



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 03 2013

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 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 Director, Nebraska Service Center, approved the employment-based preference visa petition. The Director, Texas Service Center (director), issued the petitioner a Notice of Intent to Revoke (NOIR) the petition's approval. In a Notice of Revocation (NOR), the Acting Director, Texas Service Center (acting director), ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker, and invalidated the labor certification. The petitioner appealed the acting director's decision, and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed, the petition's approval will remain revoked, and the labor certification will remain invalidated.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The acting director's realization that the petition was approved in error may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a distributor of hand-knotted, woolen rugs. It seeks to employ the beneficiary permanently in the United States as a quality control manager. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL)<sup>1</sup>.

In her NOR, the acting director concludes that the petitioner failed to establish, as of the petition's March 24, 2005 priority date, its continuing ability to pay the proffered wage and the beneficiary's qualifications for the offered position. The acting director also found that the petitioner and the beneficiary fraudulently misrepresented the beneficiary's employment experience in the petition and the labor certification. Accordingly, on April 4, 2011, the acting director revoked the approval of the petition and invalidated the labor certification.

On appeal, counsel for the petitioner states that the acting director improperly revoked the approval of the petition and improperly invalidated the labor certification. Specifically, counsel states that the acting director's decision was "unsupported by substantial evidence contained in the record," and that the finding of "fraud and/or willfull misrepresentation is without merit." Counsel asserts that any inconsistencies in the record are inadvertent and harmless error, and that the beneficiary received "ineffective legal representation by former counsel." Counsel asserts that the petitioner did possess the ability to pay the proffered wage, and that the beneficiary did possess the minimum qualifications for the position offered.

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<sup>1</sup> The DOL approved the labor certification for a worksite in Atlanta, Georgia. The petitioner states that the worksite is now in Norcross, Georgia. Because Norcross and Atlanta are in the same Metropolitan Statistical Area (MSA), the change in worksites would not invalidate the labor certification. See 20 C.F.R. §§ 656. 3, 656.30(c)(2) (stating that a labor certification remains valid only for the "area of intended employment" and defining that term as including worksites within the same MSA).

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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>2</sup> The burden remains with the petitioner in revocation proceedings to establish that the beneficiary qualifies for the benefit sought under the immigration laws. *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1987); *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968).

### **The Beneficiary's Qualifications for the Offered Position**

The petitioner sought classification of the beneficiary as a professional or skilled worker. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the 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 petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12); *see Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must examine 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 Madany v. Smith*, 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position of quality control manager requires a U.S. bachelor's degree, or a foreign equivalent degree, in textile engineering or a related field. The position also requires one year of full-time employment experience in the job offered or in "textile engineering or quality assurance in the employer's industry." The labor certification also states that the experience "must include experience with hand-knotted imported textiles."

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal of Motion, 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).

On the labor certification, the beneficiary states that she graduated from [REDACTED] with a bachelor's degree in textile chemistry in May 2003. She claims to qualify for the offered position based on employment experience as a quality control technician with the petitioner from August 2003 to August 2004.<sup>3</sup> The beneficiary states on the labor certification that, as of August 2004, she assumed the offered position of quality control manager with the petitioner.

To support the beneficiary's claimed experience, the petitioner must submit letters from employers giving the name, address, and title of the employers, as well as a description of the beneficiary's experience. 8 C.F.R. § 204.5(1)(3)(ii)(A). With its petition, the petitioner submitted a June 14, 2007 letter on its stationery, signed by its former chief financial officer (CFO). In accordance with the labor certification, the letter states that the beneficiary worked for the petitioner as a quality control technician from August 2003 to August 2004 before assuming the offered position with the petitioner.

On July 18, 2007, 30 days after the petition's filing and 28 days after its approval, the beneficiary signed a Form G-325A, Biographic Information, and the former CFO signed a letter, also dated July 18, 2007, on the petitioner's stationery in support of the beneficiary's application for adjustment of status. Contrary to the labor certification and the June 14, 2007 letter, both the Form G-325A and the July 18, 2007 letter state that the beneficiary did not begin working for the petitioner until January 2004. The Form G-325A states that the beneficiary was "unemployed" from June 2003 to December 2003, and that her only employment experience when she assumed the offered position of quality control manager with the petitioner was as a research assistant with [REDACTED] from January 2003 to May 2003. While the July 18, 2007 letter does not identify the beneficiary's position when she began working for the petitioner or her length of employment in that position, the Form G-325A states that she joined the petitioner in the offered position in January 2004 and worked as a quality control manager until June 2005. The form does not list any prior employment with the petitioner as a quality control technician.

The director advised the petitioner in the NOIR that the Form G-325A and the former CFO's letter conflicted with evidence in the record and cast doubt on the beneficiary's purported employment experience, which was the basis for the petition's approval. The director requested that the petitioner submit evidence to corroborate the beneficiary's claimed experience, including a complete copy of her 2003 tax return and Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for 2003.

