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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



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Date: **JAN 18 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 June 1, 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 March 20, 2004. However, the Director of the Texas Service Center (“the director”) revoked the approval of the immigrant petition on May 8, 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 The director’s decision will be withdrawn.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 landscaping/nursery company. It seeks to permanently employ the beneficiary in the United States as a stonemason, DOT job code number 861.381-038 (stonemason, construction), pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). As noted above, the petition was initially approved in March 2004, but the approval was revoked in May 2009.

The director first issued a Notice of Intent to Revoke (NOIR) on February 9, 2009. The beneficiary, with new counsel, submitted a timely response. The director declined to accept any of the evidence submitted by the beneficiary to demonstrate that the petitioner followed the U.S. Department of Labor (DOL) recruitment requirements or that the beneficiary had the requisite work experience in the job offered before the priority date. Due to lack of evidence in the record, the director determined that the petitioner had 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, current 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.<sup>2</sup> Specifically, counsel states that the director’s NOIR did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel contends that where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence and given a reasonable opportunity to respond, the director cannot revoke the approval of the visa petition.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

<sup>2</sup> Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] will be referred to as previous or former counsel or by name. The AAO notes that the beneficiary’s representative submitting the response to the NOIR was not a licensed attorney. He will be referred to by name, [REDACTED]

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). With respect to the evidence submitted in response to the director's NOIR, counsel indicates that the director wrongly rejected the evidence and should have considered it in determining whether the petitioner followed the DOL recruitment procedures or whether the beneficiary had the requisite work experience in the job offered before the priority date.

Counsel concludes that the director sent the NOIR and revoked the approval of the petition solely because the petition in the instant proceeding was filed by [REDACTED]

Finally, counsel notes that the director erred when he revoked the petition under the authority of 8 C.F.R. § 205.1. This regulation, according to counsel, only applies to automatic revocation and is therefore the wrong regulation to revoke the petition in the instant proceeding.

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

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

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

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

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<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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

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

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

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

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

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

Here, 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 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 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 rejected the evidence submitted by the beneficiary when responding to the director's NOIR.

The AAO notes that the representative who responded to the director's NOIR did not have the authority from the petitioner to represent the petitioner in this proceeding.<sup>4</sup> The record contains no evidence showing that ██████████ was authorized to represent the petitioner in this proceeding.

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<sup>4</sup> The beneficiary's representative is not licensed as an attorney. The AAO notes that there is no remedy available for a petitioner and a beneficiary who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically states that “an affected party is the person or entity with legal standing in a proceeding, and it does not include the beneficiary of a visa petition.” The explicit language of the regulation excludes the beneficiary from the definition of an affected party. For this reason, the AAO finds that neither the beneficiary nor his representative is the affected party and has standing in this proceeding. The director’s refusal to consider the evidence submitted was, therefore, proper.

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 and that the beneficiary had the requisite work experience before the priority date, the petitioner and/or the beneficiary submitted the following evidence:

- Copies of the newspaper tear sheets for the position offered, published [REDACTED] for three consecutive Sundays on February 11, 18, and 25, 2001;
- A copy of the beneficiary’s former employer’s [REDACTED]
- A sworn statement dated March 13, 2009 from [REDACTED] that the beneficiary worked at [REDACTED] mason from January 1, 1997 to February 28, 1999<sup>6</sup>; and
- A letter dated February 2, 2001 from (name illegible) stating that the beneficiary worked [REDACTED] as a stonemason from January 1, 1997 to February 28, 1999.

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

- A sworn statement dated June 18, 2009 from [REDACTED] stating that he has done everything in accordance with the DOL regulations in recruiting U.S. workers;
- A sworn statement dated June 18, 2009 from the beneficiary stating that he was a trained stonemason in Brazil and worked as a stonemason in Brazil from January 1, 1997 to February 28, 1999 [REDACTED]

<sup>5</sup> Businesses that are officially registered with the Brazilian government are given a unique [REDACTED] is similar to the federal tax ID or employer ID number in the United States. The Department of State has determined that the [REDACTED] 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.

<sup>6</sup> [REDACTED] also states in that sworn statement [REDACTED] was formerly called [REDACTED] and that the business name was changed on November 3, 2005.

