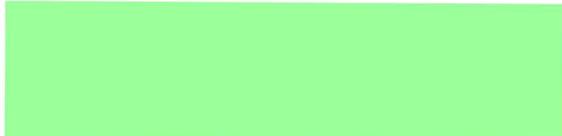


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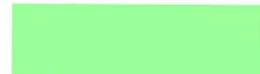
U.S. Citizenship
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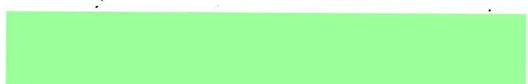
Office: TEXAS SERVICE CENTER FILE:



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:

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The instant case comes before the Administrative Appeals Office for review pursuant to 8 C.F.R. § 103.4(a).¹ Upon review, the AAO will affirm the director's decisions to revoke the approval of the petition and to invalidate the labor certification.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).² As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). On July 10, 2003, the Director, Vermont Service Center, approved the employment-based immigrant visa petition.

On May 20, 2009 the director of the Texas Service Center (the director) reopened the matter and sent the petitioner Notice of Intent to Revoke (NOIR) stating:

The Service [U.S. Citizenship and Immigration Services or 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 attorney].³

The director also stated in the NOIR that the letter of employment verification dated March 19, 2001 from _____ did not include a CNPJ number, and hence, "this office cannot verify the alleged existence of this business." The director advised the petitioner in the NOIR to submit additional evidence to show that (a) the petitioner complied with all of the Department of Labor (DOL) recruiting requirements and (b) the beneficiary possessed two years of work experience in the job offered before the labor certification application was filed with the DOL.

Responding to the director's NOIR, _____ submitted the following evidence:

¹ Under 8 C.F.R. § 103.4(a)(1) certifications by district directors may be made to the AAO "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.

³ The AAO notes that _____ was under USCIS investigation at the time the NOIR was sent in 2009. USCIS suspected that _____ submitted fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. _____ has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. _____ representations in this matter will be considered; however, he will not be sent a copy of this decision. He will be referred to throughout this decision as previous counsel or by name.

- A copy of the newspaper tear sheets for the position offered, published in the *Boston Herald* on Sunday, April 1, 2001;
- A copy of a letter dated February 14, 2001 addressed to I [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A letter dated March 30, 2009 from the President of the petitioner, [REDACTED] stating that the company “took all the correct steps when filed the Labor Certification” by advertising the position in the *Boston Herald* and posting the job at the business place;
- A statement dated March 30, 2009 from the beneficiary stating that he worked for [REDACTED] from March 10, 1997 to April 5, 1999 and that he could no longer obtain additional proof of his employment at [REDACTED] since “[REDACTED] went out of business about four years ago;” and
- A copy of the CNPJ printout of [REDACTED]⁴

Upon review of the evidence submitted above, the director issued a Notice of Revocation (NOR) on May 20, 2009 finding that the petitioner failed to follow the DOL recruitment regulations.

On November 2, 2010 the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5). The director withdrew the decision issued on May 20, 2009 (the NOR) and reinstated the approval of the petition. On January 9, 2012 the director sent another NOIR (2012 NOIR) to the petitioner. In this 2012 NOIR the director identified three specific deficiencies in the record and advised the petitioner to submit additional evidence to resolve the problems. Neither [REDACTED] nor the petitioner responded to the director’s second NOIR.

On June 13, 2012 the director revoked the approval of the petition, finding that (1) the petitioner had failed to follow the DOL recruitment procedures in recruiting U.S. workers, (2) the beneficiary did not have the requisite work experience in the job offered as of the priority date, and (3) the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date. Further, the director found fraud or willful misrepresentation involving the beneficiary’s qualifications in the job offered, and accordingly, invalidated the labor certification. The matter was then certified to the AAO, pursuant to 8 C.F.R. § 103.4(a).

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

As a threshold issue, the AAO notes that the petitioner’s business, according to the Corporate Database maintained by the Secretary of the Commonwealth, Corporations Division, was dissolved as of June 18, 2012.⁵ On November 5, 2012 we sent a Notice of Intent to Dismiss and

⁴ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ or Cadastro Nacional da Pessoa Juridica is similar to the federal tax ID or employer ID number in the United States.

⁵ The database can be accessed online at the following website address:

Derogatory Information (NOID/NDI) to the petitioner advising that we would not be able to adjudicate the matter without a response and would affirm the director's decision without further discussion if the petitioner failed to respond. The petitioner did not respond or submit additional evidence to either confirm or deny whether the business had been dissolved. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if the petitioner is no longer in business. Where the petitioning company is no longer an active business, the petition is 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.

Further, since this case comes to the AAO by certification for review pursuant to 8 C.F.R. § 103.4(a), we will provide our review as follows.

Another threshold issue in this case is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, states:

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, the regulation at 8 C.F.R. § 205.2 states:

(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).

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 proceedings

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.

As noted earlier, the director in the 2012 NOIR specifically identified three specific issues with the petition: (a) the petitioner failed to establish that the company engaged in good faith recruitment procedures, (b) the petitioner failed to show that the beneficiary possessed the requisite work experience in the job offered, and (c) the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage from the priority date. The director also asked for specific evidence to resolve the issues. Thus, the AAO finds that the director appropriately reopened the approval of the petition by issuing the 2012 NOIR, and that the 2012 NOIR gave the petitioner notice of the derogatory information specific to the current proceeding.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR and that the director's NOIR gave the petitioner notice of the derogatory information specific to the current proceeding. The AAO finds that the director's NOIR would warrant a revocation of the approval of the petition if unexplained and un rebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIR. *See, Matter of Arias*, 19 I&N Dec. 568; *Matter of Estime*, 19 I&N Dec. 450.