The AAO finds that the director properly issued the NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N at 450. Both cases hold that a notice of intent to revoke a petition's approval is properly issued for good and sufficient cause when the evidence of record at the time of issuance, if not explained and rebutted, would warrant the petition's denial

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<sup>3</sup> A beneficiary may rely on employment experience with the petitioner if the offered position differs from the position in which she gained the experience. See *Matter of Delitzer Corp. of Newton*, 88-INA-482 (BALCA 1990) (*en banc*).

based on the petitioner's failure to meet its burden of proof.

The beneficiary's employment history, as stated on the Form G-325A and in the July 18, 2007 letter, conflicted with previous representations in the petition and the labor certification that the beneficiary worked one year for the petitioner in a different position before assuming the offered position. The discrepancies in the beneficiary's positions and dates of employment with the petitioner cast doubt on whether the beneficiary possessed one year of full-time employment experience before assuming the offered position with the petitioner as set forth on the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). The director properly issued the NOIR for good and sufficient cause because, if the discrepancies were not explained or rebutted, the petitioner would have failed to establish the beneficiary's qualifications for the offered position by a preponderance of the evidence as of the time the NOIR was issued.

In an affidavit dated January 14, 2011, the beneficiary states that she truly worked for the petitioner as a quality control technician from August 2003 to August 2004. She claims that she failed to carefully review the Form G-325A and did not notice the position title and dates of employment indicated on the form before signing it because she trusted that her previous attorney correctly prepared it. A paralegal who worked at the office of previous counsel states in an amended affidavit, dated April 20, 2011, that she prepared the beneficiary's adjustment application and that the law office submitted about four times as many adjustment applications as usual in July and August of 2007, the same period during which the beneficiary's application was prepared and filed. The petitioner's current CFO also provided a statement, dated January 14, 2011, indicating that the beneficiary worked for the petitioner as a quality control technician from August 2003 to August 2004.

The record also contains an amended Form G-325A, dated January 14, 2010,<sup>4</sup> indicating that the beneficiary worked for the petitioner from August 2003 to August 2004 as a quality control technician and from August 2004 to June 2005 in the offered position. As the NOIR requested, the petitioner also submitted copies of the beneficiary's 2003 federal income tax return and IRS W-2 forms.

On appeal, the petitioner submits an affidavit, dated May 18, 2011, from the former CFO who signed the letters containing the inconsistent dates of the beneficiary's employment with the petitioner. The former CFO states that the beneficiary worked for the petitioner as a quality control technician from August 2003 to August 2004. Similar to the beneficiary's explanation for the inconsistent employment information on her Form G-325A, the former CFO states that he did not carefully review the July 18, 2007 letter before signing it because he trusted that previous counsel correctly prepared the letter. The petitioner also submits a copy of a letter from the petitioner's former

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<sup>4</sup> Although the beneficiary stated the date on the amended Form G-325A as January 14, 2010, the record establishes that she signed the amended form on January 14, 2011. The petitioner submitted the amended form on January 18, 2011 in response to the NOIR, which was dated December 15, 2010.

president in support of an H-1B work visa petition for the beneficiary. The December 1, 2003 letter states that the petitioner had employed the beneficiary as a quality control technician since August 2003. The petitioner also submits copies of a December 2003 email exchange between the beneficiary and previous counsel, and affidavits from co-workers, a customer of the petitioner, and the beneficiary's former college roommate as evidence that she worked for the petitioner as a quality control technician from August 2003 to August 2004.

Despite the additional submissions, the petitioner has failed to establish the beneficiary's qualifications for the offered position. As the acting director stated in the NOR, the beneficiary's affidavit is self-serving and is not independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N Dec. at 591-592. Similarly, the AAO finds that the letters of the beneficiary's coworkers, customer and former roommate do not overcome the contradictions in the record. One of the co-workers joined the petitioner in 2004. Therefore, he cannot verify the beneficiary's employment before that time. Further, his letter does not indicate when the beneficiary was purportedly promoted, but merely states that she was promoted "later in the year 2004." The letter from the customer does not provide any specific dates, and is therefore not probative. Likewise, the letter from the beneficiary's roommate, who lived with the beneficiary only through 2001, is not probative because it does not provide any specific dates. The roommate's letter also does not rely on any personal knowledge of the issue, but rather relies on information provided by the beneficiary. The letter from the other coworker is not probative because that individual left the petitioner's employ in August 2003, and states that the beneficiary provided his only knowledge of her purported experience thereafter. The AAO also agrees with the acting director's finding that the current CFO's experience letter was unconvincing because the record did not establish that he joined the petitioner in time to gain personal knowledge of the beneficiary's prior employment there.

The AAO also does not find the paralegal's affidavit sufficient to corroborate the beneficiary's claim that she was unaware of counsel's purported errors on her Form G-325A. Although the paralegal's affidavit implies that the unusual amount of work at the time could have caused previous counsel's law firm to mistakenly prepare the form with incorrect information, the paralegal does not state that the beneficiary's Form G-325A contained inaccurate information, or that it contained information contrary to that provided by the beneficiary. Moreover, absent evidence of duress, mistake, fraud, or legal incompetence, the beneficiary cannot disavow responsibility for the contents of a federal immigration form she knowingly signed. Her failure to apprise herself of the contents of the form constitutes deliberate avoidance and does not absolve her of responsibility for the contents of the form. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6<sup>th</sup> Cir. 2005), *citing Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11<sup>th</sup> Cir. 2005) (finding that an adjustment applicant, who signed his application form but disavowed knowledge of its contents because a friend had completed it on his behalf, possessed knowledge of the application's contents).

