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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 24 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On February 19, 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 April 30, 2002. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on May 11, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (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).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on April 30, 2002, but that approval was revoked in May 2009. The director of the Texas Service Center ("the director") determined that the petitioner's previous counsel, ██████████ paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job, and therefore, the petitioner did not follow the U.S. Department of Labor (DOL) recruitment procedures. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, subsequent counsel for the petitioner ██████████ contends that the director did not have good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition.² Specifically, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding.

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.

² The petitioner is currently represented by ██████████ who will be referred to by name or as current counsel. ██████████ will be referred to by name. Counsel who filed the appeal ██████████ will be referred to as counsel throughout the decision.

Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel argues that the director revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]. In addition, counsel states that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

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.³

Preliminarily, as a procedural matter, the AAO finds that the director erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. The regulation at 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a 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 on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that "notice" must be provided to the petitioner before a previously approved petition can be revoked. The regulation at 8 C.F.R. § 205.2 reads:

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

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

³ 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.

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

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and 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, in the Notice of Intent to Revoke (NOIR), the director wrote:

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

The director advised the petitioner in the NOIR 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 by ██████████, 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 March 11, 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 while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific

evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. The petition's approval will not be reinstated however, as the petitioner has not established that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, as more fully discussed below.

Another issue on appeal is whether the director properly concluded that [REDACTED] paid for and created the job advertisement and thus impermissibly participated in the consideration of U.S. applicants for the job.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel submitted the following evidence:⁴

- A copy of the newspaper tear sheet for the position offered, published in the [REDACTED] on December 31, 2000;
- A copy of the letter dated February 14, 2001 from the [REDACTED] addressed to [REDACTED] stating that the job ads would also be posted online on jobfind.com for 30 days;
- A copy of the advertisement placed in www.jobsinma.com from October 16, 2001 to November 16, 2001;
- A copy of the in-house job posting for the job offered placed at the petitioner's business from December 16, 2000 until January 1, 2001;
- A copy of a letter dated February 22, 2001 from the petitioner addressed to whom it may concern stating that there were no replies to the advertisements;
- A letter dated February 15, 2001 from [REDACTED] stating that the beneficiary worked as a cook auxiliary [REDACTED] from July 15, 1998 to July 17, 2000 performing all duties given to him; and
- A copy of the business registration of [REDACTED] Me showing that the business was officially registered in the CNPJ registration system on 25/02/1993 (February 25, 1993).⁵

Based on the evidence submitted, the AAO finds that the director's conclusion that [REDACTED] paid for and created the job advertisement and thus impermissibly participated in the consideration

⁴ This evidence was submitted in response to the director's Notice of Intent to Revoke (NOIR).

⁵ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ or Cadastro Nacional da Pessoa Juridica is similar to the federal tax ID or employer ID number in the United States. The director indicated that 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.

of U.S. applicants for the job is neither supported by the facts of record nor warranted under the DOL regulations. Although the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) (2001)⁶ specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered, the regulation in place at the time of the recruitment in this case allowed beneficiaries and petitioners to have agents and/or attorneys (legal representatives) represent them throughout the labor certification process. See 20 C.F.R. § 656.20(b)(1) (2001).⁷

By itself, the letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* does not show that [REDACTED] paid for or impermissibly participated in the consideration of U.S. applicants for the job offered.⁸ The record contains no evidence showing that [REDACTED] either paid for the job advertisement or interviewed or considered candidates for the position. The AAO, therefore, withdraws the director's conclusion that [REDACTED] paid for and created the job advertisement and impermissibly participated in the consideration of U.S. applicants for the job.

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 DOL's approval of the labor

⁶ 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) (2001) 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) (2004) 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.

⁷ This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

⁸ No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers. The letter dated February 14, 2001 from the *Boston Sunday Herald* 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.

certification application indicates that there was no fraud or irregularity in the labor certification process, and that the director revoked the approval of the petition simply because [REDACTED] filed the petition.

The AAO disagrees with counsel's contention. If the petitioner or [REDACTED] 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 recruitment procedures. Similarly, there is no evidence of record indicating that the petitioner and/or [REDACTED] engaged in fraud or material misrepresentation with respect to the labor certification application.

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.⁹

⁹ 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

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

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

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

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

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

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

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

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

inadmissible. *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.

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

Here, as noted above, the evidence of record does not support the director's finding of fraud or willful misrepresentation in connection with the labor certification process. Thus, the director's finding of fraud or misrepresentation is withdrawn.

