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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: **MAR 19 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 May 30, 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 January 16, 2003. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on October 28, 2009. The petitioner subsequently filed a motion to reopen, and the director dismissed the motion. Following the dismissal, the petitioner then appealed the director's decision to the Administrative Appeals Office (AAO). The director's decision to revoke the approval will be affirmed, and the appeal will be dismissed. The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary and will invalidate the Application for Alien Employment Certification, Form ETA 750.

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).

The petitioner is an individual named [REDACTED]. He seeks to employ the beneficiary permanently in the United States as his household 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, the employment-based visa petition was approved on January 16, 2003, but that approval was revoked on October 28, 2009. The director of the Texas Service Center ("the director") determined that the beneficiary did not have the requisite experience in the job offered as of the priority date.

On motion to reopen the director's October 28, 2009 decision, counsel submitted additional evidence to demonstrate that the beneficiary was a cook for at least two years in Brazil and had the requisite work experience in the job offered before the priority date. Upon review of the record, the director affirmed his earlier decision.

On appeal, counsel for the petitioner contends that the director did not have good and sufficient cause to revoke the approval of the petition, that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had the requisite work experience in the job offered as of the priority date, and that the decision to revoke the approval of the petition so many years after the petition was initially approved constitutes a violation of due process.

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.

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.²

As set forth in the director's decisions dated October 28, 2009 and March 10, 2010, the issue in this case is whether or not the beneficiary possessed the requisite work experience in the job offered 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. 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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 23, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Household Cook." 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 or two years in a related occupation as a restaurant cook.

On the Form ETA 750, part B, the beneficiary represented that he worked as a cook in a restaurant in Brazil called ' [REDACTED] ME from February 1989 to September 1991. Submitted along with the Form ETA 750 and the Form I-140 petition was a recommendation letter from [REDACTED] stating that the beneficiary was a cook for [REDACTED] from February 1, 1989 to September 30, 1991.

In the Notice of Intent to Revoke (NOIR) dated September 21, 2009, the director noted that the beneficiary could not have worked as a cook at [REDACTED] in February 1, 1989, since [REDACTED] was not registered with the Brazilian government until May 6, 1991.³

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).

³ The director found the information above by searching the CNPJ database (the CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/>). CNPJ or Cadastro Nacional da

In response to the director's NOIR and to demonstrate that the beneficiary worked as a cook in Brazil from February 1989 to September 1991, the beneficiary through his counsel of record submitted the following evidence:

- A signed statement dated October 5, 2009 from [REDACTED] who stated that the company had already opened for business when it began the process of obtaining the proper license to conduct business with the Brazilian government in January 1989;⁴
- Various documents intended to show that [REDACTED] was registered with the local city;
- A signed statement dated October 5, 2009 from [REDACTED] who once again stated that the beneficiary worked as a cook at [REDACTED] – Me from February 1, 1989 to September 30, 1991;
- An affidavit dated October 21, 2009 from the beneficiary stating that he worked as a cook at [REDACTED] from February 1, 1989 to September 30, 1991, that he did not know that [REDACTED] was not registered in the CNPJ until May 1991, and that according to [REDACTED] it is common in Brazil to start conducting a business without first registering the business with the Brazilian government;
- Various articles about the informal economy in Brazil;
- A Legal Memorandum by [REDACTED] who states in her conclusion, "While a CNPJ can be used as a proof of a business' legal existence, it cannot and should not be used as a definitive proof of its inexistence."; and
- An affidavit dated September 1, 2009 from the petitioner [REDACTED] stating that he intends to employ the beneficiary permanently in the U.S. as his household cook.

Upon review of the evidence submitted, the director revoked the approval of the petition and determined that the petitioner had not established that the beneficiary worked as a cook in Brazil. The director also stated in the Notice of Revocation dated October 29, 2009 that the beneficiary's claim that he worked as a cook in Brazil was inconsistent with his previous testimony during his removal proceedings, in which the beneficiary testified that his occupation in Brazil was that of mechanic.

On motion to reopen, counsel contended that the petitioner had submitted sufficient evidence to demonstrate that the beneficiary worked as a cook and had the requisite work experience in the job offered as of the priority date. The director affirmed his earlier decision and stated that the

[REDACTED] is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The director indicated that the Department of State had 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.

⁴ [REDACTED] also stated that the process of obtaining the license was not complete until 1994 when the business obtained the operating permit from the local town hall.

inconsistencies in the record pertaining to the beneficiary's occupation in Brazil had not been resolved.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any 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. at 591-592. No evidence has been submitted to resolve the inconsistencies in the record relating to the beneficiary's occupation in Brazil.

On appeal to the AAO, counsel contends that the beneficiary's assertions that he worked as a cook in his employment-based immigrant visa petition and as a mechanic during the removal proceedings were not inconsistent at all. Counsel states that the beneficiary during the removal hearing, for instance, did not specify *when* he worked as a mechanic. In addition, counsel claims that the reason why the beneficiary did not state he worked as a cook during the removal hearing before an Immigration Judge was perhaps because he did not consider his occupation as a cook a profession (since he only worked at [REDACTED] for roughly two years from 1989 to 1991). According to counsel, it is possible that the beneficiary worked as a mechanic before working as a cook for [REDACTED].

Counsel's contention is not persuasive and does not establish the reliability of the assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel additionally indicates that it is unreasonable to expect the beneficiary to come up with original, contemporaneous evidence of his prior employment in Brazil, from an employer he has not worked for in years, within the short period of time (30 days) given to him by the director to respond to the NOIR.