Moreover, the beneficiary's 2003 tax return included copies of an IRS W-2 form, showing that the petitioner paid her only \$1,751 in 2003. As the acting director found, the small wage amount shown on the W-2 form suggests that the beneficiary did not work full-time for the petitioner from August 2003 to December 2003. In addition, the beneficiary's identification of her occupation as "Quality Control Manager" on her self-prepared, 2003 federal income tax return, dated March 9, 2004,

suggests that she did not work as a quality control technician before assuming the offered position, as she and the petitioner now claim; rather, the beneficiary's tax return supports the information reported on her initial Form G-325A, which resulted in the NOIR.

USCIS records and other evidence in the record also suggest that the beneficiary did not work for at least a year as a quality control technician with the petitioner before assuming the offered position. Records show that, on December 15, 2003, the beneficiary obtained permission to change her status and work in H-1B visa status in the offered position, effective May 1, 2004. The beneficiary's employment authorization document (EAD), which she obtained to allow Optional Practical Training while in F-1 student visa status after her graduation, allowed her to work in the U.S. only from August 14, 2003 to July 16, 2004. The DOL regulation at 20 C.F.R. § 655.731(c)(6) required the petitioner to employ the beneficiary in H-1B status within 60 days of the H-1B effective date, or by June 30, 2004. Thus, the May 1, 2004 effective date of the beneficiary's H-1B visa status, her designated H-1B employment in the offered position, the EAD validity dates of less than one year, and the DOL regulation requiring the employer to employ the beneficiary in H-1B status by June 30 2004 tend to show that the beneficiary did not work for at least a year in a different position before assuming the offered position with the petitioner, as the labor certification requires.

Because the record does not establish by independent, objective evidence that the beneficiary possessed the required experience set forth on the labor certification before assuming the offered position with the petitioner, the AAO finds that the acting director properly revoked the petition's approval on that ground.

On appeal, current counsel appears to allege that the previous attorney of the petitioner and the beneficiary provided ineffective assistance of counsel.<sup>5</sup> She asserts that previous counsel prepared and submitted the beneficiary's initial Form G-325A and the former CFO's letter of July 18, 2007 with incorrect information about the beneficiary's employment history with the petitioner.

The petitioner, however, has not perfected a claim of ineffective assistance of counsel pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd.*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988); *see also Dakane v. U.S. Att'y. Gen.*, 399 F.3d 1269, 1274 (11<sup>th</sup> Cir. 2005) (a petitioner claiming ineffective assistance of counsel in an immigration proceeding must substantially comply with the *Lozada* requirements). To ensure the validity of a claim of ineffective assistance, *Lozada* requires the affected party: to submit a detailed statement of previous counsel's engagement and terms of representation; to provide previous counsel an opportunity to respond to the accusations; and to file a complaint against previous counsel with appropriate disciplinary authorities, or to explain why it has not filed a complaint. *Lozada*, 19 I&N Dec. at 639.

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<sup>5</sup> Counsel states that inconsistencies in the record resulted from "ineffective legal representation by former counsel."

The instant appeal does not substantially comply with any of *Lozada*'s requirements.<sup>6</sup> Accordingly, the AAO cannot consider the claim of ineffective assistance of counsel as an explanation for the inconsistencies in the record regarding the beneficiary's employment with the petitioner. Even if the AAO could consider a claim of ineffective assistance of counsel, as discussed previously, the beneficiary bears responsibility for the contents of the Form G-325A that she knowingly signed. Moreover, the ineffectiveness of the petitioner's prior counsel would not explain the small amount of wages the petitioner paid the beneficiary's in 2003, as reflected on her W-2 form, or the beneficiary's identification of her occupation as "Quality Control Manager" on her self-prepared, 2003 federal tax return.

Counsel also asserts that the beneficiary earned only a small amount of wages while purportedly working for the petitioner from August 2003 to December 2003 because the beneficiary's position was an internship in which free room and board at the home of the petitioner's president constituted part of her compensation. Again, however, because the petitioner did not submit evidence to support counsel's assertion, the AAO cannot consider this explanation. See *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel are not evidence).

The petitioner failed to establish that the beneficiary possessed the minimum experience required by the labor certification as of the petition's priority date. Therefore, the petitioner failed to overcome this ground for the revocation of the petition's approval.