With respect to the petitioner's ability to pay, the AAO concludes that the petitioner has demonstrated by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date.¹⁰

Nevertheless, the AAO finds that the petition is unapprovable, as the petitioner has not established that the beneficiary had the requisite work experience in the job offered as of the priority date. The revocation of the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155. The fact 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).

In adjudicating the appeal, the AAO noted that the beneficiary failed to list his employment at [REDACTED] on his Biographic Information (Form G-325) under a section eliciting information about his last occupation abroad. The AAO further found that the dates of the beneficiary's employment at [REDACTED] on the Form ETA 750 part B were inconsistent with the dates mentioned in the letter of employment from the beneficiary's past employer in Brazil.¹¹ In addition, the AAO observed that the business registration of [REDACTED] [REDACTED]. Me contained an address different from the address provided by the beneficiary in part B of the Form ETA 750 and from the address listed in the letter of employment from [REDACTED].¹² Based on these inconsistencies in the record, the

¹⁰ The AAO notes that the petitioner has consistently reported gross sales of over \$1 million dollars a year, spends over \$200,000 a year for employees' salaries/wages, and often paid over \$100,000 for officer compensation from 2001 to 2010. Even though the petitioner has filed multiple petitions for other beneficiaries in the past, the record shows that these beneficiaries were paid equal to or more than their proffered wage.

¹¹ The beneficiary stated in part B of the Form ETA 750 that he worked at [REDACTED] [REDACTED] from July 15, 1998 to July 22, 2000. The letter of employment from [REDACTED] [REDACTED] stated that the beneficiary worked at [REDACTED] as a cook auxiliary from July 15, 1998 to July 17, 2000.

¹² The address of [REDACTED] as shown in the business registration is at [REDACTED]

AAO sent a Request for Evidence and Notice of Derogatory Information (RFE/NDI) to both the petitioner and the beneficiary on July 7, 2010 and July 29, 2010.

In response to the AAO's July 7, 2010 RFE/NDI, counsel for the beneficiary () submitted the following evidence to show that the beneficiary worked at from 1998 to 2000:

- A sworn statement dated September 24, 2010 from the beneficiary; and
- A sworn statement dated August 18, 2010 from stating that he was the sole owner of from 1998 through 2000 and that the beneficiary worked as a kitchen assistant at his restaurant helping with preparation and cooking during that period of time.¹³

In his sworn statement, the beneficiary states, among other things, that: he worked as a cook for from July 15, 1998, at the age of 15 years old, to July 17, 2000, not July 22, 2000, when he was 17 years of age;¹⁴ that he only received cash due to his underage employment, and therefore there are no records available today to show that he was employed as a cook by ; that the inconsistencies in the record – the dates of his employment in Brazil – are due to actions and carelessness, not his; that he signed blank Forms ETA 750B and G-325; and that he was the victim of carelessness and neglect.

Along with the sworn statement, the beneficiary submitted a copy of a letter dated September 23, 2010 addressed to the Massachusetts Bar where he complained about and his professionalism.¹⁵

The address provided by the beneficiary and listed by is at .

¹³ also states that it has been three years since he has had any connection with the business (restaurant).

¹⁴ The beneficiary states he remembers leaving on July 17, 2000 because he was very excited about coming to the United States two days afterward on July 19, 2000.

¹⁵ In the complaint, the beneficiary stated that he was handed a few blank forms to sign by that he was not informed about the development of the petition, and that was hard to reach. The beneficiary also indicated that office advised him not to pursue the green card lottery to obtain legal permanent residence in 2002. Along with the letter of complaint, the beneficiary attached a couple of articles talking about (one article is dated June 28, 2009 published in the entitled and the other is posted by on June 29, 2009 at

The AAO later observed that the record also contained material discrepancies between information regarding where the beneficiary worked and where he lived from 1998 to 2000. On the Form G-325, which the beneficiary signed under penalty of perjury and submitted in connection with the Application to Register Permanent Residence or Adjust Status (Form I-485), he stated he lived in the city of Colorado, Rondonia, Brazil, from 1992 to 2000. The distance between the city of Maceio, Alagoas, and Colorado, Rondonia, is about 2,730 km (roughly 1,696 miles).

Furthermore, the AAO noted that the beneficiary was only 15 years of age in July 1998, when he claimed he was first employed by [REDACTED] at his restaurant (Restaurante da Boca). Based on the beneficiary's young age and the inconsistencies in the record, the AAO sent a second Request for Evidence and Notice of Derogatory Information (RFE/NDI) to both the petitioner and the beneficiary on September 23, 2011.