As noted above, the petitioner must resolve inconsistencies to meet his burden of proof, and the director reasonably requested the petitioner to provide proof that the beneficiary had two years of work experience in the job offered before the priority date. Such evidence is material in this case, as the DOL would not have approved the labor certification had it concluded that the beneficiary was not qualified for the job opportunity at issue. Contrary to counsel's assertions, such evidence, if provided, would have shed more light on the beneficiary's qualifications and might have resolved the inconsistencies in the record regarding where the beneficiary worked and his occupation in Brazil.

If the petitioner or the beneficiary deceived the DOL by submitting fraudulent or fabricated documents, then the labor certification is not valid and should be invalidated. 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.⁵

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

⁵ 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.

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), which states:

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.

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 would have 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).⁶ USCIS may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d).⁷

In this case, neither the petitioner nor the beneficiary has submitted independent objective evidence to resolve the inconsistencies in the record. [REDACTED] statements stating that the beneficiary worked at [REDACTED] – Me and that [REDACTED] began its business operation in January 1989 alone are not independent objective evidence resolving the

⁶ 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).

⁷ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

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

inconsistencies in the record. Evidence that the petitioner or the beneficiary creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence, as would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision. The record in this case does not contain evidence such as the beneficiary's government-issued identification card or his Brazilian booklet of employment and social security record or other proof of employment in Brazil to resolve the inconsistencies in the record. Further, the record contains an affidavit from the [REDACTED] in Sao Bernardo do Campo from March 6, 1990 until October 30, 1990 attesting to the beneficiary's membership in the Union. This membership in the [REDACTED] falls squarely within the two-year period of the beneficiary's claimed qualifying employment as a cook. While the beneficiary could possibly have worked as a mechanic before working as a cook, as noted by counsel, he does not submit an affidavit explaining his membership in the [REDACTED] during the time he was a cook, or explaining why he failed to testify before the Immigration Judge that he was also a cook, or that he was first a mechanic, then a cook. Assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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 the efforts taken by the beneficiary to obtain independent objective evidence from [REDACTED] or from the Brazilian government. Nor does the record include an explanation from the beneficiary answering the director's concerns about his statement that he worked as a mechanic in Brazil during the removal proceedings. The AAO agrees with the director that the various registration documents from [REDACTED] – Me do not reflect that [REDACTED] started the operation of business in January 1989, nor do they show that the beneficiary worked as a cook at [REDACTED] from February 1989 to September 1991.

In addition, the AAO finds that neither the recommendation letter nor the signed statement dated October 5, 2009 from [REDACTED] complies with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), in that neither includes a sufficient description of the experience or training received by the beneficiary between February 1989 and September 1991. For these reasons, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date.

Further, the AAO finds that there was fraud or material misrepresentation involving the labor certification with respect to the beneficiary's qualifications for the position.

On the true facts, the beneficiary is inadmissible. 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).

As a third preference employment-based immigrant, the beneficiary's proposed employer 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. Although the petitioner in this case obtained a permanent labor certification, the DOL issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. Compare 8 C.F.R. § 204.5(g) with § 204.5(1)(l)(3)(ii)(B). The petitioner did not establish the beneficiary's qualifications in this case, as the beneficiary does not possess two years' work experience as a cook. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his credentials was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's use of forged or falsified work experience documents shuts off a line of relevant inquiry in these proceedings. Before the DOL, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. See 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. See *Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, the DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. See *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. See *Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. See *Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the petitioner shut off a line of relevant inquiry by submitting fraudulent or falsified documents. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r

1986). Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By misrepresenting the beneficiary's work experience and submitting fraudulent documents to USCIS and making misrepresentations to the DOL, the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. *See also Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, it is proper for USCIS to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182.

By signing the Form ETA 750, and submitting fraudulent work experience letters or affidavits, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. For these reasons, the AAO determines that the labor certification has been obtained through willful and material misrepresentation.

Moreover, the AAO also finds that the director's decision to revoke the approval of the petition is based on good and sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155.

As noted above, 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).

Before revoking the approval of any petition, however, the director must provide notice. 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:

(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 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 provided the petitioner with notice of the derogatory information specific to the current proceeding. In the Notice of Intent to Revoke dated September 21, 2009 and the Notice of Revocation dated October 28, 2009, the director specifically outlined the inconsistencies in the record pertaining to the beneficiary's prior work experience as a cook in Brazil. First, the director indicated that it was unlikely that the beneficiary worked at [REDACTED] [REDACTED] from February 1989, when [REDACTED] [REDACTED] was not yet registered with the Brazilian government until May 6, 1991. Moreover, the director found that the beneficiary testified in his removal proceedings that his occupation in Brazil was that of a mechanic, not cook.

In addition, the director specifically advised the petitioner to submit independent objective evidence to demonstrate the beneficiary's work experience in Brazil. No evidence has been submitted to resolve the inconsistencies in the record and to show that the beneficiary worked as a cook from 1989 to 1991.

The beneficiary, according to the record, is also represented by the petitioner's counsel, and thus has received notice of the AAO's concerns, but has not submitted any response to clarify the record or to explain why evidence should not be found fraudulent. Based on the unexplained and un rebutted inconsistencies in the record, the director's decision to revoke of the approval of the petition was, therefore, based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

Where the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petition will be denied for these reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision to revoke the previously approved petition is affirmed.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number [REDACTED] filed by the petitioner is invalidated.