#### **The Petitioner's Ability to Pay the Proffered Wage**

In the NOIR, the director also questioned the petitioner's evidence of its ability to pay the beneficiary's proffered wage of \$42,000 per year as of the petition's March 24, 2005 priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

In the NOIR, the director noted inconsistencies in the record that cast doubt on the reliability of the petitioner's evidence to establish its ability to pay the proffered wage. Copies of the petitioner's pay stubs to the beneficiary in April and May of 2007 stated the petitioner's address as Charlotte, North

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<sup>6</sup> In the petitioner's response to the NOIR, counsel asserts that the previous attorney stated that his office's large caseload of adjustment applications in July and August of 2007 made it "impossible to achieve 100% accuracy and perfection." The petitioner, however, did not submit evidence of its previous attorney's statement to support current counsel's assertion. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel do not constitute evidence). The petitioner therefore has not established that it provided previous counsel with an opportunity to respond to the allegations of ineffectiveness in accordance with *Lozada*. Nor has the petitioner provided details of previous counsel's terms of representation, or indicated whether it has filed a disciplinary complaint against him, as *Lozada* requires.

Carolina, conflicting with the petitioner's Atlanta, Georgia address stated on the labor certification and the petition. The petitioner's H-1B visa petition for the beneficiary, which was filed in December 2003, stated another address for the petitioner in Dalton, Georgia. In addition, a 2006 work visa petition identified the petitioner's president as someone other than the president who signed the beneficiary's H-1B visa petition and labor certification. The beneficiary's labor certification approval, which the DOL issued in February 2007, was addressed to the president who signed the beneficiary's H-1B visa petition and labor certification, rather than to the president identified in the 2006 work visa petition, even though the petitioner notified the DOL of its new address in 2007.

The inconsistencies in the petitioner's immigration filings regarding its address and the name of its president, combined with the discrepancies in the petitioner's letters regarding the beneficiary's positions and dates of employment with it, cast doubt on the validity of the petitioner's evidence to establish its ability to pay the proffered wage. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Moreover, the petitioner failed to submit annual reports, federal tax returns, or audited financial statements as evidence of its continuing ability to pay the proffered wage as the regulation at 8 C.F.R. § 204.5(g)(2) requires. As the director states in the NOIR, "... the unaudited 2006 Profit and Loss statement is insufficient to determine the ability to pay." Because the evidence of record at the time of the NOIR's issuance, if not explained and rebutted, would have warranted a denial of the petition, the AAO finds that the director issued the NOIR for good and sufficient cause regarding the petitioner's ability to pay the proffered wage.

After reviewing the petitioner's rebuttal evidence in response to the NOIR, the acting director found that the petitioner sufficiently explained its address changes. But she found that the petitioner's evidence of its ability to pay the proffered wage was unreliable. The acting director noted that the wages on the petitioner's 2005 W-2 forms to its employees totaled \$415,005.44, less than the total wage amount of \$444,191 it reported on its 2005 federal tax return. She also noted that the petitioner did not provide USCIS with a copy of a 2005 W-2 form for its former president who signed the beneficiary's H-1B petition and labor certification, even though the director requested the petitioner's 2005 W-2 forms for all employees and the record shows that the former president represented himself to USCIS as the petitioner's president as late as June 2005 and was a shareholder of the petitioner until September 2005.

The petitioner has not explained the discrepancies in the total wage amounts on its 2005 tax return and on its 2005 W-2s, nor has it explained the missing 2005 W-2 form of its former president, as the acting director cited in the NOR. The inconsistencies cast doubt on the validity of the petitioner's 2005 financial information, and the petitioner did not provide sufficient evidence to overcome those doubts. *See Matter of Ho*, 19 I&N Dec. at 591-2 (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

But, even assuming the information in the petitioner's 2005 tax return to be reliable, the AAO finds that the petitioner has not established its ability to pay the proffered wage in 2005. In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has

paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>7</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the record shows that the petitioner did not pay the beneficiary the full proffered wage of \$42,000 in 2005. The beneficiary's 2005 W-2 form shows that the petitioner paid her only \$20,992.33.<sup>8</sup> The difference between the amount the petitioner paid the beneficiary in 2005 and the annual proffered wage of \$42,000 is \$21,007.67.

The record also shows that the petitioner's net income and net current assets for 2005, when added to the wages paid to the beneficiary that year, were not equal or greater to the annual proffered wage. The petitioner's net income for 2005, as shown on line 28 of its IRS Form 1120 U.S. Corporation Income Tax Return, was \$(8,920).<sup>9</sup> The petitioner's 2005 tax return shows a year-end net current asset amount of \$(351,310). Therefore, even assuming the validity of its 2005 federal tax return, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage in 2005 based on an examination of the wages it paid the beneficiary, its net income, and its net current assets.

On appeal, counsel asserts that the acting director erred in determining the petitioner's ability to pay by considering financial evidence that pre-dated the petition's March 24, 2005 priority date. Counsel also argues that the director's NOIR did not question the petitioner's evidence of its ability to pay the proffered wage in 2005 and thereby deprived the petitioner of an opportunity to explain that evidence. Counsel states:

Notwithstanding the fact that USCIS never even questioned [the petitioner's] 2005 ability to pay evidence in its Notice of Intent to Revoke, the USCIS proceeds to discount the company's 2005 federal income tax return in the Notice of Revocation because the agency could not understand a particular computation on that tax return,

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<sup>7</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) (upholding USCIS's use of the net income and net current assets amounts reflected in federal tax returns to determine the financial ability of petitioners to pay proffered wages).

