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

U.S. Citizenship and Immigration Services

[redacted]

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Date: NOV 15 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On May 23, 2012, the Director, United States Citizenship and Immigration Services (USCIS) Texas Service Center (the director), denied the preference visa petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review, pursuant to 8 C.F.R. § 103.4(a).[1] Upon review, the AAO will affirm the director's decision to deny the petition.

The petitioner is a retail market. It seeks to employ the beneficiary permanently in the United States as an Assistant Retail Manager 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).[2] As required by statute, a labor certification approved by the U.S. Department of Labor (DOL) accompanied the petition. The director denied the petition and invalidated the labor certification finding that (a) the petitioner failed to conduct good faith recruitment and that there was fraud or willful misrepresentation involving the labor certification; and (b) the beneficiary did not have the requisite work experience in the job offered as of the priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

We will discuss each of the director's finding as follows.

a. **Whether there was fraud or willful misrepresentation involving a labor certification application.**

The AAO notes that the director found fraud or willful misrepresentation involving the labor certification application and invalidated the labor certification after the petitioner failed to provide independent objective evidence to show that it followed DOL recruitment requirements, and that it actively participated in the recruitment process.

USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. 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:

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[1] Under 8 C.F.R. § 103.4(a)(1) allows certifications by district directors to the AAO for review "when a case involves an unusually complex or novel issue of law or fact."

[2] 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.

> 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.

Upon *de novo* review, the AAO finds that evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

Similarly, the record does not show inconsistencies or anomalies in the recruitment process. The AAO therefore withdraws the director's finding that the petitioner did not conduct good faith recruitment in advertising for the proffered position resulting in the approval of the labor certification application. Thus, the director's finding of fraud or willful misrepresentation is withdrawn. Further, the director's decision to invalidate the certified Form ETA 750 is withdrawn.

b. Whether or not the beneficiary qualifies for the position offered; whether the beneficiary has two years of 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 that the beneficiary has all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition as of the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. 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).

Here, the Form ETA 750 was filed and accepted for processing by DOL on March 1, 2005. The name of the job title or the position for which the petitioner seeks to hire is "Assistant Retail Manager." 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 in related occupation as a retail manager.

On the Form ETA 750, part B, signed by the beneficiary on November 3, 2004, he represented that he worked 40 hours a week as a Manager at from March 1997 to November 1999. Submitted along with the certified Form ETA 750 and the Form I-140 petition was a letter of employment verification dated April 20, 2001 from , Owner, stating that the beneficiary was employed by as a manager from March 27, 1997 to November 15, 1999 and that the beneficiary's duties included "bookkeeping, hiring and firing employees, handling business properly, and etc."

In the Notice of Intent to Deny dated January 9, 2012 (2012 NOID), the director noted that was not incorporated until December 23, 1997, and thus, the beneficiary could not have started to work at in March 1997.

Responding to the director's 2012 NOID, the petitioner submitted the following evidence:

- A letter dated January 30, 2012 from , owner of the petitioner, stating that he is aware of the beneficiary's employment for several years ( ) in the State of and his difficulties in obtaining employment records from about 15 years ago (from); and
- A statement dated February 1, 2012 from the beneficiary stating that existed even before the company was incorporated in December 1997, that he worked at from March 1997 to November 1999, and that in the search for new evidence to demonstrate his employment at , he drove 22 hours from to Georgia to find , the owner of , but could not obtain further documentation.

Upon reviewing the evidence submitted above, the director concluded that the beneficiary did not have the requisite experience in the job offered before the priority date because the petitioner failed to submit independent objective evidence demonstrating the beneficiary's employment at from 1997 to 1999.

We disagree. Independent objective evidence is not required unless there are inconsistencies in the record pertaining to the beneficiary's claim of employment at between 1997 and 1999. The record contains no inconsistencies concerning the beneficiary's employment at between the beneficiary's claim on part B of the Form ETA 750 and the evidence submitted, i.e. the letter of employment verification from .

Additionally, the letter of employment verification from contains the name, address, and title of the author, and includes a specific description of the beneficiary's experience or training, in compliance with 8 C.F.R. § 204.5(l)(3)(ii)(A).[3] Therefore, the AAO is convinced that the

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[3] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

> Any requirements of training or experience for skilled workers, professionals, 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.

beneficiary had the requisite work experience in the job offered before the priority date. The director's conclusion that the beneficiary did not have the requisite work experience as of the priority date will be withdrawn. Nevertheless, we will affirm the director's decision to deny the petition for the reason stated below.

In reviewing the case, evidence has come to light that the petitioning corporation in this matter has been dissolved as of December 29, 2011. On August 16, 2012 this office sent a Notice of Intent to Deny and Derogatory Information (NOID/NDI) along with the evidence of the company's dissolution and indicated that if the petitioner is no longer an active business, the petition and the director's certification for review to this office have become moot, in which case the petition shall be dismissed as moot. The petitioner was given 30 days to provide evidence showing that the business remains active and viable during the pendency of the petition and certification for review to the AAO.

On September 18, 2012, counsel for the petitioner responded to the NOID/NDI and acknowledged that the petitioner is no longer in business, that the business has been sold, and that it ceased operations. As we stated in the NOID/NDI, where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Thus, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D), which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

ORDER: The appeal is dismissed as moot; the director's denial of the petition is affirmed.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number [redacted], is withdrawn.