- A copy of the in-house posting advertisement for the job offer;<sup>8</sup>
- A letter dated February 29, 2001 from [REDACTED] stating that he had listed the position of a stoneworker at his business for several months and in the [REDACTED] for various Sundays and that he did not find any U.S. workers to fill the position;
- A sworn statement dated June 18, 2009 from [REDACTED] [REDACTED] stating the beneficiary was employed as a stonemason from January 1, 1997 to February 28, 1999 [REDACTED].<sup>9</sup>
- A letter dated October 21, 2002 from [REDACTED] to the city Linhares, Espirito Santo tax office requesting change of company name, address, officers or partners of Minareia Mineracao Ltda.;<sup>10</sup>
- A copy of the receipt of tax payment dated October 23, 2002 paid by [REDACTED] [REDACTED] in conjunction with the name change request;
- Proof of business registration of [REDACTED]
- Various pictures of the beneficiary at work.<sup>11</sup>

The record establishes that the petitioner requested reduction in recruitment when it filed the Form ETA 750. Before 2005, the DOL regulations allowed employers to conduct two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. See 20 C.F.R. § 656.21 (2002). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. See 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local DOL office, should: place an advertisement for the job opportunity in a

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<sup>7</sup> The beneficiary also states that his father, [REDACTED] was a partner and owner of the business at the time.

<sup>8</sup> It is unclear when the job posting was posted; the space reserved for the petitioner to fill in the time period is left blank.

<sup>9</sup> [REDACTED] states in this sworn statement that [REDACTED] changed its business name to [REDACTED] on November 5, 2002, and that the business name remains [REDACTED]. The beneficiary in his sworn statement dated June 18, 2009 states that the date November 5, 2002 is the date when the company changed its business name. The beneficiary further claims that [REDACTED] made a mistake when he said that the business changed its name on November 3, 2005 in his previous sworn statement dated March 13, 2009.

<sup>10</sup> The statement was signed by [REDACTED] who is also the beneficiary's father.

<sup>11</sup> It is unclear when or where the pictures were taken.

newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

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

In this case, the advertisements for the job offered were placed before the petitioner filed the Form ETA 750 with the DOL for processing. Based on the evidence submitted, the petitioner requested reduction in recruitment, consistent with the DOL regulations allowed at the time.

There are anomalies in the recruitment process which cast doubt on the *bona fides* of the recruitment process. A review of the record reveals that the petitioner signed the Form ETA 750 on January 31, 2001. By signing the Form ETA 750, the petitioner essentially stated under penalty of perjury that the recruitment was complete. Under the reduction in recruitment procedures, the petitioner should have completed the recruitment efforts and declared that its efforts to recruit U.S. workers yielded no result by January 31, 2001 (the date the petitioner signed the Form ETA 750).

Nevertheless, based on the evidence submitted, the petitioner placed three advertisements after it signed the Form ETA 750 on January 31, 2001.<sup>12</sup> The petitioner's premature signature, therefore, raises the likelihood that the DOL's recruitment procedures were not followed and that the petitioner or [REDACTED] (the attorney who represented the petitioner in filing the Form I-140) might have been possibly involved in the recruiting process, if the petitioner, for instance, merely 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 making the decision on whether to refer candidates to the petitioner). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Regardless of the ambiguity concerning the recruitment process, the AAO cannot affirm the director's finding that the recruitment procedures were not followed. The record has not been sufficiently developed to support that finding. In addition, the petitioner has not been specifically notified of the derogatory information involving the recruitment process, as outlined above. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

On remand, the director should question the petitioner's specific recruitment actions that were related to the beneficiary in this instant proceeding; request the petitioner to address whether it complied specifically with 20 C.F.R. § 656.21, such as whether it kept documentation of

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<sup>12</sup> Those three advertisements were placed in the *Cape Cod Times* on February 11, 18, and 25, 2001.

recruitment sources, the number of applicants responding to the advertisement, the lawful job related reasons for not hiring each U.S. worker interviewed, where such documentation was kept in the office, and to whom he submitted such documentation.<sup>13</sup> The director should also request the petitioner to describe its interactions with [REDACTED] prior to filing the petition; how many specific conversations the petitioner had with [REDACTED] prior to the filing of the labor certification application; [REDACTED] specific instructions with regard to recruitment; what procedures the petitioner specifically followed in relation to the interviewing and consideration of applicants; what role [REDACTED] played in the recruitment process and in the interviewing and consideration of applicants, if any; to identify whether the advertisements placed by [REDACTED] in the *Cape Cod Time* for stonemasons related to the instant position; to explain what [REDACTED] knew about jobfind.com; and to submit copies of the advertisement placed in jobfind.com, if available.