<sup>8</sup> The record shows that the beneficiary worked for an employer other than the petitioner for part of 2005.

<sup>9</sup> Numbers in parentheses indicate negative amounts.

which computation had nothing to do with an ability to pay analysis. That the USCIS asserts fraud based on the agency not being able to understand a particular computation on a tax return demonstrates a clear abuse of the agency's discretion.

Counsel's appellate brief, p. 10.

The director's failure to specifically question the petitioner's 2005 financial evidence in the NOIR does not bar the acting director from reviewing the petitioner's rebuttal evidence and its consistency, both internally and with other evidence in the record. *See Matter of Estime*, 19 I&N Dec. at 452 (a decision to revoke will be sustained where the evidence of record at the time the decision is rendered, "including any explanation, rebuttal, or evidence submitted by the petitioner," would warrant such denial) (emphasis added). Thus, even though the NOIR did not specifically question the petitioner's 2005 financial documentation, the acting director appropriately compared figures on its 2005 federal tax return to its other financial evidence in the record in determining the petitioner's ability to pay.

The petitioner also had an opportunity on appeal to submit additional evidence and/or to explain the sufficiency of its previous evidence to demonstrate its ability to pay the proffered wage in 2005. *See* 8 C.F.R. § 103.2(a)(1) (incorporating the Form I-290B instructions into the regulations to allow the submission of additional evidence on appeal). The petitioner's submission on appeal of counsel's brief, as well as affidavits and statements regarding the beneficiary's employment history, shows that the petitioner knew of its ability to submit additional evidence and/or argument on appeal. Despite this knowledge, the petitioner did not submit further evidence and/or explanation of its 2005 financial documentation.

In addition, although the NOIR did not specifically question the petitioner's evidence of its ability to pay the proffered wage in 2005, the notice questioned the petitioner's financial evidence in general, finding that inconsistencies in the record rendered all of its financial documentation suspect. As the director stated in the NOIR, "... the documentation for the company is now in question." Moreover, the petitioner's failure to submit the financial evidence required by the regulation at 8 C.F.R. § 204.5(g)(2) rendered all of its ability-to-pay evidence insufficient. By questioning evidence of the petitioner's ability to pay in 2006 and 2007 and by requesting copies of the petitioner's income tax returns and W-2 forms from 2005 to 2007, the AAO finds that the NOIR served sufficient notice to the petitioner that the evidence of its ability to pay the beneficiary's proffered wage was at issue in all relevant years – including 2005.

The AAO also finds that counsel errs in asserting that USCIS based its fraud determination on the petitioner's 2005 federal tax return. Although the acting director cited inconsistencies between the petitioner's 2005 tax return and its 2005 W-2 forms, she based her fraud determination, as indicated in the NOR, on the misrepresentations of the petitioner and the beneficiary regarding the beneficiary's employment history with the petitioner.

In addition, counsel incorrectly asserts that the acting director, in determining the petitioner's ability to pay the proffered wage, considered financial evidence that pre-dated the petition's March 24,

2005 priority date. The record shows that the acting director considered the beneficiary's 2003 W-2 form from the petitioner as evidence of the beneficiary's claimed employment experience with the petitioner, not as proof of the petitioner's ability to pay the proffered wage from 2005 onward. Counsel's assertions on appeal cannot be concluded to outweigh the evidence as submitted by the petitioner, which demonstrates that the petitioner could not continuously pay the beneficiary's proffered wage from the petition's priority date onward.

As previously indicated, USCIS may consider the overall magnitude of the petitioner's business activities in determining the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. at 612. The petitioner in *Sonogawa* had been in business for more than 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, however, the petitioner changed business locations and paid rent on both the old and new premises for five months. The petitioner also incurred large moving costs and could not conduct regular business for a period of time. The petitioner's financial documents for that year therefore could not demonstrate its ability to pay the offered wage. The Regional Commissioner, however, determined that the petitioner's prospects for a resumption of successful business operations were well-established. The petitioner was a fashion designer whose work *Time* and *Look* magazines had featured. Her clients included Miss Universe, movie actresses, and society matrons. Lists of the best-dressed California women included the petitioner's clients. The petitioner lectured on fashion design at design and fashion shows throughout the United States, and at California colleges and universities. The Regional Commissioner therefore held that the petitioner demonstrated its ability to pay the offered wage despite its financial difficulties in one year.

The Regional Commissioner based his determination in *Sonogawa* in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may consider evidence relevant to the petitioner's financial ability to pay that falls outside of the petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of its employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, and whether the beneficiary is replacing a former employee or an outsourced service.

Like the petitioner in *Sonogawa*, the petitioner in the instant case has been in business for more than 10 years and has submitted evidence of its reputation in its industry. According to the petitioner's tax returns, the petitioner's gross revenues nearly doubled from 2005 to 2007. Despite counsel's assertion on appeal that the petitioner's rapid growth has continued, the petitioner did not submit more recent evidence of its financial condition.

