a letter of employment dated December 19, 2002 from [REDACTED] declaring that the beneficiary worked as a cook with a specialty in Greek dishes at [REDACTED] from January 2, 1990 to December 15, 1993.

In response to the director's NOIR dated January 9, 2009 the beneficiary through his counsel of record at the time, [REDACTED] submitted a signed statement dated February 24, 2009, in which the beneficiary states that he worked as a cook at [REDACTED] in Goiania from January 2, 1990 to December 15, 1993. The beneficiary also indicates that he has asked his parents, who used to live in the town where the restaurant was located, to go back to the location of the restaurant and track down the owners, but they found that the restaurant was not there anymore, and they could not find the owners.

On appeal, [REDACTED] the President of the petitioning company, issued a sworn statement dated June 17, 2009 stating that he hired the beneficiary as a food service supervisor and a cook after he was informed of the beneficiary's cooking experience from a restaurant in Brazil and after the beneficiary demonstrated his abilities to cook.

The AAO notes that the beneficiary failed to include his employment abroad at [REDACTED] on the Form G-325 (Biographic Information), which he filed in conjunction with his Application to Register for Permanent Residence or Adjust Status (Form I-485). Further, the AAO finds that the letter of employment dated December 19, 2002 from [REDACTED] does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), in that it does not include the author's title and a sufficient description of the experience or training received by the beneficiary while he worked there between January 1990 and December 1993.

Whether or not the beneficiary had two years of work experience as a 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

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 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

On remand, the director should issue a new Notice of Intent to Revoke (NOIR) and inform the petitioner about the beneficiary's failure to include his employment abroad on the Form G-325 and the problems in the letter of employment from [REDACTED] 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). 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 as a cook and that he qualified for the job before the priority date.

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

3. 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.

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.

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 25, 2003. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$8.85 per hour or \$16,107 per year (based on a 35-hour work per week). Therefore, the petitioner is required to demonstrate that it has the ability to pay \$8.85 per hour or \$16,107 per year from February 25, 2003 and continuing until the beneficiary may receive lawful permanent residence.

In this case, however, a review of USCIS records reveals that the petitioner has previously filed one immigrant petition other than for the beneficiary in the instant proceeding since 2002. The table below shows the details of the other petition that the petitioner filed in 2002:

Receipt Number	Beneficiary (Last Name)	Priority Date	Decision	Date Adjusted to LPR:
[REDACTED]	[REDACTED]	[REDACTED]	Approved	03/31/05

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 [REDACTED] from the priority date (February 25, 2003) until the beneficiary and [REDACTED] obtain lawful permanent residence.

The petitioner has submitted the following evidence to show that it has the continuing ability to pay the proffered wage from February 25, 2003:

- An IRS Form 1120, U.S. Corporation Income Tax Return, for the year 2001; and
- The beneficiary's Forms W-2 for the years 2002 through 2008.

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 [REDACTED] from the priority date.

On remand, the director should issue a new Notice of Intent to Revoke (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 any other beneficiary from the priority date and continuing until the beneficiary receives his legal permanent residence, and until any other beneficiary obtains permanent residence or until his or her petition's approval was revoked. The totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 the issuance of a new NOIR to the petitioner, specifically advising the petitioner to demonstrate that the petitioner followed the DOL recruitment procedures and 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 a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.