The director should specifically ask the petitioner for copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.<sup>14</sup> The director should also request the petitioner to explain why the Form ETA 750 was signed on January 31, 2001 before the recruitment efforts were completed, in the context of its recruitment efforts and in the context of its certification that all procedures had been completed as of the date of signing.

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<sup>13</sup> The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers. The petitioner in the instant case could not simply submit random copies of the newspaper advertisement to demonstrate that it had conducted the recruitment requirements in accordance with the DOL procedures.

<sup>14</sup> 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 by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The director also may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, provided that the director specifically outlines what the deficiencies are with respect to the labor certification, points out how the petitioner or the petitioner's previous counsel [REDACTED] may have engaged in fraud or misrepresentation in the labor certification process, and gives the petitioner the opportunity to respond to the specific deficiencies in response to the NOIR. For instance, a finding of fraud and/or misrepresentation may be justified if the petitioner intentionally and knowingly submitted the Form ETA 750 before the recruitment efforts were completed in a case of reduction in recruitment, or if the petitioner's agent/counsel impermissibly participated in the consideration of U.S. applicants for the job (by interviewing the prospective applicants).

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

The AAO disagrees with counsel's contention. If the petitioner or 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)(1).

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

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.<sup>15</sup>

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

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified 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.

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<sup>15</sup> It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

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

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

In this case, as noted above, the factual record does not disclose that the petitioner and/or engaged in material misrepresentation with respect to the recruitment process. Nevertheless, there are anomalies in the record involving the petitioner's premature signature on the Form ETA 750 that may suggest that the DOL recruitment procedures were not properly followed.

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

If the DOL relied upon false or fraudulent documents submitted by the petitioner or [REDACTED] which is not currently reflected in the record of proceedings, then the DOL would have been unable to make a proper investigation of the facts when determining whether the labor certification application should be approved, because the petitioner or its previous counsel would have shut off a line of relevant inquiry. In such a case, if the DOL had known the true facts, it would have denied the employer's labor certification, as the petitioner would not have complied with DOL's recruitment requirements, and there would have been an invalid test of the labor market or the beneficiary would not have qualified to perform the duties of the job.<sup>16</sup> In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. Accordingly, the petitioner's or previous counsel's misrepresentation would be material under the second and third inquiries of *Matter of S & B-C*.

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

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

Further, the petition is currently not approvable, as the record does not establish that the petitioner has the continuing ability to pay the proffered wage from the priority date, and that the beneficiary is qualified to perform the services of the proposed employment as of the priority date. The petition will be remanded to the director for issuance of a 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

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<sup>16</sup> *See*, 20 C.F.R. § 656.2, which provides that the role of the DOL in the permanent labor certification process is to determine that there are not sufficient United States workers, who are able, willing, qualified and available to take the position at the time of the alien's application and admission to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. The DOL executes this role through a test of the labor market where the alien beneficiary will perform the work.

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 10, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$11 per hour or \$20,020 per year (based on a 35-hour work per week). Therefore, the petitioner is required to demonstrate that it has the ability to pay \$11 per hour or \$20,020 per year from April 10, 2001 and continuing until the beneficiary receives his legal permanent residence.

In this case, a review of USCIS records reveals that the petitioner has previously filed one other immigrant visa petition on behalf of another beneficiary since 2001. The table below shows the details of the other petition that the petitioner has filed since 2001:

<b>Receipt Number</b>	<b>Beneficiary (First Name Last Name)</b>	<b>Priority Date</b>	<b>Decision</b>	<b>Date Adjusted to LPR:</b>
[REDACTED]	[REDACTED]	-	Revoked <sup>17</sup>	-

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 the current beneficiary and also of Mr. Ribeiro listed above from the date of filing each respective labor certification application until the date the beneficiary obtains lawful permanent residence, and until the other beneficiary had his petition's approval revoked.

The petitioner has already 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 2004,<sup>18</sup> and
- A copy of the petitioner's federal tax return for the year 2000.

<sup>17</sup> Revoked as of March 27, 2009.

<sup>18</sup> The AAO notes that the petitioner paid in excess of the proffered wage to the beneficiary in 2004.