Unlike the petitioner in *Sonogawa*, however, the petitioner in the instant case has not identified any uncharacteristic business expenditures or losses that prevented it from demonstrating an ability to pay the beneficiary's proffered wage in 2005. While the petitioner claims to have employed the beneficiary from 2004 onward in the offered position, she is one of only a few employees. From the record of proceedings, it appears the petitioner may have increased its commission-paid sales force,

but it has not provided evidence that it increased its number of salaried employees. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the foregoing reasons, the AAO finds that the petitioner has not established its ability to pay the beneficiary's proffered wage from the petition's priority date onward.

### **Misrepresentation of the Beneficiary's Employment History**

In the NOR, the acting director also found that the petitioner and the beneficiary fraudulently misrepresented the dates of the beneficiary's employment with the petitioner on the labor certification and in the petition. Based on this determination, the acting director invalidated the approved labor certification.

The Act authorizes immigration officers to administer oaths and 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). The Secretary of Homeland Security has also authorized USCIS to investigate alleged civil and criminal violations of immigration laws, including fraud in applications, recommendations for prosecution, and 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. In a visa petition adjudication, 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. *See Matter of Ho*, 19 I&N Dec. at 591. Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in an employment-based, immigrant visa petition are "true."

A material misrepresentation constitutes a willful, material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means 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). To be considered material, the misrepresentation must be one which "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 [she] be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, to find a willful, material misrepresentation in visa petition proceedings, an immigration officer must determine that: 1) the petitioner and/or beneficiary made a false representation to an authorized official of the United States government; 2) the misrepresentation was willfully made; and 3) the misrepresented fact was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

In contrast to misrepresentation of a material fact, a finding of fraud requires a determination of a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the officer must have believed and acted upon the false representation. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956); see also *Ortiz-Bouchet v. U.S. Att’y. Gen.*, 24 Fla. L. Weekly Fed. C 233, 11<sup>th</sup> Cir., April 23, 2013, 2013 WL 1729412, at \*2, (deferring to the Board of Immigration Appeal’s definitions of the terms “fraud” and “material misrepresentation”).

A finding of “fraud or willful misrepresentation of a material fact involving the labor certification application” may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.30(d) (2004).<sup>10</sup>

The record establishes that, on the labor certification, the beneficiary falsely represented her employment experience with the petitioner. As discussed previously, the beneficiary’s statement on her initial Form G-325A, that she began working for the petitioner in January 2004 in the offered position, contradicted her representation on the labor certification and the representation of the petitioner’s former CFO in the June 14, 2007 letter with the petition. The small amount of wages shown on the beneficiary’s 2003 W-2 form indicated that she did not work full-time for the petitioner from August 2003 to December 2003 as she stated on the labor certification, and her identification of her occupation as “Quality Control Manager” on her 2003 tax return of March 9, 2004 indicates that she did not work in a dissimilar position for at least one year before assuming the offered position with the petitioner as the labor certification requires. The approved H-1B petition for the beneficiary also suggests that she began employment in the offered position less than a year after purportedly beginning employment with the petitioner in August 2003. The preponderance of the evidence therefore establishes that the beneficiary falsely represented her employment experience on the labor certification, which the beneficiary signed under penalty of perjury.

The beneficiary’s employment history with the petitioner is a material fact because, without one year of full-time employment experience in the job offered or in “textile engineering or quality assurance in the employer’s industry” with “hand-knotted imported textiles,” the beneficiary would not qualify for the offered position. The circumstances show that the beneficiary more likely than not misrepresented her employment history on the labor certification with an intent to deceive labor and immigration officials. The DOL and USCIS initially believed and acted upon the beneficiary’s false representations by approving the labor certification and the petition.

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<sup>10</sup> Prior DOL regulations govern the instant petition because the petitioner filed the labor certification before the effective date of the current regulations for the Program Electronic Review Management system (popularly known as PERM). See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulations apply to labor certifications filed on or after March 28, 2005, while the labor certification in the instant case was filed on March 24, 2005. The citations below are therefore to DOL regulations in effect prior to the PERM amendments, which were last published in 2004.

On appeal, counsel asserts that any factual errors in the filings were “inadvertent and harmless” and that “[n]either the petitioner nor the beneficiary intended to defraud and/or deceive the U.S. government.”

As discussed above, the record shows that the discrepancies in the beneficiary’s positions and dates of employment with the petitioner were not inadvertent and harmless. The beneficiary’s employment history with the petitioner was a material fact bearing on the beneficiary’s qualifications for the offered position. The wage amount on the beneficiary’s 2003 W-2 form, her identification of her occupation as the offered position on her 2003 tax return, and her H-1B employment in the offered position undermine arguments that the discrepancies were inadvertent.

The AAO therefore finds that the acting director properly invalidated the labor certification based on a finding that the beneficiary fraudulently misrepresented her employment history with the petitioner on the Form ETA 750B.