Because the petitioner failed to provide any response to the 2012 NOIR, the issues specifically mentioned in the director's 2012 NOIR remain unexplained and un rebutted. Therefore, we conclude that the director had good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act, 8 U.S.C. § 1155. We also find that the director's finding of fraud and/or willful misrepresentation against the petitioner and decision to invalidate the labor certification are supported by the evidence of record. *See Matter of Arias, id.; also see Matter of Estime, id.*

With respect to whether or not the petitioner conducted good faith recruitment and followed the DOL recruitment regulations, the AAO concludes that the record does not reflect inconsistencies or anomalies in the recruitment process that would justify the issuance of a NOIR based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Similarly, 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 labor certification process. *Id.* Thus, the

director's the director's conclusion that the petitioner failed to follow DOL recruitment requirements is withdrawn.

Concerning the beneficiary's qualifications for the position, the AAO agrees with the director that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before 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, 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 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all kinds of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. The only evidence submitted to demonstrate that the beneficiary possessed the requisite two years of work experience in the job offered is a letter of employment verification dated March 19, 2001 from [REDACTED] stating that the beneficiary worked as a cook from March 10, 1997 to April 5, 1999.

In the 2012 NOIR, the director stated that the letter of employment verification from [REDACTED] does not include a sufficient description of the duties or training of the beneficiary, as required by the regulation at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(B). In addition, the director found that the location of the business where the beneficiary claimed to have worked in Brazil from 1997 to 1999 was inconsistent with the state where the beneficiary claimed to have lived in Brazil until April 1999.⁶ The director also indicated that the beneficiary failed to include his employment abroad on the Form G-325 (Biographic Information), which he filed in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485).

The director requested that the petitioner submit independent objective evidence to resolve the inconsistencies in the record pertaining to the beneficiary's claimed experience as a cook in Brazil. The petitioner did not submit a response to the 2012 NOIR. No independent objective or additional evidence has been submitted. The inconsistencies in the record remain unexplained and un rebutted. The AAO therefore finds that the petitioner has failed to establish that the beneficiary possessed the minimum experience requirements as of the priority date.

⁶ The director noted that the beneficiary claimed to have lived in Cariacica, Espirito Santo, Brazil until April 1999, but the location of the business where the beneficiary claimed to have worked as a cook in Brazil from 1997 to 1999 – based on the letter of employment verification submitted – was in Sao Paulo, Sao Paulo, Brazil. The director indicated that the distance between Cariacica, Espirito Santo, and Sao Paulo, Sao Paulo, is over 458 miles. Based on this finding, the director concluded that it was not unlikely that the beneficiary worked in Sao Paulo, Sao Paulo, and lived in Cariacica, Espirito Santo, between 1997 and 1999.

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 DHS 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 DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁷

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

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.

⁷ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

– (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. at 447. 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.

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).⁸ USCIS may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d).⁹

In this case, we find that there has been sufficient 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. at 447. In the 2012 NOIR, the director indicated in specific details all of the inconsistencies that appear on the approved labor certification involving the

⁸ 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).

⁹ 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.

beneficiary's qualifications and requested that the petitioner submit independent objective evidence to resolve the inconsistencies in the record. No evidence or explanation has been submitted to resolve the inconsistencies in the record pertaining to the beneficiary's claimed experience as a cook in Sao Paulo, Brazil.

Such evidence or explanation is material because, if it were provided, it would demonstrate that the beneficiary possessed the requisite work experience in the job offered before the priority date. The petitioner's failure to submit additional evidence creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the noted inconsistencies, and considering that the petitioner received notice of the inconsistencies and did not resolve them by failing to provide any response, the AAO finds that the petitioner has deliberately concealed and willfully misrepresented facts about the beneficiary's qualifications.¹⁰ Although the petitioner in this case presented a permanent labor certification approved by DOL, the labor certification appears to have contained documentation regarding the beneficiary's experience that was false. The resulting certification was therefore erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). If USCIS had known the true facts, it would have denied the employer's petition, as the Form ETA 750 was falsified. In other words, the concealed facts, if known, would have resulted in the outright denial of the petition. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403

¹⁰ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

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

By submitting a fraudulent document to USCIS, 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. The director's decision to invalidate the certified Form ETA 750 is affirmed as evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the beneficiary's qualifications.

Finally, the director also noted that the record does not show that the petitioner has the ability to pay the proffered wage of \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week¹¹) from the priority date of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. We agree.

The record only contains a copy of an Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for 2001 (which established that the petitioner employed and paid the beneficiary at or above the proffered wage), but no evidence for 2002 onwards.

For these reasons stated above, we affirm the revocation of the approval of the petition, 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.

Beyond the decision of the director, we find that the petitioner has been dissolved as of June 8, 2012 and is no longer an active business. If the petitioning company is no longer an active business, the petition and its appeal to this office is moot, since it is no longer possible for the petitioner to continue to offer the position to the beneficiary. Further, as noted earlier, 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.

The director's decision to revoke the approval of the petition and finding of fraud and/or willful misrepresentation against the petitioner will be affirmed for the reasons stated above, with each considered as an independent and alternative basis for the decision. The burden of proof in these

¹¹ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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 approval of the petition is affirmed.

FURTHER ORDER: The AAO finds that the petitioner 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 decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED], is affirmed.