In response to the AAO's September 23, 2011 RFE/NDI, subsequent counsel for the beneficiary ([REDACTED]) submitted the following evidence to show that the beneficiary worked at [REDACTED] and lived in Maceio, Alagoas, from 1998 to 2000:

- A sworn statement dated October 11, 2011 from [REDACTED] stating that he is the father of the beneficiary, that he and his wife, the beneficiary's mother is separated, that he lived in Maceio, Alagoas, Brazil with his son (the beneficiary) from December 1997 to July 2000, and that the beneficiary worked as a cook assistant during that period when his son lived with him;¹⁶
- A document showing the address of [REDACTED];¹⁷ and
- A sworn statement dated October 11, 2011 from [REDACTED] stating that she is the biological mother of the beneficiary, that she and her husband, the beneficiary's father, are separated, that she lived and continues to live in Colorado, Rondonia, and that the beneficiary lived with his father in Maceio, Alagoas from December 1997 to July 2000.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983);

¹⁶ [REDACTED] also states, "For me it was important that my son worked from a young age to become responsible."

¹⁷ The document shows that [REDACTED] lives at [REDACTED].

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 19, 2001. The name of the job title or the position for which the petitioner seeks to hire is “cook.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Prepare all types of dishes.” Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on March 28, 2001, he represented that he worked 35 hours a week at [REDACTED] as a cook in Maceio, Alagoas, Brazil from July 15, 1998 to July 22, 2000. This information, as noted earlier, is inconsistent with the letter of employment from [REDACTED] which states that the beneficiary worked as a cook from July 15, 1998 to July 17, 2000. The information is also inconsistent with the Form G-325 which stated that the beneficiary lived in Colorado, Rondonia – about 2,730 km (roughly 1,696 miles) away from Maceio, Alagoas – from 1992 to 2000.

In response to the AAO’s most recent RFE/NDI the beneficiary states in a sworn statement that he lived and worked in Maceio, Alagoas for [REDACTED] from 1998 to 2000, that the information about where he lived as listed on the Form G-325 and concerning the period of his employment from July 15, 1998 to July 22, 2000 was wrong due to [REDACTED] carelessness, and that he was instructed by his attorney at the time ([REDACTED]) to sign blank forms. The beneficiary also states that he started to work for [REDACTED] when he was 15 years old and left when he was 17 years of age, that he received cash only since he was underage (minor), and that he cannot produce any other evidence to demonstrate that he was employed by [REDACTED].

The AAO finds that the beneficiary’s failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application’s contents).

The beneficiary also submitted sworn statements issued by his parents. The beneficiary’s father testified that his son lived with him in Maceio, Alagoas, from 1997 to 2000 and that his son worked as a cook assistant at [REDACTED]. The beneficiary’s mother stated that she lived and continues to live in Colorado, Rondonia, and that the beneficiary lived with his father in Maceio, Alagoas from December 1997 to July 2000.

The AAO in the RFE/NDI specifically alerted the petitioner and the beneficiary to resolve any inconsistencies in the record by independent objective evidence by submitting, for instance, copies of pay stubs, payroll records, tax documents, or financial statements or other evidence, i.e.

Brazilian booklet of employment and social security, to show his employment at [REDACTED] between July 1998 and July 2000. Both the petitioner and the beneficiary were also advised to submit a revised letter from [REDACTED] and a copy of a government-issued identification card reflecting where the beneficiary lived and worked between 1998 and 2000.

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).

Here, neither the petitioner nor the beneficiary has demonstrated that the primary or the secondary evidence is unavailable. The record contains no evidence showing that [REDACTED] owned [REDACTED] between 1998 and 2000. Nor does the record include any evidence showing the efforts taken by the beneficiary to contact and locate [REDACTED] and to obtain any evidence from [REDACTED]. [REDACTED] sworn statement stating that the beneficiary worked at his restaurant alone is not sufficient and does not establish the reliability of the assertion. Similarly, the assertions of [REDACTED] (the beneficiary's fathers) attesting to the beneficiary's employment at [REDACTED] and residence in Maceio, Alagoas between 1998 and 2000 are not corroborated by other evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The two letters of employment from [REDACTED] by themselves are not sufficient to show that the beneficiary worked as a cook for at least two years since neither describes the training or experience of the beneficiary, in accordance with 8 C.F.R. § 204.5(1)(3)(ii).¹⁸

The inconsistent evidence of the beneficiary's employment has not been resolved by independent objective evidence. The record does not establish that the beneficiary is qualified for the proffered position as of the priority date.

The petition will be denied for this reason. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.

¹⁸ The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, "Any requirements of training or experience for skilled workers, professional, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.