### ***Bona Fide Job Opportunity***

The record shows that the petitioner is a close corporation, and its current sole shareholder and current president are close family members of the beneficiary.

“If the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore a *per se* bar to labor certification.” *Matter of Modular Container Systems, Inc.*, 89-INA-228, 1991 WL 223955, \*6 (BALCA 1991), citing 20 C.F.R. § 656.50 (1990) (for labor certification purposes, “employment” means “permanent, full-time work by an employee for an employer other than oneself”).

Even if self-employment is not at issue, a labor certification employer must attest on the Form ETA 750A that “the job opportunity has been and is clearly open to any qualified U.S. worker” pursuant to the former regulation at 20 C.F.R. § 656.20(c)(8) (2004). See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987) (the petitioner has the burden to show that a *bona fide* job opportunity is available to U.S. workers).

When the beneficiary has “such a ... close personal relationship with [the petitioner] that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.” *Matter of Modular Container Systems*, at \*7; see also *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000) (a job offer may not be *bona fide* where the beneficiary is related to the petitioner by “blood,” finances, marriage or through friendship).

To determine whether a job is clearly open to U.S. workers, adjudicators must apply a “totality of the circumstances” test. *Matter of Modular Container Systems*, 89-INA-228, at \*8. Factors to be considered include: whether the beneficiary is in a position to control or influence hiring decisions regarding the offered position; whether the beneficiary is related to the corporation’s directors, officers, or employees; whether the beneficiary has an ownership interest in the corporation; whether

the beneficiary is involved in the corporation's management; and whether the beneficiary is one of a small number of employees. *Id.*

A beneficiary's close relationship to a petitioning corporation is a material fact in determining whether the job was truly open to qualified applicants. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,403 (BIA 1986). The concealment of such a relationship in labor certification proceedings can constitute willful misrepresentation of a material fact and serve as grounds for invalidation of the labor certification. *Id.*, at 403; *see also* 20 C.F.R. § 656.31(d) (2004).

In the instant case, the record shows that the beneficiary's father is the petitioner's current sole shareholder and that the beneficiary's sister is its current president. The familial relationships are established by copies of birth affidavits from the beneficiary's parents, her identifications of her parents on her adjustment application form, and information linked to the petitioner's website. *See* [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013).<sup>11</sup> According to information and articles on the petitioner's website, the beneficiary's father founded the business in [REDACTED] in 1978, and the petitioner was established in the U.S. 20 years later. *See* [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013).

In a January 16, 2011 affidavit, the beneficiary's father states that he acquired half of the petitioner's stock on April 26, 2004. He states that the petitioner's former president owned the remaining half of the shares, which the beneficiary's father claims that he ultimately acquired from the former president on September 8, 2005. A copy of a stock certificate of the petitioner, numbered "1," however, does not support the statement of the beneficiary's father. The certificate shows that the former president received 500 shares of the petitioner's stock on April 22, 1998 and transferred the shares on September 8, 2005. But the certificate shows that the former president transferred the shares, not to the beneficiary's father, but to the petitioner.

A copy of stock certificate "2" shows that the beneficiary's sister acquired 500 shares of the petitioner's stock on April 26, 2000 and transferred them to the beneficiary's father on April 26, 2004. The record also contains a copy of stock certificate "3," showing that the beneficiary's father received 500 shares in the petitioner on May 31, 2004, with no record of any later transfer of the shares.<sup>12</sup>

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<sup>11</sup> In the NOR, the acting director notes that the beneficiary's sister is the petitioner's president and that the beneficiary's father is its sole shareholder. On appeal, the petitioner did not address these relationships, neither confirming nor denying them.

<sup>12</sup> The record does not indicate whether the May 31, 2004 stock certificate refers to the shares that the beneficiary's father acquired from his daughter on April 26, 2004, or to an additional 500 outstanding shares. If the certificate represents additional shares, it also appears to contradict the statement of the beneficiary's father that he acquired the remaining half of the petitioner's shares on September 8, 2005, as he would have already held 1,000 shares when he purportedly acquired 500 shares from the former president on that date. The AAO notes that the petitioner did not provide a certified copy of its stock ledger, which may have clarified the petitioner's ownership.

The record does not contain copies of pages in a stock transfer ledger or evidence of consideration exchanged for the shares to confirm the claimed stock transfers. Despite these deficiencies in the record, the stock certificates tend to confirm that the beneficiary's father acquired sole ownership of the petitioner's shares on September 8, 2005, as the record shows no other party besides the beneficiary's father owning shares of the petitioner after that date.

A copy of the petitioner's 2010 catalog identifies the beneficiary's sister as the petitioner's president and contains a copy of her signature. The signature on the petitioner's 2005 Georgia tax return, dated September 7, 2006, appears identical to the signature of the beneficiary's sister in the catalog. The signature on the tax return also identifies the signer as the petitioner's president and states the email address of the beneficiary's sister next to it. Other identical signatures of the beneficiary's sister are on: the stock certificate showing the April 26, 2004 transfer of shares to the beneficiary's father; the petitioner's federal tax returns of 2005, 2006 and 2007; and its Georgia tax returns of 2006 and 2007.