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until the beneficiary receives his permanent residence or until he ported to another similar employment pursuant to section 204(j) of the Act, 8 U.S.C. § 1154(j) as amended by section 106(c) of AC21.<sup>19</sup>

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

- Copies of the petitioning organization's federal tax returns, annual reports, and/or audited financial statements for the years 2001 through the present;
- Copies of the beneficiary's W-2s, 1099-MISCs, paystubs, or other documents that the petitioning organization issued to the beneficiary at any time since 2001; and
- Copies of [REDACTED] 1099-MISCs, paystubs, or other documents that the petitioning organization issued to the beneficiary for the years 2001 through 2009, if any.

Further, the AAO finds that the record does not reflect that the beneficiary was qualified for the position in the job offered as a stonemason as of the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 10, 2001. The name of the job title or the position for which the petitioner seeks to hire is "stonemason." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

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<sup>19</sup> Based on the evidence submitted in response to the director's NOIR and on appeal, the beneficiary appeared to have left the petitioner around June 2004 and will start to work for another landscaping company called [REDACTED]. Counsel for the petitioner argues that the beneficiary will validly port to work for another company. It is important to note here that section 204(j) of the Act does not apply to an immigrant visa petition process but to an application for adjustment of status. Thus, whether or not section 204(j) of the Act allows the beneficiary to port to work for another landscaping company five years after he left the petitioner is not relevant to the outcome of this proceeding, and we will not address the validity of the beneficiary's porting in this decision. This question, which arises as a consequence of the statutory provisions at section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and section 204(j) of the Act, is appropriately deferred to the Form I-485 adjustment of status adjudication.

Under direction of manager, set cobblestones, bricks, etc. to build walks, curbstones, align stones with plumbline and finishes joints.

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.

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

As set forth above, the proffered position requires the beneficiary 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 January 31, 2001, he represented he worked 40 hours a week as a stonemason at [REDACTED] from January 1997 to February 1999. To show that the beneficiary had the requisite work experience in the job offered before April 10, 2001, the petitioner originally submitted the following evidence:

- A signed statement dated February 2, 2001 from [REDACTED] [REDACTED] that the beneficiary worked as a stonemason at [REDACTED] Mexico Ltda. from January 1, 1997 to February 28, 1999.

In response to the director's NOIR, the petitioner, [REDACTED], stated in his sworn statement dated June 18, 2009 that when he first hired the beneficiary in September 2000, the beneficiary clearly knew what he was doing. The beneficiary in his sworn statement dated June 18, 2009 also stated that he worked as a stonemason for a company that was owned by his father at the time.<sup>20</sup>

In adjudicating the appeal, the AAO observes that the beneficiary failed to list his employment in Brazil with [REDACTED] on his Biographic Information (Form G-325), filed in connection with his Form I-485 (Application to Register Permanent Residence or Adjust Status). Further, the beneficiary was only 17 years of age when he claimed he first worked full time at [REDACTED]. Based on the beneficiary's young age in

<sup>20</sup> The beneficiary specifically states:

I was trained as a stonemason in Brazil and did that kind of work for [REDACTED] [REDACTED] Brazil from January 1, 1997 to February 28, 1999. My father, [REDACTED] was a partner and owner of the business, so that is how I got into that line of work. I worked for the company as a stonemason until I left for the United States.

January 1997 and the failure to list his employment abroad on the Form G-325, it is not likely that the beneficiary worked full time [REDACTED] between January 1997 and February 1999. The name of the company and the date of any name change are also in question.

On remand, the director should issue a NOIR requesting the petitioner to submit independent objective evidence to demonstrate the veracity of the beneficiary's statements that he worked for [REDACTED] between January 1997 and February 1999. The director may request the petitioner to submit, for instance, the beneficiary's booklet of employment and social security, copies of pay stubs, payroll records, tax documents, or financial statements or other evidence from the beneficiary's past employer in Brazil, and/or a copy of a government-issued identification card reflecting where the beneficiary lived and worked between 1997 and 1999.

Further, on remand the director may pursue the revocation of approval of the petition for fraud and misrepresentation in connection with the labor certification process, specifically with respect to the presentation of the beneficiary's credentials,<sup>21</sup> provided that the director specifically outlines what the deficiencies are and gives the petitioner the opportunity to respond to the specific deficiencies in response to the NOIR or the NDI/RFE.

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 outlining the lack of independent objective evidence of the beneficiary's qualifications and of the petitioner's ability to pay, as discussed above. The director should also question the petitioner's recruitment procedures under the labor certification application. 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.

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<sup>21</sup> A finding of fraud and/or misrepresentation may be justified if the petitioner submitted false or fraudulent documents with respect to proving the beneficiary's qualifications.