Moreover, the beneficiary's sister appears to have signed the petitioner's December 17, 2010 lease of an office warehouse building in Georgia. The lease indicates that she is both "President" of the petitioner and "Manager" of the landlord, Online records of the Georgia Secretary of State's office identify the beneficiary's sister as the registered agent of which was established about three months before the lease's signing. See <http://> (accessed May 3, 2013). Online records of the secretary of state's office also identify the beneficiary's sister as the registered agent, CEO, CFO and corporate secretary of the petitioner. See <http://> (accessed May 3, 2013).

In addition, information linked to the petitioner's website states that the beneficiary's sister has served as chief executive officer of the petitioner since 2001. See <http://> and <http://> (accessed May 3, 2013) ("In 2001, [the beneficiary's sister], his eldest daughter, joined the business as CEO Atlanta) after completing her Bachelor's from Atlanta, USA. Where, [the beneficiary], his second daughter held the seat of COO (Atlanta) in 2004."<sup>13</sup> Information on the petitioner's website also indicates that another sister and brother of the beneficiary have served as managers in the business in India since 2006. See <http://www> (accessed May 3, 2013).

In accordance with *Matter of Modular Container Systems*, the record establishes the beneficiary's close familial relationships with the petitioner's directors, officers or employees. The record shows

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<sup>13</sup> Other information on the petitioner's website, however, suggests that the beneficiary's sister may have served as the petitioner's president since only 2005. See <http://www> (accessed May 3, 2013) ("... since 2005, she has wheeled the company's Atlanta-based U.S. headquarters ...").

that the beneficiary's father founded the petitioner's parent company, owned as much as half of the petitioner's stock as of the labor certification's filing, and has been its sole shareholder since September 2005, which predates the approval of the labor certification and the filing of the I-140 petition. The record also shows that the beneficiary's sister owned half of the petitioner's shares from April 2000 to April 2004, may have served as the petitioner's president since as early as 2001, and now holds multiple officer positions in the corporation. Another sister and a brother of the beneficiary have also served as managers at the parent company in India since 2006.

The record does not contain any direct evidence that the beneficiary herself ever held an ownership interest in the petitioner,<sup>14</sup> was in a position to influence hiring decisions for the offered position, or was involved in managing the corporation. But the beneficiary's close familial relationships with the petitioner's sole owner and top officer, as well as the business's practice of employing its founder's children, call into question whether the job opportunity was truly open to U.S. workers and whether a qualified U.S. applicant would have replaced the beneficiary. See *Matter of Modular Container Systems*, 89-INA-228, at \*7.

Where a beneficiary's wife served as a director, CFO and corporate secretary of the petitioning corporation, the Board of Alien Labor Certification Appeals ruled that a *bona fide* job opportunity did not exist. *Matter of Young Seal of America*, 88-INA-121, 1989 WL 250362 (BALCA 1989). The familial ties of the beneficiary to the petitioning corporation in the instant case appear to be closer than the ties in *Young Seal*. While there was no evidence in *Young Seal* that the beneficiary's wife had an ownership interest in the petitioner, documents in the record show that the beneficiary's father in the instant case is the sole shareholder of the petitioner and her sister previously owned half of the petitioner's shares. Moreover, rather than having one close familial tie to the petitioning organization like the beneficiary in *Young Seal*, the instant beneficiary has four close familial ties to the petitioner's business: her father; and three siblings. At the time of the petition's filing, the petitioner indicated it had only 12 employees, of whom the beneficiary and her sister would have been two. The beneficiary's close familial ties to the petitioner and the business's history of employing the founder's children suggest that the job opportunity was not truly open to qualified U.S. applicants.

Had the DOL known of the beneficiary's close familial relationships with two principals of the petitioning corporation, it would not likely have approved the labor certification without further inquiry. See *Matter of Young Seal of America*, 88-INA-121.

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<sup>14</sup> Lines 14, Schedules L of the petitioner's 2005 and 2006 federal tax returns state the beneficiary's name in connection with "[o]ther assets" valued at \$1,000. In the NOR, the acting director mentioned the assets assigned to the beneficiary in the 2005 tax return when discussing possible evidence of consideration for the stock share transfers. The petitioner, however, did not address these reported assets on appeal, and it is unclear whether they reflect a past ownership interest in the petitioner by the beneficiary.

**Conclusion**

In summary, the AAO finds that the acting director had good and sufficient cause to revoke the approval of the instant petition. On appeal, the petitioner failed to establish that the beneficiary possessed the experience required by the terms of the labor certification, and also failed to establish its continuing ability to pay the proffered wage from the petition's priority date onward. The AAO also affirms the acting director's invalidation of the labor certification based on a finding that the beneficiary fraudulently misrepresented her employment experience on the labor certification.

The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition's approval remains revoked. The labor certification remains invalidated pursuant to 20 C.F.R. § 656.30(d) (2004) based on the fraudulent misrepresentation of the beneficiary.